

**COURT OF APPEAL FOR ONTARIO**

**IN THE MATTER OF THE *COMPANIES' CREDITORS*  
*ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF  
COMPROMISE OR ARRANGEMENT OF  
NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL  
NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL  
CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL  
COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND  
NORTHERN TELECOM CANADA LIMITED**

**APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
R.S.C. 1985, c. C-36, AS AMENDED**

**RESPONDING BOOK OF AUTHORITIES OF  
THE MONITOR AND CANADIAN DEBTORS  
(Response to Motion for Leave to Appeal)**

February 21, 2017

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2016 ONCA 332  
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Nortel Networks Corp., Re

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**In the Matter of the Companies' Creditors  
Arrangement Act, R.S.C. 1985 c. C-36, as amended**

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation,  
Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks  
International Corporation and Nortel Networks Technology Corporation Application  
under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Alexandra Hoy A.C.J.O., R.A. Blair, S.E. Pepall J.J.A.

Judgment: May 3, 2016

Docket: CA M45307, M45309, M45310 M45311, M45312, M45313

Proceedings: refusing leave to appeal *Nortel Networks Corp., Re* (2015), 27 C.B.R. (6th) 175, 2015 CarswellOnt 7072, 2015 ONSC 2987, Newbould J. (Ont. S.C.J. [Commercial List]); and refusing leave to appeal *Nortel Networks Corp., Re* (2015), 27 C.B.R. (6th) 51, 2015 ONSC 4170, 2015 CarswellOnt 10304, Newbould J. (Ont. S.C.J. [Commercial List])

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Shayne Kukulowicz, Michael Wunder, Ryan Jacobs, Geoffrey Shaw, Jane Dietrich, for Moving party, Official Committee of Unsecured Creditors of Nortel Networks Inc. et al.

Andrew Kent, Brett Harrison, Laura Brazil, for Moving party, Bank of New York Mellon as Indenture Trustee

Steven L. Graff, Ian Aversa, Miranda Spence, for Moving party, Nortel Trade Claims Consortium

Michael E. Barrack, D.J. Miller, John L. Finnigan, Michael S. Shakra, Andrea McEwan, for Responding parties, Board of the Pension Protection Fund and Nortel Networks U.K. Pension Trust Ltd.

Benjamin Zarnett, Jessica Kimmel, Peter Ruby, Peter Kolla, for Responding party, Monitor, Ernst & Young Inc.

Kenneth Kraft, John Salmas, for Responding party, Wilmington Trust, National Association

Derrick Tay, Jennifer Stam, for Responding parties, Canadian Debtors(2)

Kenneth Rosenberg, Lily Harmer, Massimo Starnino, for Responding party, Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund

Mark Zigler, Ari Kaplan, for Responding parties, Former Employees of Nortel and LTD Beneficiaries

Arthur O. Jacques, Paul Steep, Byron Shaw, for Responding party, Canadian Creditors' Committee

Barry E. Wadsworth, for Responding party, CAW-Canada

Matthew P. Gottlieb, Matthew Milne-Smith, for Responding parties, Joint Administrators of the EMEA Debtors(3) other than Nortel Networks S.A.

Subject: Contracts; Estates and Trusts; Evidence; Insolvency; Intellectual Property; International; Property

MOTIONS for leave to appeal from decisions reported at *Nortel Networks Corp., Re* (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) and *Nortel Networks Corp., Re* (2015), 2015 ONSC 4170, 2015 CarswellOnt 10304, 27 C.B.R. (6th) 51 (Ont. S.C.J. [Commercial List]), regarding allocation of proceeds of sale of debtor's assets.

***Per curiam:***

## **A. Introduction**

1 January 14, 2009 was not a good day. At that time, Nortel Networks Corp. ("NNC") and the other Nortel Canadian Debtors filed for insolvency protection under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). That same day, Nortel Networks Inc. ("NNI") and other U.S. Debtors filed voluntary petitions for relief under Chapter 11 of the U.S. *Bankruptcy Code*, 11 U.S.C. §§1101 - 1174, and other Nortel entities incorporated in Europe, the Middle East and Africa ("EMEA") were placed under administration in England by the High Court of England and Wales under the U.K. *Insolvency Act 1986*, c. 45. Shortly afterwards, courts in Canada and the United States approved a cross-border, court-to-court protocol that established procedures for the co-ordination of cross-border proceedings in Canada and the U.S.

2 More than seven years later, many Januarys have come and gone and these insolvency proceedings continue. During that time:

- more than 6,800 Nortel former employees or pensioners have died;
- well in excess of \$1 billion has been incurred in costs; and
- Nortel's assets have been sold and some \$7.3 billion<sup>1</sup> in sale proceeds have been placed in escrow (the "Lockbox Funds").

3 The leave motions now before this court arise from the joint trial dealing with the allocation of the Lockbox Funds. Newbould J. (the "trial judge") of Ontario's Superior Court of Justice (Commercial List) and Judge Gross of the U.S. Bankruptcy Court for the District of Delaware presided over the joint trial.<sup>2</sup> It was held over the course of six weeks. Each judge rendered separate decisions on May 12, 2015. Each concluded that the Lockbox Funds should be allocated on a *pro rata* basis among the various Nortel debtor estates. Although their analysis differed somewhat, the outcome was the same.

4 Appeal proceedings were initiated in Canada and the U.S. The moving parties were authorized to file their leave materials in the absence of an issued judgment on the basis that counsel would subsequently file the formal judgment. The formal judgment was issued on April 26, 2016 and filed with this court on April 27, 2016.

5 Before this court, the six moving parties, led by the U.S. Debtors, seek leave to appeal the trial judge's judgment pursuant to s. 13 of the *CCAA*. They submit that the trial judge made fundamental errors and that the proposed appeal is of significance to the practice of insolvency and to the parties, and will not delay the completion of the *CCAA* proceedings.

6 The responding parties, led by the Board of the Pension Protection Fund and Nortel Networks UK Pension Trust Limited ("UKPC"), submit that the record supports the trial judge's factual findings, which were integral to his analysis, including his findings that Nortel's assets were jointly created, that the Nortel group of companies operated on a fully-integrated global basis and that Nortel did not operate separate businesses in separate countries. In their submission, the proposed appeal is not *prima facie* meritorious. In addition, the remaining elements of the test for leave to appeal under the *CCAA* have not all been met.

7 After consideration of each of the factums<sup>3</sup> and other materials filed on the leave motions, we agree with the responding parties that the test for leave has not been met. For the reasons that follow, we dismiss the moving parties' motions for leave to appeal.

## B. Genesis of Dispute

8 NNC was a publicly-traded Canadian corporation at the helm of a global networking solutions and telecommunications business, and the direct or indirect parent of more than 130 subsidiaries located in more than 100 countries. These companies were collectively referred to as the "Nortel Group" or "Nortel".

9 NNC was the successor to a long line of companies, headquartered in Canada, that date back to the founding of the Bell Telephone Company of Canada in 1883. NNC's principal, direct operating subsidiary was Nortel Networks Limited ("NNL"), also a Canadian company. NNL was the direct or indirect parent of operating companies located around the world. It owned 100 percent of the equity of each of the following entities: NNI, Nortel's operating company in the United States; Nortel Networks UK Ltd. ("NNUK"), Nortel's operating company in the United Kingdom; and, Nortel Networks (Ireland) Ltd. ("NN Ireland"), Nortel's operating company in Ireland. It also owned 91.17 per cent of the equity of Nortel Networks S.A. ("NNSA"), Nortel's operating company in France.

10 Following the insolvency filings, Nortel's initial plan was to downsize and carry on portions of the telecommunications business. However, by June 2009, the decision was made to liquidate Nortel's assets.

11 On June 29, 2009, an Interim Funding and Settlement Agreement ("IFSA") was approved by both the Canadian and American courts. Among other things, it addressed interim funding for NNL and the anticipated sales of Nortel's business lines and residual intellectual property ("IP"). The parties, consisting of the Canadian Debtors, the U.S. Debtors<sup>4</sup>, and the EMEA Debtors<sup>5</sup>, agreed to cooperate with the sales process and also agreed that the proceeds of sale would be held in escrow. The issue of allocation was deferred.

12 Under the IFSA, there would be no distribution out of escrow without "either (i) agreement of all of the Selling Debtors<sup>6</sup> or (ii) ... determination by the relevant dispute resolver(s) under the terms of the Protocol ... applicable to the Sale Proceeds". The parties were then to negotiate and attempt to reach agreement "on a protocol for resolving disputes concerning the allocation of Sale Proceeds from Sale Transactions (the "Interim Sales Protocol)". Despite numerous attempts at resolution, agreement on both an Interim Sales Protocol and allocation proved to be elusive.

13 Meanwhile, over \$7 billion was generated from various asset sales and other realizations. From mid-2009 until March 2011, proceeds of \$3.285 billion were generated from the sale of Nortel's various business lines, including some patents. Of that amount, \$2.85 billion is available for allocation. In June 2011, proceeds of approximately \$4.5 billion were generated from the sale of Nortel's residual intellectual property, consisting of approximately 7,000 patents and patent applications, to the Rockstar consortium. In total, approximately \$7.3 billion is currently held in escrow.

14 By orders dated January 21, 2010, the Canadian and U.S. courts approved a "Final Canadian Funding and Settlement Agreement". The Agreement addressed a number of issues and allowed NNI a \$2 billion claim against NNL in NNL's *CCAA* proceeding, which claim is not subject to offset or counterclaims.

15 The parties still could not agree on an Interim Sales Protocol or on allocation. In the spring of 2013, the Canadian court and the U.S. bankruptcy court granted orders approving an "Allocation Protocol". The purpose of this Protocol was to set out "binding procedures for determining the allocation of the Sale Proceeds among the Selling Debtors"<sup>7</sup>. It provided for a joint hearing to determine allocation before the Canadian court and the U.S. bankruptcy court.<sup>8</sup> Any party in interest was at liberty to advance any theory on allocation. Leave to appeal that order was denied by this court on June 20, 2013.

16 The issue of allocation of the Lockbox Funds then proceeded to trial.

### C. Trial Judge's Decision

#### (1) Trial Decision

17 The trial judge's reasons may be summarized. He commenced by reviewing the history of the Nortel Group. He described the operations and the four main product groups or lines of business. Before turning to his analysis of the legal issues, he made a number of important findings about the Nortel Group's structure. He found, and repeatedly reiterated, that the Nortel Group operated as a highly-integrated multinational enterprise. For instance, he stated:

[16] The Nortel Group operated along business lines as a highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities organized around the world. Each entity, such as NNL, NNI, NNUK, NN Ireland and NNSA, was integrated into regional and product line management structures to share information and perform research and development ("R&D"), sales and other common functions across geographic boundaries and across legal entities. The matrix structure was designed to enable Nortel to function more efficiently, drawing on employees from different functional disciplines worldwide, allowing them to work together to develop products and attract and provide service to customers, fulfilling their demands globally.

[17] As a result of Nortel's matrix structure, no single Nortel entity, either NNL or any of the other Canadian debtors in Canada, NNI or any of the other US debtors in the United States or NNUK or any of the other EMEA debtors, was able to provide the full line of Nortel products and services, including R&D capabilities, on a stand-alone basis. While Nortel ensured that all corporate entities complied with local laws regarding corporate governance, no corporate entity carried on business on its own.

18 The trial judge also found that R&D, which was performed at labs around the world, was the primary driver of Nortel's value and profit.

19 After reviewing the necessary background, the trial judge turned to the legal issues before him, starting with the interpretation of the Master Research and Development Agreement ("MRDA"). The MRDA dealt with transfer-pricing arrangements, effective from 2001 onwards, among NNL, NNI, NNUK, NNSA and NN Ireland, who were parties to the agreement.<sup>9</sup>

20 The parties took differing and competing positions on the meaning and application of the MRDA:

- The Monitor (on behalf of the Canadian Debtors), supported by the Canadian Creditors' Committee ("CCC"), took the position that under the MRDA, NNL owned the IP whereas other participants to the MRDA were simply licensees. They argued that the proceeds derived from the sale of the residual IP belonged exclusively to NNL.
- The U.S. Debtors and other U.S. interests, including the Bondholders, argued that NNI and the other licensees held all of the rights and value in the IP in their respective exclusive territories as defined in the MRDA.
- The EMEA Debtors asserted that parties to the MRDA jointly owned all of the IP in proportion to their financial contributions to R&D and that all should share in the sale proceeds attributable to IP in those same proportions. The joint ownership arose independent of, but was recognized in, the MRDA.
- The UKPC took the position that the MRDA should not govern allocation and that a *pro rata* allocation based on a *pari passu* distribution should be used. The CCC also adopted this as its alternative position.

21 The trial judge found that, by its terms, the MRDA was to be construed in accordance with, and governed by, Ontario law. He reviewed the applicable principles of contractual interpretation, including the law on factual matrix (surrounding circumstances), commercial reasonableness, and recitals. In reviewing the law, he considered the recent

authority from the Supreme Court of Canada on contractual interpretation, *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), which was released during the course of the trial. He considered in detail the parties' positions, the language of the MRDA and evidence on factual matrix.

22 He concluded that the MRDA was an operating agreement and was not intended to, nor did it, deal with the disposal of all of Nortel's assets in a situation in which no revenue was being earned and no profits or losses were occurring. Rather, he found that the MRDA was developed for, and driven by, transfer-pricing concepts for tax purposes and did not govern allocation after Nortel ceased operations:

[177] I accept that the MRDA was a transfer pricing document created for tax purposes. The licenses were a part of it. The licenses granted under it were never dealt with separately from the MRDA. Their only purpose was to support the intended tax treatment resulting from the MRDA.

.....

[185] I conclude that the circumstances surrounding the creation of the MRDA lead to no other result but that the construct of legal title to the NN Technology being in NNL in return for NNL granting exclusive licenses to the Licensed Participants was only for the purpose of supporting the proposed method to split profits or losses on a tax efficient basis while Nortel operated as a going concern business. The agreement in its application was intended to apply only to Nortel while it operated and not to deal with rights after Nortel and its subsidiaries stopped operating its businesses.

23 Thus, he rejected the primary positions of the Monitor, the CCC, the U.S. Debtors and other U.S. interests, as well as the EMEA Debtors' joint ownership theory.

24 Having found that the MRDA did not govern allocation on Nortel's insolvency and having rejected the joint ownership theory, the trial judge turned to the metric to be used to allocate the Lockbox Funds. He found that the intangible assets that were sold were not separately located or owned in any one jurisdiction. Rather, they were created by all of the so-called "Residual Profit Entities" or "RPEs" (namely, NNL, NNI, NNUK, NNSA and NN Ireland), which were located in different jurisdictions. In addition, the matrix structure allowed Nortel to draw on employees from different functional disciplines worldwide, regardless of region or country, according to need.

25 He held that NNL was not entitled to the proceeds of sale simply because the patents were in its name:

[197] This was not one corporation and one set of employees inventing IP that led to patents. Nortel was a highly integrated multi-national enterprise with all RPEs doing R&D that led to patents being granted. It was R&D that drove Nortel's business. R&D and the intellectual property created from it was the primary driver of Nortel's value and profits. All parties agree on that. It would unjustly enrich NNL to deprive all of the other RPEs of the work that they did in creating the IP just because the patents were registered in NNL's name.

26 He determined that he had wide powers under the *CCAA* to do what was just in the circumstances. Section 11 of the *CCAA*, which reflected prior jurisprudence, expressly provides that a court may make any order it considers appropriate in the circumstances, subject to the provisions of the Act. He wrote:

[208] In this case, insolvency practitioners, academics, international bodies, and others have watched as Nortel's early success in maximizing the value of its global assets through cooperation has disintegrated into value-erosive adversarial and territorial litigation described by many as scorched earth litigation. The costs have well exceeded \$1 billion. A global solution in this unprecedented situation is required and perforce, as this situation has not been faced before, it will by its nature involve innovation. Our courts have such jurisdiction. [Footnote omitted.]

27 He observed that it is a fundamental tenet of insolvency law that all debts be paid *pari passu* and that all unsecured creditors receive equal treatment. In his view, a *pro rata* allocation could be achieved by directing an allocation of the

Lockbox Funds to each Debtor Estate based on the percentage that the claims against that Estate bore to the total claims against all of the Debtor Estates.

28 In reaching this conclusion, the trial judge dealt with the argument that a *pro rata* allocation would amount to substantive consolidation. He concluded that a *pro rata* allocation would not constitute substantive consolidation in the unique circumstances of this case. In any event, even if it were substantive consolidation, there was precedent that justified substantive consolidation in this case: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *PSINET Ltd., Re* (2002), 33 C.B.R. (4th) 284 (Ont. Gen. Div. [Commercial List]); *Northland Properties Ltd., Re* (1988), 29 B.C.L.R. (2d) 257 (B.C. S.C.).

29 Ultimately, he concluded that the Lockbox Funds were to be allocated on a *pro rata* basis in accordance with certain governing principles, which are outlined below.

30 After his reasons were released, the U.S. Debtors supported by the Official Committee, the Ad Hoc Group of Bondholders and the Law Debenture Trust Company of New York filed motions for clarification, reconsideration or amendment in Canada and the U.S. and a number of points were clarified.

31 In the end result, the judgment that was signed, issued and entered on April 26, 2016 provided that the allocation proceed on a *pro rata* basis in accordance with the following principles:

(a) Each Debtor Estate<sup>10</sup> is to be allocated that percentage of the Lockbox Funds that the total allowed pre-filing claims against that Debtor Estate bear to the total allowed pre-filing claims against all Debtor Estates.

(b) In determining what the claims are against the Debtor Estates, pre-filing claims of the kind provable under the *Companies' Creditors Arrangement Act* that have received court approval and which have been paid may be taken into account to the extent that they have been paid under the settlement.

(c) In determining what the pre-filing claims are against each Debtor Estate, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once.

i. Claims on bonds are to be made on the Debtor Estate of the issuer and shall be included in that Debtor Estate's total allowed claims for the purpose of determining its allocation. A claim can be recognized by the Debtor Estate that guaranteed the bond, but those claims will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.

ii. If the UK Pension Claimants make a claim for the approximately £2.2 billion deficit in the NNUK pension plan against NNUK and also against other EMEA Debtors or the EMEA Non-Filed Entities, the claim against NNUK will be taken into account in determining claims against the Debtor Estates for allocation purposes but the additional claims against the EMEA Debtors or the EMEA Non-Filed Entities will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.

(d) Subject to the general proviso in (c), above, in respect of claims that can be made against more than one Debtor Estate, pre-filing intercompany claims against a Debtor Estate shall be included in the determination of the claims against that Debtor Estate for purposes of its allocation.

(e) The following specific pre-filing claims shall be included in the determination of the allowed claims against NNL for purposes of determining its allocation:

i. the US\$2.0627 billion claim of NNI against NNL that was approved by this Court and the U.S. Court;

ii. the claims of NNUK and Nortel Networks SpA against NNL pursuant to the Agreement Settling EMEA Canadian Claims and Related Claims dated July 9, 2014; and

iii. the claim of the UK Pension Claimants against NNL recognized in this Court's judgment of December 9, 2014, as such claim is finally determined.

(f) Cash on hand in any Debtor Estate will not be taken into account in determining its allocation. Each Debtor Estate with cash on hand will continue to hold that cash and deal with it in accordance with its administration.

#### **D. Analysis**

32 Six moving parties now seek leave to appeal from the trial judge's allocation decision: the U.S. Debtors, the Ad Hoc Group of Bondholders, the Conflicts Administrator of Nortel Networks S.A., the Official Committee of Unsecured Creditors of NNI and others, the Bank of New York Mellon as Indenture Trustee, and the Nortel Trade Claims Consortium.

33 We will commence our analysis by discussing the test for leave to appeal under the *CCAA* and then address the moving parties' positions in relation to that test.

##### ***(1) Test for Leave to Appeal***

34 Section 13 of the *CCAA* provides that any person dissatisfied with an order or a decision made under the Act may appeal from the order or decision with leave. Leave to appeal is granted sparingly in *CCAA* proceedings and only where there are serious and arguable grounds that are of real and significant interest to the parties. In addressing whether leave should be granted, the court will consider whether:

- (a) the proposed appeal is *prima facie* meritorious or frivolous;
- (b) the points on the proposed appeal are of significance to the practice;
- (c) the points on the proposed appeal are of significance to the action; and
- (d) whether the proposed appeal will unduly hinder the progress of the action.

See, for e.g.: *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 24; *Timminco Ltd., Re*, 2012 ONCA 552, 2 C.B.R. (6th) 332 (Ont. C.A.), at para. 2; and *Nortel Networks Corp., Re*, 2013 ONCA 427, 5 C.B.R. (6th) 254 (Ont. C.A.), at para. 3.

##### ***(a) Whether Appeal is Prima Facie Meritorious***

35 The moving parties take the position that leave should be granted because the appeal is *prima facie* meritorious. In making that argument, they raise three main issues — substantive consolidation, the interpretation of the MRDA, and questions of fairness. We will deal with each issue in turn.

##### **(i) Substantive consolidation**

###### ***Position of the Moving Parties***

36 First, the moving parties submit that the trial judge erred in not recognizing that the allocation ordered departed from "corporate separateness" and was a form of substantive consolidation.

37 Secondly, it is alleged that the trial judge erred by applying an inappropriately low threshold for the application of substantive consolidation.

38 In its supplementary factum, the Bank of New York Mellon, as Indenture Trustee, makes a related argument. It submits that since the Nortel proceeding no longer involves a restructuring, the *CCAA*'s purpose is spent and the proceeds

should thereafter be distributed under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), or at least in a manner consistent with the *BIA* scheme. It says the *BIA* does not contemplate consolidation but rather distribution on an entity-by-entity basis.

39 Finally, the Ad Hoc Group of Bondholders makes a related argument. It submits that the allocation decision takes property interests that belong to certain debtor estates and gives them to others. They argue that, even though the authority provided under s. 11 is broad, the *CCAA* does not permit a court to redistribute property in this way.

### *Analysis*

40 The moving parties' arguments on substantive consolidation are not *prima facie* meritorious.

41 Professor Janis Sarra, a leading expert on insolvency law in Canada, describes substantive consolidation in her article "Corporate Group Insolvencies: Seeing the Forest and the Trees" (2008) 24 B.F.L.R. 63, at pp. 80 - 81:

Substantive consolidation essentially treats member entities of a corporate group as one entity. In the context of liquidation, it creates a common pool of assets to meet creditors' claims. In the context of restructuring, it may create the opportunity for creditors to share in the future upside potential of a restructured entity or entities by centralizing and negotiating an arrangement in respect of their claims. Canadian courts have recognized substantive consolidation under both the *BIA* and the *CCAA* where there is evidence of intertwined assets and liabilities; integrated administrative functioning and operations; a perception by creditors that they are dealing with an integrated entity; common control and governance structures; where it would be impracticable to separate the affairs of related entities; where it is more cost effective and beneficial to creditors to have the proceedings administered as a single estate; and where it would result in an expeditious and administratively efficient administration of the proceeding.

42 As we have noted, the trial judge concluded that *pro rata* allocation was appropriate, that it did not amount to substantive consolidation, and that even if it could be said that a *pro rata* allocation involved substantive consolidation, it was not precluded by law in the unique circumstances of the case.

43 In reaching those conclusions, he made numerous factual findings, in addition to those already mentioned, including the following:

- "Nortel (a) had fully integrated and interdependent operations; (b) had intercompany guarantees for its primary indebtedness; (c) operated a consolidated treasury system in which generated cash was used throughout the Nortel Group as required; (d) disseminated consolidated financial information throughout its entire history, save for the year before its bankruptcy; and (e) created IP through integrated R&D activities that were global in scope": para. 223.
- "[N]o one entity or region was able to provide the full line of Nortel products and services": para. 202.
- "Nortel's matrix structure also allowed Nortel to draw on employees from different functional disciplines worldwide ... regardless of region or country according to need": para. 203.
- "R&D was organized around a particular project, not particular geographical locations or legal entities, and was managed on a global basis": para. 202.
- "The fact that Nortel ensured that legal entities were properly created and advised in the various countries in which it operated in order to meet local legal requirements [did] not mean that Nortel operated a separate business in each country. It did not": para. 202.
- "The intangible assets that were sold, being by far the largest type of asset sold, were not separately located in any one jurisdiction or owned separately in different jurisdictions": para. 202.

- The assets are "so intertwined that it is difficult to separate them for purposes of dealing with different entities": para. 222.
- There is "no recognized measurable right in any one of the selling Debtor Estates to all or a fixed portion of the proceeds of sale": para 224.
- "Nortel has had significant difficulty in determining the ownership of its princip[al] assets, namely the \$7.3 billion representing the proceeds of the sales of the lines of business and the residual patent portfolio", which "constitutes more than 80 per cent of the total assets of all Nortel entities": para. 222.

44 In addition to his factual findings supporting the *pro rata* order, the trial judge explained why the allocation in this case did not constitute substantive consolidation, either actual or deemed:

- The Lockbox Funds were largely due to the sale of IP and no one Debtor Estate had any right to the funds. They did not belong in whole or in part to any one Estate or combination of Estates.
- The various entities and the various Estates were not being treated as one entity and the creditors of each entity would not become creditors of a single entity. Each entity remained separate and with its own creditors.
- Each entity would maintain its own cash on hand and would be administered separately.
- The inter-company claims would not be eliminated.

45 Similarly, Judge Gross explained at p. 554 of his reasons that the *pro rata* allocation, which was not a distribution, "both recognizes the integrity of the corporate separateness and the integrated synergistic operations of Nortel." Furthermore, he noted that a "pro rata allocation does not merge the Nortel Debtors into a single survivor and does not erase intercompany claims": p. 554.

46 In our view, there is no *prima facie* merit to the argument that we should interfere with the trial judge's conclusion that the allocation decision did not amount to substantive consolidation. His conclusion was based on the nature and effect of his allocation decision and his factual findings. He made the findings having heard from 36 witnesses and having received and reviewed thousands of exhibits and dozens of deposition transcripts over the course of a six-week trial. Those factual findings were central to the result. Absent palpable and overriding error, those factual findings are afforded deference by this court: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 10.

47 The moving parties also allege that the trial judge erred by applying an inappropriately low threshold for the application of substantive consolidation in finding that, even if the allocation did constitute substantive consolidation, it was permissible. They point to *Northland* as the leading authority on substantive consolidation but say that it is time to revisit that decision in Canada.

48 The trial judge correctly observed that while the *CCAA* does not expressly address the issue of substantive consolidation, jurisprudence in Canada has recognized substantive consolidation as being appropriate in certain exceptional circumstances: see, for e.g., *Lehndorff General Partner Ltd.*, *PSINet Ltd.*, and *Northland Properties Ltd.*

49 He also correctly observed that the court has jurisdiction to make any order that it considers appropriate in the circumstances under s. 11 of the *CCAA*. Although that section came into effect after the Nortel filing under the *CCAA*, it reflects past jurisprudence: *Ted Leroy Trucking Ltd.*, *Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 68. Specifically, s. 11 states:

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the

matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

50 That said, since there is no *prima facie* merit to the argument that the *pro rata* allocation constitutes substantive consolidation, there is no need to re-visit the jurisprudence governing substantive consolidation in Canada or to consider whether the threshold for substantive consolidation should be changed.

51 Furthermore, we see no merit in the argument raised by the Bank of New York Mellon that the trial judge erred by failing to allocate the Lockbox Funds in a manner consistent with the *BIA* scheme, which contemplates distribution on an entity-by-entity basis. Under the *CCAA* allocation decision, distribution to creditors will be done on an entity-by-entity basis.

52 Finally, the argument raised by the Ad Hoc Group of Bondholders and the Official Committee also lacks merit. It presumes that the various Nortel companies had distinct and separable property rights in Nortel's IP. The trial judge repeatedly rejected that proposition. As we explain in the following sections, we see no merit in the argument that the trial judge erred in failing to recognize such distinct property rights. As such, we see no merit in the argument that he exercised his authority in a way that ignored such rights.

53 This ground of appeal is not *prima facie* meritorious.

## **(ii) The Interpretation of the MRDA**

### ***Position of Moving Parties***

54 The moving parties take the position that the trial judge erred in concluding that the MRDA has no application to the allocation of the Lockbox Funds. On their reading, the MRDA provides NNI and other "Integrated Entities" with valuable rights to Nortel's IP in their respective exclusive jurisdictions. They note that the trial judge and Judge Gross diverged on the issue of IP rights under the MRDA.

55 The thrust of their contractual argument is two-fold: (1) the trial judge misinterpreted the MRDA by disregarding the words of the agreement; and (2) he failed to apply the Supreme Court of Canada's decision in *Sattva Capital Corp.* by taking an impermissibly narrow view of the scope of factual matrix evidence. In particular, they submit that the trial judge failed to take into account evidence relating to, and explaining, the tax-driven nature of the MRDA and the purposes the parties were trying to achieve through the agreement.

### ***Analysis***

56 We reject the moving parties' submissions on the interpretation of the MRDA.

57 On August 1, 2014, the Supreme Court of Canada released *Sattva Capital Corp.* The essence of that decision is best captured by excerpts from the reasons of the court written by Rothstein J.:

- "Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law": para. 43.
- "[T]he historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": para. 50.
- "[T]his Court in *Housen [v. Nikolaisen]*, 2002 SCC 33, [2002] 2 S.C.R. 235] found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings .... These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest

of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law": para. 52.

- "[I]t may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law .... Legal errors made in the course of contractual interpretation include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor': para. 53.
- "However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation": para. 54.
- "The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare": para. 55.

58 Justice Rothstein also discussed the need to consider the surrounding circumstances, or factual matrix of a contract, when interpreting a written agreement. The goal of contractual interpretation is to ascertain the objective intentions of the parties. In doing so, "a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": para. 47. Recognizing that words do not have an immutable meaning, the court should consider the contract's commercial purpose, taking into account its genesis, background, context, and the market in which the parties are operating.

59 In this case, the moving parties suggest that the trial judge erred in his interpretation of the MRDA and failed to pay heed to *Sattva Capital Corp.* In our view, the moving parties' arguments are not *prima facie* meritorious.

60 We are not persuaded that there is any reason to interfere with the trial judge's interpretation of the agreement on the basis of palpable and overriding error. Nor, in our view, have the moving parties pointed to any extricable legal error warranting intervention by this court.

61 As mentioned, although *Sattva Capital Corp.* was released during the course of the allocation trial, the trial judge nonetheless considered and applied *Sattva Capital Corp.* in interpreting the MRDA. In over 40 paragraphs, he addressed the relevant law on, and evidence of, factual matrix: see paras. 55 - 57, 117 - 157. He properly rejected evidence of subjective intention as being inadmissible.

62 We would also observe that, as noted by the Monitor and the Canadian Debtors, to be fully successful on their appeal, the U.S. Debtors would have to persuade the court that the trial judge should have: (i) concluded that the MRDA controlled allocation of Nortel's assets in the event of insolvency; (ii) adopted the interpretation of the MRDA advanced by the U.S. Debtors; and (iii) accepted the expert valuation evidence tendered by the U.S. Debtors.

63 The trial judge did none of these things. All of his conclusions to the contrary engage questions of fact or mixed fact and law that are well within his province.

64 For instance, the trial judge rejected the U.S. Debtors' valuation evidence as unreliable and the moving parties' factums are silent on how this finding could be overcome. The acceptance or rejection of the evidence of a witness is squarely within the fact-finding arena of the trial judge. The moving parties have suggested no reason why the trial judge's findings on valuation would be reversed.

65 In conclusion, this ground of appeal does not warrant granting leave to appeal.

### **(iii) Fairness to the Parties and Related Arguments**

### ***Position of Moving Parties***

66 Next, the moving parties submit that they were denied procedural fairness in various respects and that the allocation decision is, among other things, arbitrary, and inequitable. In this regard, we do not propose to address every argument in the multitude of factums filed. The principal submissions on fairness and related arguments that merit comment are as follows.

67 The moving parties say they were given no notice or opportunity to make submissions on the remedy granted. Moreover, there was no record before the court on the full spectrum of claims asserted against the Selling Debtors and no one proposed the specific remedy granted.

68 The U.S. Debtors also submit that the remedy did not respond to the question before the court, which they say was the allocation of the Sale Proceeds (i.e. the proceeds from a particular Sale Transaction) among the Selling Debtors (i.e. the Nortel parties to a particular Sale Transaction). In their view, the trial judge did not answer that question but instead allocated the Sale Proceeds to Nortel entities that did not transfer assets in a particular Sale Transaction and were, thus, not entitled to any Sale Proceeds.

69 The Ad Hoc Group of Bondholders similarly submits that the trial judge answered the wrong question. For instance, it says that the only question properly before the court was to determine the relative value of the assets, rights and interests that each Selling Debtor sold or relinquished, which generated the Sale Proceeds. Moreover, they say that the decision disregards their legitimate expectations.

70 The U.S. Debtors further submit that the allocation is arbitrary since there is no logical connection between what will be or will not be counted for allocation purposes. In particular, they point to the fact the allocation excludes \$4 billion in bondholder guarantee claims from the U.S. Debtors' allocation. They say that, as a result, the U.S. Debtors will receive no allocation of funds on account of approximately two-thirds of their claims.

71 Similarly, the Ad Hoc Group of Bondholders submits the allocation is arbitrary as it produces a redistribution of assets among debtors that violates the rule that equity holders get paid after creditors.

72 The Conflicts Administrator of NNSA also takes issue with the fairness of the allocation decision. It says that NNSA is prejudiced by the decision because of the relatively small quantum of its creditors' claims in comparison with those of other debtor estates.

73 Finally, the Official Committee, which represents all general unsecured creditors of the U.S. Debtors, complains that the trial judge exercised his discretion in an unprincipled way and strayed into improper "commercial judicial moralism".

### ***Analysis***

74 We are not satisfied that there is *prima facie* merit to the moving parties' submissions.

75 As explained, the trial judge was required to "determine the allocation of the Sale Proceeds among the Selling Debtors" under the Allocation Protocol.

76 Given the trial judge's conclusion that the MRDA did not govern allocation and his rejection of the EMEA Debtors' joint ownership theory, the trial judge had to determine what other metric should be used to allocate the Lockbox Funds among the U.S., Canadian and EMEA Debtor Estates.

77 The Allocation Protocol permitted submissions on "any theory of allocation". At trial, the UKPC and the CCC, in the alternative, sought a *pro rata* distribution of the funds held in escrow and each submitted expert reports that supported a *pro rata* result. Moreover, the U.S. Debtors, the Official Committee and the Ad Hoc Group of Bondholders all made submissions before the trial judge opposing a *pro rata* allocation and had an opportunity to test the evidence.

They submitted a motion to strike the *pro rata* allocation evidence, attacked the reliability of the expert reports and cross-examined the experts.

78 Thus, all parties knew that a *pro rata* allocation was in play. The fact that the specifics of the allocation ordered by the trial judge were not identical to those advanced by any of the parties does not, in our view, create unfairness to the parties. This is not a situation where the trial judge addressed an issue that was not before him, failed to grapple with the arguments or evidence, or came up with a new theory of the case.

79 The two judges were not required to determine value but allocation. The IFSA provided for a right to receive an allocation of the Sale Proceeds without restricting the basis upon which that allocation might be determined by the two courts. In particular, we note that the trial judges were given authority to decide the issue of allocation. In addition to the terms of the Allocation Protocol, we note s.10(a) of the IFSA:

[T]his Agreement is not, and shall not be deemed to be, an acknowledgement by any Party of the assumption, ratification, adoption or rejection of the Transfer Pricing Agreements or any other Transfer Pricing methodology employed by the Nortel Group or its individual members for any purpose nor shall it be determinative of, or have any impact whatsoever on, the allocation of proceeds to any Debtor from any sale of assets of the Nortel Group;

[Emphasis added.]

80 We also observe that the trial judge turned his mind to expectations and found that there was no evidence to support the Bondholders' argument that their legitimate expectations would be disregarded by a *pro rata* allocation.

81 Furthermore, we see no basis for the assertion that the allocation framework is arbitrary and unfair since it excludes \$4 billion in Bondholder guarantee claims from the U.S. Debtors' allocation. Under the allocation decision, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once for allocation purposes. This principle is applicable to all claims. The allocation decision also specifies that claims on bonds are to be made on the Debtor Estate of the issuer. Claims on those bonds may also be made on the Debtor Estate of the guarantor but those claims will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.

82 On the reconsideration motion, it was argued that the trial judge's decision should be changed to provide that the claims by the bondholders on the guaranteed bonds against the issuer and guarantor Debtor Estates should be included in the claims for allocation purposes. It was contended that, without such a change, there would be a manifest injustice, especially to the creditors of the U.S. Debtors other than the bondholders.

83 The trial judge rejected that argument, noting that the \$2 billion admitted claim against NNL endures. Further, cash on hand in the U.S. Debtors' Estates would be available to their creditors. He also noted that the issue of the treatment of the guaranteed bonds, and whether they should be counted once or twice in a *pro rata* allocation, was a live issue in evidence at trial, which was open to the U.S. Debtors to explore. He found, at para. 16, that "any lack of briefing by the U.S. Debtors and the [Official Committee] was a deliberate tactic taken by them in attacking the *pro rata* allocation method proposed at trial". He concluded that, even if he were to reconsider the double-counting issue, he would not change his mind:

I see no injustice in the result... There must also be considered other claims that could be made against more than one Debtor Estate, including the pension claim by the UKPC against NNUK that could be made against other EMEA Debtors and claims that could be made on bonds issued by NNL and guaranteed by NNC. The allocation decision precludes the double counting of any such claims for allocation purposes. The U.S. Debtors and [Official Committee] do not suggest that any of these other claims should be permitted to be claimed twice for allocation purposes. I see no basis to treat the guaranteed bonds any differently for allocation purposes. The principles that govern allocation should be applied consistently to each debtor.

84 We are not persuaded that there is *prima facie* merit to the argument that the allocation is arbitrary. The trial judge was clearly alive to the fairness concerns and gave reasons for adopting the approach he did after careful consideration of the evidence and argument at trial.

85 We would also observe that there was no other clear answer to the question of who was entitled to receive the sale proceeds. As Judge Gross noted at p. 500 of his reasons, the parties "submitted widely varying approaches for deciding the issue leaving virtually no middle ground." The U.S. Debtors and Bondholders argued that in excess of \$5 billion belonged to the U.S. Estate and that the Canadian Estate should receive only \$0.77 billion. The Canadian Debtors and the Monitor, in sharp contrast, argued that in excess of \$6 billion belonged to the Canadian Estate and that the U.S. Estate should receive just over \$1 billion. The highly integrated nature of the Nortel business operations and the nature of the assets sold defied either outcome.

86 Judge Gross's comments in his reasons on the allocation trial, at pp. 532-533, accurately sum up the context in which the two courts came to adopt the *pro rata* allocation approach:

The Court is convinced that where, as here, operating entities in an integrated, multi-national enterprise developed assets in common and there is nothing in the law or facts giving any of those entities certain and calculable claims to the proceeds from the liquidation of those assets in an enterprise-wide insolvency, adopting a prorata allocation approach, which recognizes inter-company and settlement related claims and cash in hand, yields the most acceptable result.

There is nothing in the law or facts of this case which weighs in favour of adopting one of the wide ranging approaches of the Debtors. There is no uniform code or international treaty or binding agreement which governs how Nortel is to allocate the Sales Proceeds between the various insolvency estates or subsidiaries spread across the globe.

87 Nor are we satisfied that there is *prima facie* merit to the Official Committee's argument that the trial judge exercised his discretion in an unprincipled way by straying into improper "commercial judicial moralism". To the extent the Official Committee is suggesting that it amounts to judicial moralism when a judge takes into account fairness concerns, we reject that argument. The trial judge considered the evidence before him in considerable detail and worked with the facts presented to him. Based on those facts, he concluded that a *pro rata* order constituted the answer to the allocation issue. The fact that the answer is also fair should not detract from the force of his conclusion.

88 Finally, we are not persuaded that there is any merit to the argument that the allocation violates the rule that equity holders get paid after creditors. The Ad Hoc Group of Bondholders submits that the trial judge's decision results in NNL (NNI's parent company) receiving allocation proceeds from the sale of NNI's assets and rights that ought to have been allocated to the NNI estate for the benefit of NNI's creditors. This argument is premised on NNI having a right to the particular proceeds as a result of the MRDA interpretation advanced by the U.S. Debtors and Bondholders. As we have discussed above, the trial judge rejected that argument.

89 For these reasons, we conclude that none of the fairness and related arguments put forward by the moving parties are *prima facie* meritorious.

(b) *Significance of Issues to the Practice*

### **Position of Moving Parties**

90 The moving parties submit that the trial judge's decision presents important issues of first impression in the cross-border insolvency context. They submit that, without appellate intervention, there is a risk substantive consolidation will become far more widely available. In addition, they say that it creates significant uncertainty on the separation of subsidiaries within a corporate group and on the consequences of an insolvency proceeding on the rights of stakeholders,

including creditors. In their submission, an appeal would permit this court to clarify these issues. Furthermore, the appeal would allow this court to clarify the proper interpretation and effect of *Sattva Capital Corp.* on commercial agreements.

### Analysis

91 As discussed above, the moving parties have raised three main issues they say warrant leave — namely, substantive consolidation, the interpretation of the MRDA, and fairness. Of the three issues, the moving parties submit that the first two raise issues of significant interest to the practice.

92 We disagree.

93 The facts of this case are unique and exceptional. As we have already discussed, substantive consolidation is not engaged and so this case would not provide an opportunity for this court to provide guidance on that question. Nor does this case engage any issues that require any clarification on the application of *Sattva Capital Corp.* . In short, granting leave would not provide an opportunity for this court to provide guidance on legal issues of significance to the practice.

#### *(c) Significance of Issues to the Action*

### Position of Moving Parties

94 The moving parties state that the allocation of the Lockbox Funds is the overriding issue in the *CCAA* proceedings.

### Analysis

95 We accept that the allocation of the Lockbox Funds is a significant issue in this *CCAA* proceeding. That said, we are of the view that, standing alone, this factor is insufficient to warrant granting leave to appeal. To perhaps state the obvious, typically parties tend to seek leave to appeal a decision that is of significance to an action.

#### *(d) Progress of Proceedings*

### Position of Moving Parties

96 The moving parties submit that the proposed appeal will not unduly hinder the progress of Nortel's *CCAA* proceeding. They state that many steps and issues remain before creditor distributions can be made, including the determination of claims. In addition, the allocation decisions of the Canadian court and the U.S. court must both be final orders in their respective jurisdictions before funds can be released from escrow. It is argued that this court should grant leave to ensure that it maintains the ability to address any issues should Judge Gross's decision be varied or overturned on appeal.

97 The moving parties also make the point that there are no operating businesses that are in the process of restructuring because the Nortel businesses and assets have been liquidated and the joint trial was a "stand-alone component" of the *CCAA* proceeding. Thus, it is argued that the traditional concerns leading courts to "sparingly" grant leave to appeal in *CCAA* proceedings are not applicable here. In fact, the Official Committee submits that where an appeal would have existed as of right under the *BIA*, it is nonsensical to deny leave here simply because Nortel's liquidation proceeded under the *CCAA*.

### Analysis

98 This brings us to the final consideration: progress. Repeatedly, the parties have been encouraged to resolve their differences, but without success. For instance, in a 2011 decision, *Nortel Networks Inc., Re*, 669 F.3d 128 (U.S. C.A. 3rd Cir. 2011), the Third Circuit Court of Appeals admonished the parties at p. 143:

We are concerned that the attorneys representing the respective sparring parties may be focusing on some of the technical differences governing bankruptcy in the various jurisdictions without considering that there are real live

individuals who will ultimately be affected by the decisions being made in the courtrooms. It appears that the largest claimants are pension funds in the U.K. and the United States, representing pensioners who are undoubtedly dependent, or who will become dependent, on their pensions. They are the Pawns in the moves being made by the Knights and the Rooks.

Mediation, or continuation of whatever mediation is ongoing, by the parties in good faith is needed to resolve the differences. [Footnote omitted.]

99 Former Chief Justice Winkler also encouraged the parties to find a way to resolve this matter. In April 2012, he warned about the "prospect of additional delays and the potential for conflicting decisions" if the parties failed to reach a negotiated settlement.

100 Numerous mediations have been ordered but have failed.

101 In the Annual Review of Insolvency, Kevin P. McElcheran described *Nortel* as a case that has become "an emblem of waste and dysfunction in a system intended to foster consensus based solutions to commercial insolvency", noting that it has "eclipsed all previous Canadian cases in both duration and expense": 2014 Ann. Rev. Insolv. L. 24 at p. 24. And that was in 2014.

102 Consistent allocation decisions have been issued by the Canadian and U.S. courts. A further appeal proceeding in Canada would achieve nothing but more delay, greater expense, and an erosion of creditor recoveries. There are asymmetric appeal routes in Canada and the U.S. However, we do not accept that the separate appeal proceedings in the U.S. somehow diminish the need to bring these proceedings in Canada to a conclusion. In our view, any additional step is a barrier to progress.

103 Furthermore, the fact that this case is a liquidation and not a restructuring does not render delay immaterial, where so many individuals and businesses continue to await a resolution of this proceeding. The potential of an interim distribution, remote or otherwise, does not alter this reality. In addition, the parties acceded to a liquidation under the *CCAA*. They cannot now reject the parameters of that statute, which requires leave to appeal, and where the jurisprudence on the applicable test is settled and long-standing.

#### **E. Standing Issue**

104 There is the additional issue of the standing of the Nortel Trade Claims Consortium that needs to be addressed. It represents a group of creditors that collectively holds over \$130 million in unsecured claims against NNI and certain of its U.S. affiliates. It includes institutional investors and former Nortel employees. Unlike other U.S. creditors, the Consortium's sole recourse is against the U.S. Debtors' estates.

105 At trial, the Consortium was represented by the Official Committee. It says that, given the trial decision, its interests may diverge from those of the rest of the Official Committee. It submits that the Consortium should have standing to seek leave to appeal. It relies on the court's jurisdiction to grant leave to appeal, pursuant to s. 13 of the *CCAA*, to "any person dissatisfied with an order or a decision made under [the] Act". It argues that the trial judge exceeded his jurisdiction by deciding matters that are properly for the U.S. court to decide.

106 It is unnecessary to decide the standing issue. Even if the Consortium had standing, we would dismiss its leave motion for the same reasons we have dismissed the other leave motions. In any event, we see no merit in its argument that the trial judge exceeded his jurisdiction.

#### **F. Disposition**

107 In conclusion, we are not persuaded that the test for leave to appeal has been met. For these reasons, we dismiss all of the motions for leave to appeal.

*Motions dismissed.*

Footnotes

- 1 All references to dollars are to U.S. dollars, unless otherwise specified.
- 2 Judge Gross's reasons are reported at 532 B.R. 494 (U.S. Bankr. D. Del. 2015).
- 3 In accordance with the directions of the Court of Appeal case management judge, there was one main factum filed on behalf of the moving parties by the U.S. Debtors and one main factum filed on behalf of the responding parties by the UKPC. Six supplementary factums and one reply factum were also filed.
- 4 With the exception of Nortel Networks (CALA) Inc.
- 5 The Joint Administrators were also party to the IFSA but only for the purposes of Section 17 (No Personal Liability of the Joint Administrators).
- 6 A description of "Selling Debtor" is found in s.12 (a) of the IFSA: "Each Debtor hereby agrees that its execution of definitive documentation with a purchaser (or, in the case of any auction, the successful bidder in any such auction) of, or closing of any sale of, material assets of any of the Debtors to which such Debtor (a "Selling Debtor") is proposed to be a party..."
- 7 Selling Debtors was defined in the Allocation Protocol as the "Canadian Debtors, U.S. Debtors, EMEA Debtors and Nortel Networks Optical Components Ltd., Nortel Networks AS, Nortel Networks AG, Nortel Networks South Africa (Pty) Limited, and Nortel Networks (Northern Ireland) Limited."
- 8 The EMEA Debtors were held to have attorned to the jurisdiction of the Canadian court and the U.S. bankruptcy court.
- 9 Nortel Networks Australia was also a party to the agreement. It ceased being a Residual Profit Entity on December 31, 2007.
- 10 The order defines "Debtor Estate" as "each of the individual legal entities" set out in Schedule B. Schedule B lists the 45 entities, including the Canadian Debtors, the U.S. Debtors, the EMEA Debtors and five "EMEA Non-Filed Entities" who have not commenced insolvency proceedings. See also the similar definition given to Selling Debtors under the Allocation Protocol.

2

2010 ONSC 5584  
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2010 CarswellOnt 8462, 2010 ONSC 5584, 194 A.C.W.S. (3d) 717, 85 C.C.P.B. 161

**IN THE MATTER OF THE COMPANIES' CREDITORS  
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL  
NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL  
CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

Morawetz J.

Heard: September 29 - October 1, 2010

Judgment: November 9, 2010

Docket: 09-CL-7950

Counsel: Fred Myers, Gale Rubenstein, Melaney Wagner for Ernst & Young Inc., Monitor

Derrick Tay, Alan Merskey, Jennifer Stam for Nortel Networks Corporation, et al.

W.E. Pepall for Former Employees

Thomas McRae for Nortel Canadian Continuing Employees

G. Finlayson for Noteholders

Ken Rosenberg for Superintendent of Financial Services

Alex MacFarlane for Chapter 11 Unsecured Creditors' Committee

Lyndon Barnes, Geoffrey Grove for Board of Directors

Linc Rogers for Northern Trust Company

Kyla Maher for Flextronics (Canada) Inc.

Barry Wadsworth for the CAW

Peter Engelmann, Fiona Campbell for Susan Kennedy, Court Appointed LTD Beneficiaries' Representative

Joel Rochon, Sakie Tambakos for Dissenting LTD Beneficiaries

Subject: Estates and Trusts; Evidence; Employment; Public; Insolvency; Corporate and Commercial

APPLICATION by monitor for approval of distribution of health and welfare trust among certain beneficiaries;  
CROSS-MOTION by dissenting long-term disability beneficiaries for approval of distribution of health and welfare  
trust in accordance with different proposal.

***Morawetz J.:***

**Overview**

1 Ernst & Young Inc. (the "Monitor"), in its capacity as Monitor of Nortel Networks Corporation, Nortel Networks Limited ("NNL"), Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation (collectively, the "Applicants" or "Nortel") applies for approval of a proposed methodology for allocation (the "Proposed Allocation Methodology") of the funds held in the Applicants' Health and Welfare Trust (the "HWT") among certain beneficiaries participating in the HWT.

2 The Monitor also requests (i) an order declaring December 31, 2010 as the deemed Notice of Termination date under the Trust Agreement (defined below) and dispensing with delivery of a Notice of Termination; (ii) authorization for the HWT Trustee (the "Trustee") to make distributions from the HWT to beneficiaries under participating benefits based on the Proposed Allocation Methodology and as directed by the Monitor or the Applicants; (iii) authorization for payment from the corpus of the HWT of the costs of the Trustee or other service providers retained by it in accordance with the Trust Agreement and of any payment agent appointed by it or by the Applicants incurred in carrying out the provisions of the order; and (iv) approval of the retention of Independent Counsel (defined below) for the purpose of the Retainer (defined below).

3 The Monitor has filed its 51<sup>st</sup> Report and a Supplement to the 51<sup>st</sup> Report in support of the requested relief.

### **Background**

4 Nortel filed for and obtained protection under the *Companies' Creditors Arrangement Act* ("CCAA") on January 14, 2009.

5 Although Nortel is insolvent, it continued for more than a year to fund its pre-filing obligations for medical, dental, and certain other benefits to its pensioners, their survivors, and disabled employees; however, it could not continue to do so indefinitely. In the absence of special arrangements, Nortel's benefits payments would have ceased on March 31, 2010.

6 The Applicants, the Monitor, court-appointed employees' representatives and representative counsel and the CAW-Canada ("CAW") reached an agreement regarding outstanding employment issues, including the payment of benefits during 2010 to, among others, Pensioners and LTD Beneficiaries (both defined below). The agreement was amended and restated on March 30, 2010 (as amended and restated, the "Settlement Agreement") and was approved by this court by Order dated March 31, 2010 [2010 CarswellOnt 2077 (Ont. S.C.J. [Commercial List])], and subsequently affirmed by the Court of Appeal for Ontario by Order dated June 3, 2010 [2010 CarswellOnt 3752 (Ont. C.A.)].

7 The Settlement Agreement provides that the parties to it "will work towards a Court approved distribution of the HWT corpus in 2010 to its beneficiaries entitled thereto ... and the resolution of any issue necessarily incident thereto." This provision recognizes the importance and significance of achieving an allocation of the HWT corpus, if possible, before the end of 2010 (when payment of benefits will cease) in order for distributions to be made to individuals based on such an allocation.

8 Nortel established the HWT on January 1, 1980 as a tax-efficient vehicle through which Nortel would continue to provide employee benefits by agreement between Northern Telecom Limited (a predecessor company to NNL) and Montreal Trust Company (as trustee), and amended by subsequent agreements (collectively, the "Trust Agreement").

9 The Trust Agreement provides, among other things, that:

(a) all contributions (from both Nortel and employees) will be held in a single fund (the "Trust Fund"), including all profits, increments, and earnings thereon;

(b) Nortel may designate as the "Health and Welfare Plan" certain of the following health and welfare plans (and such other similar plan or plans as Nortel may from time to time place in effect): health care; management long term disability; union long term disability; a management survivor income benefit; management short term disability; and a group life insurance; and

(c) the Trust Fund is created for the purpose of providing the Health and Welfare Plan benefits for the benefit of the Applicants' active and retired employees.

10 Obligations of the HWT were owed to various beneficiaries with respect to various benefits, including the following:

- post-retirement medical and dental benefits ("Pensioner M&D") and life insurance benefits ("Pensioner Life") to pensioners of Nortel or their eligible dependants ("Pensioners") (approximately 11,000 pensioners and 6,000 spouses);
- long-term disability benefits to active employees with long-term disabilities and their eligible dependants ("LTD Beneficiaries") (approximately 360 individuals and 318 dependants);
- survivor income benefits ("SIBs") to survivors of certain non-unionized Nortel employees ("SIB Beneficiaries") (approximately 80 survivors); and,
- survivor transition benefits ("STBs") to survivors of certain unionized former Nortel employees ("STB Beneficiaries"), payable for a five-year period (approximately 305 survivors currently receiving STBs and 3,000 Pensioners and LTD Beneficiaries on whose deaths their survivors would be eligible for STBs).

11 This motion concerns the determination of which beneficiaries are entitled to share in the HWT corpus in respect of the following benefits (the "Potential Participating Benefits") on the termination of the HWT:

- (a) Pensioner Life;
- (b) Pensioner M&D;
- (c) life insurance benefits for LTD employees ("LTD Life");
- (d) optional life insurance for active employees, where employees pay their own premiums ("Optional Life");
- (e) optional life insurance for LTD Beneficiaries, where premiums are waived ("LTD Optional Life Benefit");
- (f) medical and dental benefits for LTD employees ("LTD M&D");
- (g) income replacement benefits for Nortel employees on LTD ("LTD Income");
- (h) SIBs
- (i) income benefits currently being paid to survivors of certain unionized former Nortel employees ("STBs - in pay"); and
- (j) income benefits being accrued for pensioners and LTD Beneficiaries on whose death their survivors would be eligible for STBs ("STBs - accrued").

12 The total liabilities of the HWT are estimated to be approximately \$542.9 million as at December 31, 2010. However, the value of investments held for the HWT at June 30, 2010 is approximately \$77.2 million, although the actual amount of cash available at the date of termination of the HWT is subject to change. For the purpose of the illustrative scenarios in the Monitor's materials, the balance available for distribution at December 31, 2010 is assumed to be in the amount of \$80 million (including a Pensioner Life insurance premium paid by Nortel for 2010 of \$7.8 million).

13 It is clear that an allocation and distribution of the corpus of the HWT has a serious and significant impact on employee and pensioner claims against the Applicants.

14 The assets in the HWT are clearly inadequate to address its liabilities. The claimants have an unsecured claim against Nortel for any shortfall, but sadly, any distribution from the Nortel estate is not expected to fully address the claims or to even come close to fully addressing such claims.

15 Mercer has prepared a report providing a preliminary valuation of certain non-pension post-retirement benefit plans and post-employment plans, estimated as at December 31, 2010 (the "Mercer 2010 HWT Preliminary Valuation") to assist with the analysis with the Proposed Allocation Methodology. It is the basis for distribution of the HWT corpus.

16 A number of outcomes relating to an allocation of the HWT corpus is possible given:

(a) the Trust Agreement does not provide clear guidance on which individuals are entitled to participate in a distribution on termination of the HWT, and there are a number of possible interpretations and

(b) the evolution of Nortel's practices, business, benefits and recordkeeping over the 30 years of the HWT's existence.

17 The Monitor recommends the Proposed Allocation Methodology based on the advice of counsel with respect to the interpretation of the Trust Agreement. The termination provision of the Trust Agreement (the "Termination Provision") provides:

Upon receipt of the Notice of Termination the Trustee shall within one hundred twenty (120) days determine and satisfy all expenses, claims and obligations arising under the terms of the Trust Agreement and Health and Welfare Plan up to the date of the Notice Termination. The Trustee shall also determine upon a sound actuarial basis, the amount of money necessary to pay and satisfy all future benefits and claims to be made under the Plan in respect to benefits and claims up to the date of the Notice of Termination. The Corporation and the designated affiliated or subsidiary corporations shall be responsible to pay to the Trustee sufficient funds to satisfy all such expenses, claims and obligations, and such future benefits and claims. The final accounts of the Trustee shall be examined and the correctness thereof ascertained and certified by the auditors appointed by the Trustee. Any funds remaining in the Trust Fund after the satisfaction of all expenses, claims and obligations and future benefits and claims, arising under the terms of the Trust Agreement and the Health and Welfare Plan shall revert to the corporation.

18 The Proposed Allocation Methodology, in brief, provides that those beneficiaries whose claims are in pay (that is, those with income claims presently being paid) and those whose claims are certain to be payable at some future date will share in the distribution.

19 The Proposed Allocation Methodology is as follows:

(a) the HWT is to be treated as one trust;

(b) on termination, the following Potential Participating Benefits share *pro rata* in the HWT corpus (based on each such Potential Participating Benefit's respective share of the present value of all such Potential Participating Benefits):

(i) Pensioner Life;

(ii) LTD Income;

(iii) LTD Life;

(iv) LTD Optional Life Benefit;

(v) STBs - in pay; and

(vi) SIBs;

(collectively, the "Proposed Participating Benefits");

(c) the following beneficiaries will receive distributions from the Proposed Participating Benefits' *pro rata* share of the HWT corpus:

- (i) Pensioners (including those active employees who will vest by the valuation date and LTD Beneficiaries) for Pensioner Life;
- (ii) LTD Beneficiaries for LTD Income and LTD Life;
- (iii) LTD Beneficiaries participating under Optional Life for LTD Optional Life Benefit;
- (iv) STB Beneficiaries currently in pay for STBs; and
- (v) SIB Beneficiaries currently in pay for SIBs;

(collectively, the "Proposed Participating Beneficiaries")

(d) the amount of the distribution to each Proposed Participating Beneficiary from the Proposed Participating Benefits' *pro rata* share of the HWT corpus will be calculated pursuant to the assumptions in the Mercer 2010 HWT Preliminary Valuation, with data as of December 31, 2010, and the Pensioner Life premiums paid for the HWT during 2010 will be treated as a reduction only to the allocation otherwise made to Pensioner Life;

(e) the present value of the Proposed Participating Benefits will be calculated pursuant to the assumptions in the Mercer 2010 HWT Preliminary Valuation, with data as of December 31, 2010; and

(f) there will be payment from the HWT on account of any conversion privilege, if any, relating to the Pensioner Life or Optional Life that is exercised by any holder of such right.

20 The Monitor submits that its recommendation is based on its conclusions regarding four legal issues:

- (a) the HWT constitutes one trust;
- (b) beneficiaries with income claims presently being paid and whose claims are certain to be paid in the future should share in the distribution;
- (c) the assets in the reserve account referred to as Group Life - Part II (related to optional life insurance) should be distributed among HWT beneficiaries eligible to participate upon termination; and
- (d) beneficiaries should participate *pro rata* in the HWT funds.

21 Counsel to the Monitor prepared a Memorandum of Law (the "Memorandum"), which analyzed how the funds in the HWT were to be distributed pursuant to its interpretation of the Trust Agreement. This Memorandum is attached as Schedule A.

22 The Monitor also prepared a chart illustrating various allocation scenarios (the "Allocation Chart"). The Allocation Chart is attached as Schedule B.

23 The Proposed Allocation Methodology is reflected in Scenario 2.

24 The Monitor is of the view that deeming December 31, 2010 as the date of Notice of Termination of the HWT for the purposes of the Trust Agreement and dispensing with Nortel sending a Notice of Termination to the Trustee will create consistency and avoid confusion between the date of termination of benefits and the LTD Beneficiary termination date of December 31, 2010 pursuant to the Settlement Agreement, the valuation date and the Mercer 2010 HWT Preliminary Valuation and the expected date of termination of the HWT.

25 Scenario 2 has attracted widespread support. Consents to the proposed allocation have been provided by counsel to the Nortel Canadian Continuing Employees ("NCCE"), to the court-appointed employee representative, counsel to the Former Employees ("Former Employees") and the LTD Beneficiaries representative, and the CAW.

26 Counsel to the Bondholders and to the Unsecured Creditors' Committee in the Chapter 11 proceedings do not oppose the allocation proposed in Scenario 2. However, to the extent that Scenario 2 is not approved, both the Bondholders and the Unsecured Creditors' Committee reserve their rights.

27 The Scenario 2 allocation is opposed by the Dissenting LTD Beneficiaries (defined below). While the Dissenting LTD Beneficiaries largely agree with the structure of the analysis provided by counsel to the Monitor as set out in the Memorandum, they disagree with the conclusion that future Pensioner Life benefits, which they characterize as the payment of annual premiums on one year term life insurance policies, are entitled to participate in an distribution of the HWT.

28 The Dissenting LTD Beneficiaries brought a cross-motion seeking approval of the distribution of the HWT in accordance with Scenario 3 of Schedule B, or other alternative relief as set out in their Notice of Motion.

29 The differences between Scenario 2 and Scenario 3 are significant. The total of all benefit liabilities under the HWT is \$548.2 million. The HWT has assets of \$80 million. Scenarios 2 and 3 provide for a charge of \$7.8 million for Pensioner Life Premiums for 2010 leaving \$72.2 million for distribution. Under Scenario 2, the proposed amount payable to Pensioner Life claims is \$35.05 million and \$26.98 million to LTD Insurance, with smaller amounts paid for other benefits as indicated. Under Scenario 3, there would be no distribution on account of Pensioner Life claims and there would be an increase of \$30.59 million for LTD claims to \$57.57 million.

30 The motion of the Dissenting LTD Beneficiaries was served the day before the hearing. A number of parties expressed concern over late service and reserved their rights, in the event Scenario 2 was not approved, to submit further evidence and to present further argument. This concern was acknowledged by counsel to the Dissenting LTD Beneficiaries.

31 As stated above, the Monitor's recommendation is based on its conclusions regarding legal issues as set out at [20].

32 The Dissenting LTD Beneficiaries take no issue with [20] (a) and (c).

33 For the reasons set forth in the Memorandum, I accept the conclusions set out at [20] (a) and (c): the HWT constitutes one trust, and Group Life - Part II reserved assets should be included in HWT distribution.

### **Legal Counsel**

34 All but a very few individuals are represented by court-appointed representatives and Representative Counsel for the Former Employees, LTD Beneficiaries and the NCCE, or by CAW counsel.

35 The court orders appointing the employee representatives provide that they may represent their constituents for the purpose of settling or compromising their claims in insolvency proceedings or in any other proceeding that has been or may be brought before this court.

36 The Former Employees' representatives and the LTD Beneficiaries' representative each retained independent counsel (collectively, "Independent Counsel") to advise them with respect to the Proposed Allocation Methodology and to take all steps necessary or desirable with respect to thereto (the "Retainer"). Independent Counsel appear on their behalf on this motion. Nortel has agreed to provide funding for the retention of Independent Counsel for these purposes, subject to a fee cap.

37 Although only three individuals formally opted out of being represented by Representative Counsel, approximately 40 individuals (the "Dissenting LTD Beneficiaries") have retained Mr. Rochon.

38 The Dissenting LTD Beneficiaries raised an issue of conflict of interest of Representative Counsel. A motion was brought to address the issue, but subsequent to the retention of Independent Counsel, the Dissenting LTD Beneficiaries decided not to proceed with their motion.

39 I am satisfied that any issues relating to conflict in this area have been addressed in a satisfactory manner.

### **Position of Parties Supporting Scenario 2**

40 The Monitor recommends the Proposed Allocation Methodology, submitting that it represents a fair and reasonable balancing of various interests in a trust fund that is clearly inadequate to fully meet all claims and that it is a practical methodology that can be implemented without undue cost and delay. The parties supporting the Monitor adopted the submissions of the Monitor.

41 The Monitor submits that distribution of the HWT should extend not only to beneficiaries with income claims presently being paid (*i.e.*, LTD Income) but also to those whose claims are certain to be paid in the future (*i.e.*, Pensioner Life).

42 The Monitor submits that this interpretation best gives meaning to the Termination Provision and would distribute the HWT to holders of benefits that have been vested so that an employee or former employee receives what is promised to him or her. It submits that the Proposed Allocation Methodology provides that those beneficiaries whose claims are in pay (that is, those with income claims presently being paid) and those beneficiaries whose claims are certain to be payable at some future date will share in the distribution. The Monitor emphasizes that this interpretation is consistent with the Termination Provision in terms of both the requirement to pay all claims and future claims, as well as the limiting words "up to the date of the Notice of Termination".

43 It is uncontroversial that any claims actually made and obligations actually incurred up to the date of the Notice of Termination should participate. On the issue of what future benefits and claims should be paid (given that the phrase "future benefits and claims" is not defined and given that the Termination Provision sets a cut-off date of "up to the date of the Notice of Termination"), the Monitor submits that not all potential contingent future unvested beneficiaries of the HWT are entitled to participate. In this respect, the Monitor argues that the effect of the phrase, "up to the date of the Notice of Termination," is to restrict distribution to "future benefits and claims" that can be considered to have been made or incurred prior to the date of termination.

44 The Monitor further submits that "future benefits and claims" should be interpreted to also include claims that have not been made at the date of termination but that, without termination, would *certainly* be made in the future. The Monitor contends that such benefits can be said to have vested and, therefore, belong among the Proposed Participating Benefits.

45 The NCCE supports the Scenario 2 allocation but does not necessarily agree with any or all of the submissions of the Monitor.

46 The Former Employees representative submits that the outcome proposed by the Monitor is reasonable and warrants court approval. Their support is conditional upon the continued support and agreement of other beneficiary classes and, ultimately, the approval of the court.

47 In this connection, the Former Employees submit that all represented interests have equal status as beneficiaries of the HWT. The Termination Provision does not establish priorities as between beneficiaries, nor does it make specific allocation of trust assets to any particular beneficiary class on trust termination. In absence of any express terms in this

regard, a trustee is under a duty of "even-handedness" to administer the trust impartially as between beneficiaries and classes of beneficiaries.

48 On the issue of what future benefits and claims should be paid, the Former Employees submit that the specific use by the Termination Provision of the term "benefits" in the phrase "benefits and claims" is significant and that the term has, and must, be given a meaning that is distinct from "claims". The Former Employees submit that the settlor intended to provide for future benefits, as well as future claims at the point of termination.

49 The Former Employees reject the argument that vested retiree life benefits are subordinate to LTD Beneficiaries on trust termination. They submit that very clear language would be required to exclude a beneficiary class having a vested, non-contingent benefit from sharing on termination and that no such language exists in the Trust Agreement.

50 The Former Employees submit that the Monitor's recommendation that Pensioner Life share or participate *pro rata* with the other beneficiary classes represents a reasonable interpretation of the Trust Agreement in light of surrounding circumstances. These include the fact that, *at its creation*, the HWT was funded by \$11 million transferred from a Mutual Life Assurance Account representing the surplus in a prior retirement life insurance plan; that each annual HWT financial statement after its formation reported a "Pension Insurance Fund Reserve"; and that Pensioner Life premium were historically paid from HWT assets up to and throughout the CCAA proceedings.

51 The Former Employees disagree with the Dissenting LTD Beneficiaries' characterization of the Pensioner Life benefit as contingent. They submit that it is a permanent life insurance benefit such that - provided premiums were paid - insurance would continue throughout the retiree's life time without subsequent application or examination. *Dayco (Canada) Ltd. v. C.A.W.*, [1993] 2 S.C.R. 230 (S.C.C.) at p. 305. They submit that Pensioner Life benefits vested when a Nortel employee retired, and, as such, Nortel or the HWT assumed an unconditional, binding obligation to make Pensioner Life insurance premium payments for the balance of the retiree's life.

52 The Former Employees submit that, in respect of Pensioner Life, the vesting event is retirement, not death. The ultimate Pensioner Life benefit - payment on death - is not a contingent or speculative event. Consequently, they submit that Pensioner Life is a vested future benefit and certain future claim and plainly within the scope of the Termination Provision.

53 CAW supports the submission of the Monitor and emphasizes that, in accordance with accepted labour law principles, all of the benefits that have accrued to unionized retirees at the time of their retirement under a collective agreement must be seen as having "vested." As such, a retiree who has been subject to a collective agreement has the right to seek through their union the enforcement of those rights that had vested at the time of their retirement, even though the collective agreement in effect at the time of such retirement has, in fact, expired.

54 In a submission unique to its interests, the CAW argues that the Dissenting LTD Beneficiaries who are members of the CAW, and the counsel that purports to represent them, have no standing to oppose that which the union has determined to support. As a result, the submissions of the Dissenting LTD Beneficiaries is incompatible with the union's role as exclusive bargaining agent, which provides it with the authority to resolve disputes arising out of the interpretation, application, or administration of the collective agreement and is subject only to the duty of fair representation.

### **Dissenting Ltd Beneficiaries**

55 The Dissenting LTD Beneficiaries submit that a plain reading of the Termination Provision demonstrates that only claims of the HWT actually incurred prior to the Notice of Termination can participate in the wind-up distribution. Such claims would include the ongoing future income payments that flow from claims incurred up to the date of the Notice of Termination.

56 They submit that the foregoing interpretation is consistent with tax, actuarial, and insurance rules, principles and practices that apply to health and welfare trusts, in general, as well as the publicly available documentation related to the HWT.

57 The Dissenting LTD Beneficiaries reject as unreasonable an interpretation of the Termination Agreement such that future premium payments owing to a third party insurer in respect of coverage beyond the date of termination should be paid from the HWT. They submit that, in recommending the inclusion of future claims, the Monitor ventures beyond the plain wording of the Termination Provision and advocates for an overly expansive interpretation of these provisions in order to capture future claims, which are contingent, and is contrary to the taxation rules that govern HWTs.

58 They contend that this interpretation fails to give any meaning to the "up to the Notice of Termination" cut-off date set out in the Termination Provision and runs afoul of the basic tenet of contractual interpretation that meaning should be given to provisions in their entirety. They argue that giving meaning to the expression "future benefits" and to the stipulated cut-off date necessarily leads to the conclusion that only "future benefits and claims" incurred prior to the Notice of Termination are payable on wind-up of the HWT.

59 The Dissenting LTD Beneficiaries also challenge the Monitor's characterization of Pensioner Life benefits as relating to permanent insurance. Rather, they submit that these benefits relate to one year renewable term life insurance policies paid monthly by Nortel to Sun Life.

60 The Dissenting LTD Beneficiaries also reject the notion that Pensioner Life benefits are certain to be paid in the future. They submit that their position is supported by the termination provisions of the Sun Life Group Term Life Insurance Policies. These indicate that coverage is automatically terminated upon the receivership or bankruptcy of the policyholder, NNL, and that "the insurance of all members stops on the termination date of this policy and claims incurred after that date are not eligible for payment." They add that it is clear that Nortel is effectively bankrupt and that, therefore, Pensioner Life and other life insurance coverage will terminate. Benefits pursuant to this coverage will not, then, "certainly be made in the future".

61 They further cite as problematic the reading in of an obligation to pay "claims that have not been made but would certainly have been made in the future" because the certainty of the claim being relied upon by the Monitor relates to the certainty of death. They submit that the payment of the death claim is the obligation of Sun Life, a third party insurer, and not of Nortel or the HWT. The benefit provided by Nortel is restricted to the payment of premiums only, which cannot give rise to a claim in the future that would be captured by the Termination Provision.

62 The Dissenting LTD Beneficiaries suggest that the wind-up liabilities should be interpreted in accordance with a funding basis consistent with the tax considerations that apply to the HWT, particularly when such a result best reflects the plain meaning of the Termination Provision and the evidence before the Court regarding actuarial practice.

63 In this respect, they submit that tax rules permit only group term life insurance policies, and not permanent policies, to be held in an HWT. To accede to an interpretation in which Pensioner Life benefits participate on termination would offend the tax rules governing health and welfare trusts and potentially throw into question the tax treatment of the HWT.

64 They submit that tax rules are relevant, in this respect, because the proper interpretation of the Termination Provision should be one that is compliant with tax law and applicable actuarial and insurance standards and principles. This follows from the accepted principle of contractual interpretation that, when faced with two plausible interpretations, one of which will lead to a construction of a contract that is unlawful, courts will prefer the interpretation that is consistent with the law.

65 The Dissenting LTD Beneficiaries submit that, given that Nortel established the HWT in order to secure tax benefits of such trust arrangements, the tax purpose and motivation of the HWT, as well as Nortel's subsequent actions in relation

to the HWT, should strongly inform the interpretation of the Termination Provision and any prospective allocation methodology. The fact that Nortel was taking tax deductions equal to its contributions encourages the inference that its contributions were in respect of claims that had occurred or were currently occurring, such as disability income payment.

66 They contend that an interpretation allowing Pensioner Life benefits to share in the distribution of HWT assets would imply that Nortel HWT was not tax compliant and would suggest that Nortel had been claiming deductions to which it was not entitled because of the *Income Tax Act's* prohibition of deducting prepaid insurance considerations.

67 The Dissenting LTD Beneficiaries also reject the Monitor's emphasis on the fact that Pensioner Life benefits were part of a reserved plan. They submit that but for an \$11 million initial contribution at the HWT's inception from a Mutual Life Assurance Account, the nature of the Pensioner Life benefit suggests that benefits pursuant to it would be treated as pay-as-you-go claims for which no pre-funding was permitted and which would not have required a bookkeeping reserve.

68 They argue that the \$11 million transfer does not constitute evidence that the pensioners are beneficiaries of the HWT today on its wind-up and should have no bearing on the interpretation of the Termination Provision.

69 The Dissenting LTD Beneficiaries urge the conclusion that the notional reserve for the Pensioners' Life Insurance Plan is distinguishable from the reserve for the LTD and Survivor Income Plans for which Nortel recognized an obligation to accumulate funds. This reserve ought not to have any significance on the interpretation of the Termination Provision.

70 Moreover, the Dissenting LTD Beneficiaries urge that *pro rata* distribution of funds is not appropriate in this case. In this respect, they submit that the Termination Provision does not specify how the Trust Fund is to be shared on the dissolution of the Nortel HWT. They reject the Monitor's proposal that the Court apply the maxim "equality is equity" on the grounds that it is a principle of last resort and not a *prima facie* presumption. The Dissenting LTD Beneficiaries submit that "equality is equity" can apply only if there is not some good reason in law and equity why it ought not to apply.

71 They submit that a determination of the appropriate allocation should reflect the intention of the parties at the time the transactions were entered into and the necessity for fairness in the ultimate result.

72 The Dissenting LTD Beneficiaries suggest that equal treatment of incurred claims of the LTD Beneficiaries and survivors and the contingent claims of pensioners in respect of future Pensioner Life benefits is inconsistent with the purpose for which Nortel established the Nortel HWT. They submit that such equal treatment would be patently unfair to the LTD Beneficiaries, who have a profound interest in the HWT and who were the ones most harshly impacted by the Settlement Agreement, which, among other things, prevents them from seeking legal redress the funding shortfall.

73 They submit that an equitable distribution of the Nortel HWT is one that will take into account the compelling reasons why this court should not apply the "equality is equity" principle in this case, such as the disproportionate impact of the distribution on LTD Beneficiaries.

## Analysis

### Preliminary Issue - Expert Evidence

74 Scenario 3 provides for an enhanced recovery for the Dissenting LTD Beneficiaries - at the expense of the of the Pensioner Life claimants. The situation facing the Dissenting LTD Beneficiaries and the Pensioner Life claimants is that of a "zero sum game". Increased allocation for one group corresponds with a diminished allocation and recovery for another group.

75 There is no doubt that the position of the Dissenting LTD Beneficiaries has been severely compromised by Nortel's insolvency. However, the Dissenting LTD Beneficiaries are not alone in this respect. All of the parties claiming entitlement to the HWT have been adversely impacted by Nortel's insolvency.

76 Counsel to the Dissenting LTD Beneficiaries submits that the proper distribution of the assets of the HWT upon wind-up depends on the Termination Provision, read in the context of the Trust Agreement as a whole, and with a view to the intention of Nortel as the settlor *at the time it entered into the Trust Agreement*.

77 Counsel further submits that evidence of such intention may be gleaned from various sources, *including the factual matrix at the time* and other documents relating to the HWT, employee benefits and employee communications (see *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.) at p. 670).

78 Counsel further submits that a trust document should be construed using rules of contractual interpretation and rules of statutory interpretation. The goal of contractual interpretation is to discover, objectively, the parties' intentions *at the time the contract was made* (see *Gilchrist v. Western Star Trucks Inc.*, [2000] B.C.J. No. 164 (B.C. C.A.) at para. 17. Second, the agreement must be construed as a whole with meaning given to all its provisions (see *Pass Creek Enterprises Ltd. v. Kootenay Custom Log Sort Ltd.*, [2003] B.C.J. No. 2508 (B.C. C.A.) at para. 17. Third, the court should interpret the agreement having regard to *the business context in which the agreement was concluded* (see *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, [2007] O.J. No. 1083 (Ont. C.A.) at para. 24.

79 However, the submissions at [77-79] have to be contrasted with the position put forth by the Dissenting LTD Beneficiaries, who contend that, as a result of the changes to the *Income Tax Act* from 1986 onward, no deductible contributions could have been made for life insurance unless they were in the form of premiums actually paid to an insurer during the year. Counsel to the Dissenting LTD Beneficiaries then concludes that wind-up liabilities should be interpreted in accordance with a funding basis consistent with the tax considerations that apply to HWTs of this type - particularly when the result best reflects the plain meaning of the Termination Provision - rather than the evidence before the court regarding actual practice.

80 If the submissions at [77-79] are accepted, it brings into question the Dissenting LTD Beneficiaries' reliance upon the 1986 amendments to the *Income Tax Act*, concerning the deduction of prepaid insurance consideration, and upon Interpretation Bulletin IT-428 on this subject. It also puts into issue the admissibility of the affidavits of Joann Williams, sworn August 9, 2010 (the "Williams Affidavit") and September 24, 2010 (the "Supplementary Williams Affidavit"); of Jeremy Bell, sworn September 3, 2010 (the "Bell Affidavit") and September 23, 2010 (the "Supplementary Bell Affidavit"); and of Diane A. Urquhart, sworn September 26, 2010 (the "Urquhart Affidavit").

81 In my view, the position put forth by the Dissenting LTD Beneficiaries that the 1980 Trust Agreement should be interpreted in light of post-1986 tax regime is flawed.

82 First, it ignores that Nortel has certain obligations as set out in the Plans, as there is clear language that establishes its obligations.

83 Second, it ignores the fact that Pensioner Life obligations vest on retirement.

84 Third, there is an absence of any contractual provision that could be interpreted as disentitling certain claimants, such as Pensioner Life claimants, from receiving their vested entitlement to a share of the trust.

85 Fourth, although the Dissenting LTD Beneficiaries submit that the distribution of the HWT is to be governed by legal interpretation of the Trust Agreement, the evidence put forth by the Dissenting LTD Beneficiaries by and large ignores the obligation of Nortel in the Trust Agreement and focuses on funding issues affected by subsequent events.

86 In my view, the position at [80] is inconsistent with the argument put forth at [77-79].

87 The Trust Agreement dates from 1980. According to the submissions of the Dissenting LTD Beneficiaries, it follows that questions of interpretation of the Trust Agreement must be based on the situation as it existed at the time the Trust Agreement was executed. I agree with this submission.

88 The contractual obligations of Nortel are set out in the various benefit plans that form part of the Record (the "Plans"). It is clear that retirement is the point at which certain obligations result in benefits for the claimants. The HWT, therefore, should be seen as the funding vehicle that delivers the benefit provided by Nortel to the claimants.

89 The Trust Agreement establishes the basis upon which the HWT was established and is to be funded, as well as the basis upon which benefits are to be paid to claimants. Nortel has contractual obligations to the claimants. It may be that certain obligations may be amended from time to time; nevertheless, once certain promises and obligations of Nortel give rise to vested benefits in favour of certain beneficiaries, they cannot be unilaterally withdrawn or eliminated.

90 Counsel to the Monitor and parties supporting the Monitor identified numerous concerns with the evidence submitted by the Dissenting LTD Beneficiaries.

91 With respect to the Williams and Bell Affidavits, the Monitor submits that neither should be given any consideration, as both affidavits fail to meet the required criteria to overcome their presumptive inadmissibility, being based on arguments and theories irrelevant to the HWT, and neither affidavit deals with the Termination Provision. Counsel also submits that issues of both admissibility and weight arise with respect to the Williams and Bell Affidavits. They argue that the evidence is not relevant because both expert witnesses purport to express opinions and opine on the ultimate issue before the Court, insofar as they express views on the terminal distribution of the HWT.

92 Specifically, counsel submits that the affidavits speak to matters of tax and insurance law that are beyond the expertise of Williams and are, in any event, irrelevant; that their opinions in respect of other trusts or benefit administrators reserved for LTD claims are irrelevant; that how the HWT could have been funded is irrelevant; that Williams uses undefined terms that are not referred to in the Termination Provision; and that the tax deductibility of contributions by Nortel is unreferenced in the trust document as a factor in allocation or termination.

93 It is further submitted that the affidavits do not pass the test for necessity, either, because Williams and Bell have no qualifications or experience in the construction of trust documents and their evidence does not inform or assist in any meaningful way how the trust instrument is to be interpreted on termination.

94 There is no evidence that Canada Revenue Agency has challenged or disallowed any tax deductions relating to the HWT taken by Nortel post-1986. There is no evidence that the 1986 changes to the *Income Tax Act* resulted in any alteration of the obligations of Nortel in the Plans and, specifically, to the Pensioner Life claimants. There is no evidence that the changes to the *Income Tax Act* somehow invalidate the HWT, in whole or in part.

95 In this context, I have concluded that evidence relating to the 1986 tax changes and evidence relating to current actuarial practice that reflects the 1986 tax changes is not relevant to the issue to be determined, namely an interpretation of the Trust Agreement. Simply put, legal developments in 1986 do not affect or alter the factual matrix as it was in 1980, and the Trust Agreement has to be interpreted on the basis of facts existing in 1980.

96 The Williams Affidavit expresses a "belief" that the LTD Beneficiaries' Income Replacement Benefits is required to be paid in priority to Pensioner Life benefits on the distribution of assets from the HWT on its wind-up. In my view, in the Williams Affidavit and the Supplementary Williams Affidavit, Ms. Williams attempts to introduce current standards based on contemporary tax practice to change the facts as they were in 1980. It seems to me that her conclusions are derived from evidence that is not relevant to the interpretation of the 1980 Trust Agreement. Further, her conclusions are tantamount to her opining on questions of law.

97 The Bell Affidavit is submitted to provide Mr. Bell's opinion on the generally accepted actuarial principles and practices used to determine sufficient contributions to fund long-term disability wage replacement benefits. Mr. Bell also asserts, as a "belief", that "claims not incurred at the time of the bankruptcy of a company should be funded from health and welfare trust *after* incurred claims are provided for" (emphasis in original). It seems to me that, in the Bell Affidavit and the Supplementary Bell Affidavit, Mr. Bell, like Ms. Williams, has drawn conclusions from evidence that

is not relevant to the interpretation of the 1980 Trust Agreement. His conclusion also results in Mr. Bell opining on questions of law.

98 The criteria for admissibility of expert opinion evidence has been, in my view, accurately summarized at Schedule C of the factum submitted by counsel to the Monitor, in particular, at paragraphs 3 - 6. Schedule C is attached.

99 Schedule C was composed before the filing of the Williams Supplementary Affidavit and Bell Supplementary Affidavit, the Urquhart Affidavit, and the affidavit of Michael McCorkle (the "McCorkle Affidavit"). In my view, these affidavits add no relevant evidence to the issue to be determined: the interpretation of the Trust Agreement. In fact, the second Bell affidavit comments on a different and unrelated healthcare benefit trust and the McCorkle Affidavit relates to events in 2005 and 2006.

100 The Williams Supplementary Affidavit again relies on facts from 1986 to buttress her opinion on the question of law that is before the court.

101 In substance, I am in agreement with the content of Schedule C insofar as it relates to the law and, particularly, to both affidavits of Ms. Williams and Mr. Bell, as well as those of Ms. Urquhart and Mr. McCorkle.

102 With respect to the Urquhart Affidavit, it is included in the responding Motion Record of the Dissenting LTD Beneficiaries, a document dated September 27, 2010 and filed in court September 28, 2010, the day before the hearing commenced.

103 The Urquhart Affidavit proffers an opinion that there cannot be claims or benefits prior to the HWT wind-up that enable the pensioners to qualify for participation in the HWT distribution, other than to receive the Pensioner Life insurance premiums for 2010 provided for the Settlement Agreement. There are two difficulties with this affidavit. It attempts to recast the facts at the time the Trust Agreement was executed to a post-1986 era. Secondly, the opinion goes to the legal issue to be determined in this motion. The affidavit does not meet the required criteria to overcome the presumptive inadmissibility as a matter of law. In addition, I seriously question whether this affidavit can be considered "fair, objective, and non-partisan" as required by rule 4 of the *Rules of Civil Procedure*.

104 The Urquhart Affidavit, to the extent that it is intended to support the conclusions of Ms. Williams and Mr. Bell, is inadmissible for the same reasons provided relating to the affidavits of Williams and Bell.

105 Furthermore, I question the appropriateness of Ms. Urquhart providing her opinion that new evidence in the 51<sup>st</sup> Report of the Monitor establishes a misappropriation of assets on the part of Nortel. There is evidence that trust monies were used to pay benefits. There may have been inadequate contributions by Nortel and a shortfall, but this does not necessarily result in the conclusion that there has been a misappropriation of assets. To suggest misappropriation of assets, without referencing an evidentiary foundation is, at best, a questionable use of the word "misappropriation" and, at worst, reckless.

106 Additional concerns were also raised as a result of comments in [13] of the Urquhart Affidavit. Ms. Urquhart states that Nortel had a right to *terminate* Pensioner Life insurance coverage. This statement is not accurate: the information booklet excerpt that forms the basis of this conclusion - and which is reproduced in her affidavit at [13] - clearly states that Nortel had only a right to *amend* the coverage.

107 While I can appreciate there may have been a degree of haste in preparing this affidavit, concerns are raised when such inaccurate statements are made.

108 The Urquhart Affidavit is for the most part irrelevant to the determination of the issues at hand. It does not provide any assistance to the court, and it is not, in my view, necessary or appropriate to consider it.

109 Counsel to the Dissenting LTD Beneficiaries submits that, given the seriousness of the issues, this is not the time to invoke technical arguments or make unfounded attacks on well-regarded and suitably qualified experts so as to avoid an honest debate of the issues on their merits. The issues on this motion are clearly serious, but it centres on the interpretation of the 1980 Trust Agreement. The deponents may very well be regarded as experts in their field, but that does not necessarily result in their evidence having to be considered when it is not, in my view, relevant. Accordingly, I decline to give any consideration to their affidavits.

### Disposition

110 As I have indicated above, there is no question that the impact of the shortfall in the HWT is significant. This was made clear in the written Record, as well as in the statements made by certain Dissenting LTD Beneficiaries at the hearing. However, the effects of the shortfall are not limited to the Dissenting LTD Beneficiaries and affect all LTD Beneficiaries and Pensioner Life claimants. The relative hardship for each claimant may differ, but, in my view, the allocation of the HWT corpus has to be based on entitlement and not on relative need.

111 All parties are in agreement that the HWT corpus must be distributed having regard to those benefits and claims that can be considered to have been made or incurred before the date of termination. The parties disagree as to whether that distribution of the HWT corpus should also include claims that, without termination, would certainly have been made in the future, including Pensioner Life benefits. The Monitor and supporting parties submit that the latter category should share in the distribution while the Dissenting LTD Beneficiaries argue that it should not.

112 It seems to me that the phrase "all future benefits and claims" in the Termination Provision allows for the possibility that claims otherwise certain to be made in the future are to be satisfied upon termination. The use of "all future benefits and claims" reveals that the HWT is not absolved of its responsibility to settle valid expenses, claims or obligations for reason only that they are future claims. It is permissive of Pensioner Life benefits but not determinative of the issue.

113 Ultimately, what is needed is a determination of what constitutes a valid claim against the HWT at the date of termination of the trust. In this respect, I agree with the Applicants that any claim that can be said to have vested at the date of termination can share on the wind-up distribution; therefore, it must be considered whether Pensioner Life benefits can be said to have vested at the relevant point in time.

114 It is settled that a permanent pensioner life benefit becomes vested on the date of an employee's retirement notwithstanding any uncertainty as to date on which the life insurance claim will be realized, *i.e.*, death: *Dayco (Canada) Ltd. v. C.A.W., supra*. The Dissenting LTD Beneficiaries urge me to make the finding that Pensioner Life benefits under the HWT are not permanent life benefits but rather term life benefits, conceptualized as the payment of annual premiums on one year term life insurance policies.

115 I decline to do so. Any such interpretation of the agreement requires the assistance of tax, actuarial and insurance principles and practices developed in a time period subsequent to 1980. The proper interpretation of the Trust Agreement must have regard to the intentions and reasonable expectations of the parties that signed it, which cannot be ascertained from practices and regulations introduced years after the Agreement was concluded. There is no indication or evidence, either in the Agreement itself or elsewhere, that the Trust Agreement should incorporate subsequent developments in tax, actuarial, or insurance principles and practices. It would be inappropriate to interpret the Termination Agreement with reference to considerations that could not possibly have been contemplated by the parties when the Agreement was drafted in 1980.

116 I find that the parties to the Trust Agreement had both the intention and reasonable expectation that Pensioner Life benefits would manifest as permanent life benefits. Permanent pensioner life benefits vest on retirement. These Pensioner Life benefits must, therefore, be considered vested future benefits and, thus, certain future claims that are within the scope of the Termination Provision and subject to distribution upon wind-up.

117 It is necessary to focus on the obligations of Nortel, as opposed to the funding challenges faced by it. The obligation of Nortel to provide Pensioner Life benefits remains constant: claimants have a contractual right to certain entitlements and Nortel has a corresponding contractual liability. The argument of the Dissenting LTD Beneficiaries at [61-62] is misguided because it takes Nortel's contemporary funding shortfall to alter a contractual relationship that was determined and fixed by the Trust Agreement in 1980. In the words of counsel to the Former Employees, the obligations of Nortel cannot be decoupled from the Trust Agreement.

118 There is no basis to disentitle Pensioner Life claimants from sharing in the distribution of the HWT. In particular, the language of the Trust Agreement in no way provides for the ousting of their rights. I have concluded that their vested ownership rights cannot be abrogated in the manner suggested by the Dissenting LTD Beneficiaries. It is one thing for changing circumstances to result in a diminished recovery for all entitled parties; it is something entirely different to conclude that Pensioner Life claimants should receive no distribution from the HWT Trust. I see no grounds in law, equity, contract, or otherwise to conclude that one unfortunate party - Pensioner Life claimants - should be required to subsidize the misfortunes of another -the LTD Beneficiaries. I view *pro rata* distribution to be the only principled and fair manner of resolving this unfortunate scenario.

119 In the result, the Monitor's motion is granted, approving Scenario 2, being the proposed methodology for the allocation of the corpus of the HWT. The consequential relief requested in the Notice of Motion as set out at [2] is also granted.

120 In light of this disposition, in my view, it is not necessary to address standing issues in respect to certain dissenting LTD Beneficiaries.

121 It follows that the cross-motion of the Dissenting LTD Beneficiaries is dismissed.

122 An order shall issue to give effect to the foregoing.

123 I wish to express my appreciation to all court-appointed representatives who have worked diligently in fulfilling their mandate in what is clearly a very difficult situation.

## Schedule "A"

### Memorandum

August 27, 2010

### Introduction

This memorandum is filed in conjunction with the Fifty-First Report of Ernst & Young Inc., the monitor of Nortel Networks Limited ("Nortel") (the "Monitor's Report") and refers to documents appended thereto. For the purposes of this memorandum we rely upon the facts set out in the Monitor's Report and the documents referred to in such report. In addition, capitalized terms that are not defined in this memorandum have the meanings set out in the Monitor's Report.

### Issues

The issue to be determined in this motion is how the funds remaining in Nortel's Health and Welfare Trust (the "HWT") are to be distributed upon termination of the HWT. This determination requires consideration of the following questions:

Does the HWT constitute one trust or several trusts?

Who is entitled to the assets in the reserve account on the financial statements referred to as Group Life- Part II (related to optional life insurance)?

Which claims participate on a termination of the HWT?

How should the Trust Fund be shared among participating beneficiaries?

### **Discussion**

Before addressing the appropriate distribution of the Trust Fund, it is important to appreciate that Nortel has contractual obligations to its employees and pensioners to provide certain health and welfare benefits. Employees and pensioners have claims for those benefits against Nortel on the basis of their contracts of employment. Claims that do not participate on a termination of the HWT can nevertheless be made against the estate of Nortel.

The creation of such contractual relations does not in itself create trust relationships between the parties, nor is a trust required to fund or deliver health and welfare benefits. Nortel elected to create the HWT as a funding medium through which to fund at least some of the Plans.

The HWT was established as a health and welfare trust for tax purposes. Health and welfare trusts are subject to classic trust law principles.

Determining the proper distribution of the Trust Fund on termination of the HWT depends on the interpretation of the termination provisions of the Trust Agreement, read in the context of the Trust Agreement as a whole, and with a view to the intention of Nortel as the settlor at the time the Trust Agreement was entered into. Evidence of such intention may be gleaned from various sources, including the factual matrix at the time and other documents relating to the HWT, employee benefits and employee communications.

#### ***Does the HWT Constitute One Trust or Several Trusts?***

The first issue that must be addressed in order to determine the appropriate distribution of the Trust Fund is whether the HWT constitutes one trust or several trusts. The issue arises because the language of the Trust Agreement indicates a single trust but administrative and accounting practices may suggest an intention to create a number of separate trusts, as explained below.

The HWT was administered historically as having separate accounting and "reserves" for certain of the benefit plans covered under the trust (the "Reserved Plans"). Amounts were notionally reserved on the HWT financial statements for the Reserved Plans, but the benefits were not fully pre-funded. There was no actual segregation of trust assets; rather, all assets were commingled. Benefits under benefit plans other than the Reserved Plans were paid by Nortel through the HWT on a pay-as-you-go basis.

#### ***Trust Law Principles***

As stated above, classic trust law principles apply to health and welfare trusts. Under trust law, a trust is established if the so-called three certainties are present: certainty of objects, certainty of subject matter and certainty of intention.

*Certainty of objects* requires that the beneficiaries be clear and ascertainable. If the HWT is one trust, the objects are all the beneficiaries of all the Plans. If the HWT consists of separate trusts for the Reserved Plans, the beneficiaries for each Reserved Plan (other than optional life, as discussed in Part B below) would be the objects of each respective trust. Therefore, there is certainty of objects (other than with respect to optional life) whether there is one trust or several trusts.

*Certainty of subject matter* requires clarity as to which property forms part of the trust fund. If the HWT is one trust, the subject matter would be the Trust Fund. If the HWT consists of several trusts, the trust fund for each Reserved Plan would be the reserved amount of the fund in respect of such Plan. Therefore, there is certainty of subject matter whether there is one trust or several trusts. However, if there are several trusts, as there is a deficiency in the HWT and the funds have been commingled, there would be a tracing issue to address.

*Certainty of intention* requires a consideration of the intention of the settlor. That is, was the intention of Nortel, as the settlor of the HWT, to establish one trust in respect of all the Plans or separate trusts for each of the Reserved Plans?

In considering Nortel's intention, we have reviewed (i) the Trust Agreement; (ii) Nortel's representations to Revenue Canada (as it then was) in respect of the tax ruling; (iii) and, to a lesser extent, the subsequent administrative and accounting practices of the Trustee and of Nortel acting as settlor and administrator of the HWT.

#### *The Trust Agreement*

The Trust Agreement refers to the establishment of a single Trust Fund. There is no indication in the Trust Agreement of an intent to create a separate trust in respect of each Plan. No provision in the Trust Agreement authorizes or directs the Trustee to segregate assets generated by contributions made on account of different Plans or different classes of beneficiary, and in fact the Trust Fund assets have always been commingled without allocation to separate Plans.

The recitals in the Trust Agreement state that a trust fund "to be known as the Health and Welfare Trust" is established to give effect to the Health and Welfare Plan. The purpose of the Trust Fund is "to provide the Health and Welfare Plan benefits for the benefit of the Employees".

#### **"Trust Fund" is defined as**

The term "Trust Fund" as used herein shall mean all of the assets of the "Health and Welfare Trust" including all funds received by way of *contributions from the Corporation* and those of its designated affiliated or subsidiary corporations in accordance with the provisions of the Health and Welfare Plan and of this Trust Agreement, *and all employees' contributions* together with all profits, increments, and earnings thereon.

(Emphasis ours.)

#### ***The Recitals in the Trust Agreement Provide That Additional Plans May Be Added to the HWT from Time to Time***

The Corporation has established for the benefit of certain of its employees and the employees of such affiliated or subsidiary Corporations as the Corporation may designate, certain Health and Welfare plans, and such other similar plan or plans as the Corporation may from time to time place in effect, as follows:

- (a) a Health Care Plan;
- (b) a Management Long Term Disability Plan;
- (c) a Union Long Term Disability Plan;
- (d) a Management Survivor Income Benefit Plan;
- (e) a Management Short Term Disability Plan;
- (f) a Group Life Insurance Plan;

*all of which are hereinafter collectively referred to as the "Health and Welfare Plan."*

(Emphasis ours.)

The Trust Agreement does not specify that any additional plans constitute separate trusts.

The Trust Agreement does, however, require the Trustee to keep separate records in respect of each of the separate Plans. Article 3, paragraph (2)(p) of the Trust Agreement provides:

The Trustee shall keep accurate and detailed accounts of all investments and transactions made by it pursuant to this Agreement and shall keep separate records for each of the separate Plans.

*a. Representations to Revenue Canada*

Evidence of Nortel's intention may also be gathered from its representations to Revenue Canada for the tax ruling. These representations refer to a *single trust fund* with "sub-accounts" created expressly for the purpose of record-keeping. In the overall description of the arrangement, in its letter to Revenue Canada dated December 16, 1979 (the "Ruling Request Letter"), Nortel states that Nortel (with related companies) proposes "to *establish a Health and Welfare Trust Fund.*"

***In describing the Long Term Disability Plan, the Ruling Request Letter states***

Under this plan eligible claims by employees will be submitted to the administrator for settlement. The administrator will then issue a draft to the claimant(s) drawn on the trust's account.

***In the description of the Group Life Insurance Plan (Part I - Basic & Part II - Optional), the Ruling Request Letter states***

Contributions (both the active employees' and the Company's) not immediately applied against claims & expenses of the Carrier will be deposited/transferred to a sub-account of the Trust called the "Pensioners Insurance Fund". [With respect to Part I - Basic.]

.....

Group Life Insurance (Part II) is paid totally by the employees and is optional. These employees' contributions will form part of the trust fund but will be kept in a separate sub-account.

Under this plan (both Part I and Part II) the Carrier will receive and settle all claims and receive settlement of its premium at that time from the Trust. As a matter of record keeping claims together with the Carrier's claim expense charges will be charged to the respective sub-accounts.

*b. Administrative and Accounting Practices*

The manner in which Nortel administered the HWT and performed financial reporting may also be relevant.

During the administration of the HWT in the normal course, the Trustee accounted for the assets in the HWT in part by distinguishing between pay-as-you-go benefit plans and funded benefit plans with notional reserve accounts.

The reports prepared by actuaries and accountants for the purposes of determining Nortel's funding policy with respect to the Health and Welfare Plan and preparing financial statements of Nortel and the HWT refer to "reserves" or "sub-accounts" in respect of certain of the Plans.

On the other hand, Nortel files only one federal tax return in respect of the HWT. In addition, it appears that Nortel did not instruct the Trustee to establish separate bank accounts and no separate bank accounts were maintained in respect of each Reserved Plan.

#### *Analysis*

It may be possible to argue that, because separate records were maintained in respect of each of the Plans, Nortel intended to " earmark " the funds for specific purposes. The notes to the financial statements set out the funded status of each Reserved Plan separately (i.e., long-term disability plan, survivor income benefit plan, pensioners' insurance plan and employee-financed group life plan (Part II)). In addition, both the ruling and the Ruling Request Letter refer to sub-accounts of the Trust Fund, which could suggest an intention on the part of Nortel to create separate trusts.

However, as stated above, there is no express term of the Trust Agreement creating separate trusts and thus no clear statement of intent to create separate trusts. Instead, there are clear provisions stating that the sub-accounts were for record-keeping purposes only, and separate bank accounts were not established or maintained.

We have been unable to find any case where a court has held that there was an intention to create separate trusts on the basis of record-keeping alone. The fact that the accounting and actuarial valuations were performed on a "plan-by-plan" basis indicates nothing more than compliance with Article 3, paragraph (2)(p) of the Trust Agreement.

In conclusion, given the provisions of the Trust Agreement, other relevant documents and Nortel's administrative practices, the HWT constitutes one trust providing a number of different benefits for the beneficiaries.

*Who is entitled to the assets in the reserve account on the financial statements referred to as Group Life- Part II (related to optional life insurance)?*

The 2009 financial statements refer to an amount of \$17,906,000 in the reserve account in respect of the group life-part II (optional life) benefit (the "Optional Life Account") and there is no corresponding liability. There are three possibilities for the allocation and distribution of the Optional Life Account:

- Payment to optional life participants;
- Reversion to Nortel; or
- Inclusion of these funds as part of the Trust Fund to be distributed to those beneficiaries eligible to participate in the corpus of the HWT at the time of termination and distribution of the HWT.

#### *Payment to optional life participants*

All of the contributions to the optional life insurance plan (i.e., the premiums) were made by the participants (except for those persons on long-term disability whose premiums were contributed by Nortel). Term life insurance was provided by Sun Life, and Nortel was the policyholder.

If the HWT establishes separate trusts, the employees participating in optional life may argue that they are entitled to the Optional Life Account, as they are its only beneficiaries. However:

On the plain language of the Trust Agreement, Nortel would be entitled to these funds because Article VI of the Trust Agreement provides that, on termination, any surplus remaining reverts to Nortel.

The employees received what they bargained for. Based on the employee communications provided to us, the employees participating in optional life had no expectation that they would receive anything other than

term life insurance protection and a conversion privilege in the event of termination.<sup>1</sup> It is unlikely that these reserved funds were contemplated by anyone other than Nortel and Sun Life, and there is no evidence of an intention on the part of the participants not to part outright with the premiums when they paid them. Indeed, the participants in the optional life plans changed from year to year, and any participant who elected not to participate in a following year received no refund.

Even if there are separate trusts for the Reserved Plans, there is an issue with respect to certainty of objects for the Optional Life Account. The Optional Life Account historically was used to pay optional life claims when there was a year of negative experience and used to reduce premiums in the next year if premiums in respect of a year were set too high. In other words, it was used to benefit not past participants but current and future optional life participants, who are unknown. As a result, there does not appear to be certainty of objects. Therefore, it is arguable that there cannot be a separate trust in respect of the Optional Life Account.

Nevertheless, whether there is a single trust or several trusts, optional life participants may argue they should be the beneficiaries of the Optional Life Account on the basis of resulting or constructive trust.

### *Resulting Trust*

*The authors of Oosterhoff on Trusts divide resulting trusts into two broad categories*

The first occurs when a settlor transfers assets to trustees and thereby creates or intends to create an express trust. If the express trust fails to arise or fails to dispose of the entire beneficial ownership of the trust assets, the remainder normally results to the settlor or to his or her estate.

Resulting trusts in the second category arise when one person (A) voluntarily transfers an asset to another person (B) or when A purchases an asset and directs the vendor to transfer the asset to B. In these situations, equity usually presumes that A did not intend that B should take the asset beneficially, and therefore, B will hold the asset on resulting trust for A unless the presumption is rebutted.<sup>2</sup>

Because the employees participating in the optional life insurance plan paid all of the premiums for the life insurance benefits, they could argue that, in effect, they overpaid the original premiums, and should be reimbursed under a resulting trust. However, since the optional life policy is only between Nortel and Sun Life, the participants would have to establish that Nortel acted as their agent in procuring the life insurance from Sun Life and wrongfully kept any surpluses, for which there is no evidence. Among other things, there is no evidence of:

- any understanding or intention that Nortel would act as an agent of the employees in purchasing the insurance;
- separate policies, certificates or accounts in the names of specific employees;
- liability on the part of employees for any shortfall (which would be expected if they were the principals);
- an expectation of receiving a refund of premium based on favourable claims experience; or
- any right of employees to require a return or transfer of the funds or the delivery of policies.

To the contrary, the evidence is that Nortel and Sun Life treated Nortel as the principal, including the cross-rating of claims between basic and optional life. Accordingly, we do not think a Court would impose a resulting trust.

### *c. Constructive Trust*

A constructive trust is a remedy that a court may impose where necessary to prevent the unjust enrichment of the defendant at the expense of the plaintiff, or to compensate the plaintiff for a wrong.<sup>3</sup> The participants in the optional life insurance plan may claim that a constructive trust should be imposed on the Optional Life Account.

Each of the following elements must exist to warrant the imposition of a constructive trust:

- enrichment,
- corresponding deprivation, and
- the absence of any juristic reason for the enrichment.<sup>4</sup>

The courts have also recognized that a constructive trust may be appropriate more generally to prevent persons from retaining property which, in "good conscience," they should not be permitted to retain.<sup>5</sup>

In *I.U.O.E., Local 894 v. Smurfit-Stone Container (Canada) Inc.*,<sup>6</sup> the employer had received demutualization proceeds in respect of life insurance plans. The employer was the policyholder and paid the premiums. The New Brunswick Court of Appeal held that there was no unjust enrichment or fiduciary obligation and therefore it was not appropriate to impose a constructive trust. Although the demutualization benefit had enriched Smurfit-Stone, the Union had not suffered a corresponding deprivation. The employees had not been deprived of any of the defined benefits they bargained for. In addition, since the policy carried with it an ownership interest in Sun Life and Smurfit-Stone was the policyholder, there was a juristic reason for it to retain the demutualization benefit.

Similarly, the optional life participants may be unable to establish a deprivation because they obtained exactly what they had bargained for (i.e., term life insurance coverage). As all of the elements required to make out a case for unjust enrichment are not present, a constructive trust should not be imposed.

The situation of the optional life participants is distinguishable from the situation of the annuitants in *Re Nortel Networks Corporation*,<sup>7</sup> where a constructive trust was imposed on individual annuity contracts held by Sun Life. In that case:

- separate accounts were kept by Sun Life relating to each individual annuitant;
- upon retirement, the annuitants had a right to the amounts in their accounts through one of four available methods;
- although Nortel was named as owner and beneficiary, each annuity also recorded the name of a particular individual as "annuitant";
- the annuitants did not receive the payments from Nortel to which they were entitled; and
- but for the constructive trust, the assets would have gone to Nortel's general creditors, which the Court considered would be a windfall.

The optional life participants, by contrast, received the coverage they bargained for. Separate accounts were not kept by Sun Life for named individuals; the participants had no right to receive refunds of premium or direct a delivery or transfer of surplus funds; and there is no concern about a windfall, since under the Proposed Allocation Methodology the funds will be used for payments to other beneficiaries who are suffering a shortfall on their claims.

Where all the elements described in paragraph 35 above are not present, a court may nevertheless impose a constructive trust on the basis that it would not be in good conscience to allow the legal owner of specific assets to retain them. In *N.A.I.T. Academic Staff Association v. N.A.I.T.*,<sup>8</sup> a significant portion of the premiums had been paid by the participants. N.A.I.T. was the owner of the policy and received the demutualization proceeds. The union

took the position that a fiduciary relationship existed between the employer and the employees because N.A.I.T. acted as the employees' agent in obtaining the policy and remitting the premiums.

The Court found that an agency existed sufficient to be the foundation for the fiduciary duty claimed, and that N.A.I.T. had profited as a result of that relationship. N.A.I.T.'s breach of its fiduciary duties by keeping the money (even in the absence of misconduct) was remedied by imposing a constructive trust.

While it might not be in good conscience for Nortel to retain the Optional Life Account, the same cannot be said if the Optional Life Account remains in the Trust Fund for distribution to the other HWT beneficiaries who are suffering a shortfall on their claims. Further, as discussed in paragraph 33 above, there are no indicia of agency in this case.

#### *Reversion to Nortel*

If the Optional Life Account is a separate trust fund and there is no constructive or resulting trust, under the terms of the Trust Agreement, Nortel is entitled to surplus funds on the termination of the HWT. However, given the tax rules related to health and welfare trusts (i.e., there can be no reversion), this result is not tenable and would potentially throw into question the tax treatment of the HWT since inception. In addition, the financial statements in respect of the HWT disclose a debt to the HWT due from the sponsoring company (Nortel). The financial statements do not indicate to which of the reserved funds the debt due from the sponsoring company relates. Accordingly, it could be allocated a number of different ways, including a set off in respect of any entitlement of Nortel to excess optional life funds. Finally, the Trust Agreement does not provide for any reversion to Nortel unless "all expenses, claims and obligations and future benefits and claims arising under the terms of the Trust Agreement and the Health and Welfare Plan" have been satisfied. Given the large deficit in the Trust Fund, and with respect to the Plan, there can be no reversion to Nortel regardless of whether there is one trust or several trusts.

#### *Inclusion in the Trust Fund*

Whether the HWT is one trust or several trusts, the result would be the inclusion of the Optional Life Account in the corpus of the HWT to be distributed to those beneficiaries eligible to participate at the time of termination.

#### *Which claims participate on a termination of the HWT?*

***In order to determine which claims participate on termination, we will consider:***

*the beneficiaries of the HWT;*

*the termination provision in Article VI of the Trust Agreement (the "Termination Provision"); and*

*application of the Termination Provision to claims of the beneficiaries.*

#### *The Beneficiaries of the HWT*

"Beneficiaries" is not expressly defined in the Trust Agreement. Instead, Article II of the Trust Agreement states that the Trust Fund is "created for the purpose of providing the Health and Welfare Plan benefits for the benefit of Employees". "Employees" are "those active and retired employees of the Corporation and designated affiliated or subsidiary corporations which have adopted the Health and Welfare Plan, including dependents as defined in Schedule A, on whose behalf contributions are or have been made to the Trust Fund and who are eligible for benefits under the Health and Welfare Plan".

The first recital to the Trust Agreement refers to components of the "Health and Welfare Plan". These include a health care plan, management long-term disability plan, union long term disability plan, management survivor income benefit plan, management short-term disability plan and group life insurance plan. In the Trust Agreement,

all of these separate arrangements are defined collectively to be the "Health and Welfare Plan". The definition of Health and Welfare Plan also includes "such other similar plan or plans as the Corporation may from time to time place in effect."

Therefore, under the Trust Agreement, the beneficiaries of the HWT are defined widely as those employees and former employees of Nortel and their dependants who are eligible for benefits under a health or welfare benefit arrangement that is funded by or through the Trust Fund, and, where there is a surplus on wind-up of the HWT, Nortel itself.

*d. The Termination Provision*

The Trust Agreement provides that Nortel may terminate the HWT on sixty days' notice to the Trustee. Upon receipt of notice of termination, the Trustee must take certain steps:

Upon receipt of the Notice of Termination the Trustee shall within one hundred twenty (120) days determine and satisfy all expenses, claims and obligations arising under the terms of the Trust Agreement and Health and Welfare Plan up to the date of the Notice of Termination. The Trustee shall also determine upon a sound actuarial basis, the amount of money necessary to pay and satisfy all future benefits and claims to be made under the Plan in respect to benefits and claims up to the date of the Notice of Termination. The Corporation and the designated affiliated or subsidiary corporations shall be responsible to pay to the Trustee sufficient funds to satisfy all such expenses, claims and obligations, and such future benefits and claims. The final accounts of the Trustee shall be examined and the correctness thereof ascertained and certified by the auditors appointed by the Trustee. Any funds remaining in the Trust Fund after the satisfaction of all expenses, claims and obligations and future benefits and claims, arising under the terms of the Trust Agreement and the Health and Welfare Plan shall revert to the Corporation.

(Emphasis ours.)

Whether the HWT is one trust or consists of several separate trusts, lack of clarity in the Termination Provision raises an issue of precisely which benefits and claims participate on termination. Specifically:

- It is clear that any claims actually made and obligations actually incurred up to the date of the Notice of Termination should participate. These would include, for example, reimbursement of medical bills actually incurred, life insurance payments to the estates of people who died and income payments due to LTD beneficiaries.
- What is not clear is which *future* benefits and claims should be paid from the HWT. The phrase "future benefits and claims" is not defined in the Trust Agreement and occurs only in the Termination Provision. While some meaning must be given to the word "future", meaning must also be given to the expression "up to the date of the Notice of Termination".

The next section offers an interpretation of the Termination Provision that gives meaning to the language as a whole, and explains how this interpretation would be applied to different types of benefits.

*e. Application of the Termination Provision to claims of the beneficiaries*

It is first necessary to consider generally whether future benefits would be available to ALL beneficiaries of the HWT, which in turn requires a consideration of the concept of vested rights. Some beneficiaries have vested rights and benefits under the Plans. Benefits vest when an employee or former employee becomes absolutely entitled to receive what is promised; that is, the promise to provide the benefits is not subject to any contingency. Vested benefits cannot be reduced or eliminated.<sup>9</sup> The beneficiaries with vested benefits are pensioners and people in receipt of LTD benefits, survivors' income benefits and survivor transition benefits.

By contrast, the benefits of active employees may be amended or terminated at any time, as may the employment itself. Claims in respect of these types of benefits (health, dental and life (basic and optional, subject to the discussion above) for active employees other than those on LTD) are not vested and therefore should not participate unless they have been incurred by the date of the Notice of Termination. Claims in respect of future benefits for active employees are uncertain and contingent and cannot be said to have arisen before the date of the Notice of Termination.

If the Trust Agreement is interpreted to provide that, on termination, all beneficiaries with vested rights under all Plans participate for future benefits, then all such claims would be included. However, this interpretation gives no meaning to the cut-off date stipulated in the Trust Agreement: "up to the date of the Notice of Termination."

If, by contrast, the Trust Agreement is interpreted to give meaning to both the expression "future benefits" and to the stipulated cut-off date, the Trustee should pay only "future benefits and claims" that can be considered to have been made or incurred *prior to the notice of termination*. "Future benefits and claims" may further be interpreted to also include claims that have not been made at the date of the Notice of Termination but that, without termination, would certainly have been made in the future. Applying this interpretation to each category of benefit:

*Pensioner Medical/Dental: Only claims that were actually incurred prior to the Notice of Termination would be included, since future benefits (being contingent and uncertain) cannot be said to have existed prior to the cut-off date.*

*Pensioner Life Insurance: As pensioner life is permanent (and not term) insurance, it may be argued that the present value of this future benefit for all pensioners should be included, as there is no contingency with respect to the ultimate payment of this benefit. This benefit may therefore be considered to have existed before the cut-off date.*

*LTD Income: The present value of the future benefit for LTD income already in pay prior to the Notice of Termination should be included on the basis that a claim was made before the Notice of Termination and the ongoing stream of income constitutes future benefits in respect to that claim.*

*LTD Medical/Dental: Only claims that were actually incurred prior to the Notice of Termination would be included, on the same basis as (i), above.*

*LTD Life Insurance: It may be argued that the present value of this future benefit for all LTDs should be included, as those individuals who are on permanent disability will either die while on LTD or after retirement, so that they are covered in any event, and the claims are not contingent.*

*SIBs: The present value of the future benefit for SIB income already in pay prior to the Notice of Termination should arguably be included, on the same basis as (iii) above.*

*STBs: The present value of the future benefit of STBs in pay prior to the Notice of Termination should arguably be included, on the same basis as (iii) above.*

As noted previously, claims that do not participate on a termination of the HWT may nevertheless remain valid claims in the Nortel estate.

Although we do not believe that the existence of the Reserved Plans demonstrates an intention to establish separate trust funds, regard may be had to Nortel's practice to assist in interpreting the Termination Provision. Other than with respect to optional life, our analysis leads to the conclusion that the claims entitled to participate on termination are in fact claims for benefits with respect to the Reserved Plans.<sup>10</sup> This strongly suggests that there was a perceived difference between these types of claims and claims that Nortel paid on a pay-as-you-go basis. In other words, these were treated as claims that were certain to occur and therefore required the keeping of reserves. This supports our conclusions with respect to which claims participate on termination and which do not.

In conclusion, as discussed above, there are difficulties in interpreting the Termination Provision. However, based on the Trust Agreement, other relevant documents and Nortel's administrative practices, the following categories of claims should participate:

*claims of all beneficiaries of the HWT actually incurred before the Notice of Termination; and*

*claims in respect of future benefits where those benefits have vested and meet the test of the cut-off date as described above, being pensioner life insurance, LTD income, SIBs and STBs. In addition, on balance, LTD life insurance should be included.*

*How should the Trust Fund be shared among participating beneficiaries?*

Under any interpretation of the Trust Agreement, an actuary would determine the present value of the participating claims. Nortel would be required to pay the Trustee sufficient funds to satisfy this obligation.

As set out above, the Termination Provision does not specify how the Trust Fund is to be shared on the dissolution of the HWT. Since there are insufficient funds to satisfy all claims against the HWT, an issue arises as to how to allocate the Trust Fund among the competing claims.

It is a well-established maxim that "equality is equity". This means that, in the absence of sufficient reason for dividing property on any other basis, the courts will order equal division.<sup>11</sup> This principle has been applied by Canadian courts in many different circumstances, including distributions of funds to investors in an insolvency and to beneficiaries of a pension plan being wound up.

If the Reserved Plans were treated as involving separate trusts, the beneficiaries under each Reserved Plan (other than optional life) would share *pro rata* in the funds reserved for that Plan. Beneficiaries of plans without reserves would not receive anything from the HWT.

If there is a single trust, the Trust Fund should be distributed *pro rata* among the claims entitled to participate on termination.

### ***Summary of Conclusions***

The HWT is a single trust fund.

The optional life participants are not entitled to the Optional Life Account and these assets do not revert to Nortel. As the HWT is a single trust fund, these assets should be distributed among the HWT beneficiaries who are eligible to participate at the time of termination.

All claims and obligations arising up to the Date of Termination participate on a termination of the HWT.

With regard to future claims, it may be argued that (i) all claims for all future benefits vested under the Plans should be present valued and participate; or that (ii) only claims made prior to the date of the Notice of Termination, including the present value of future income payments for benefits already in pay, should participate. Given the language of the Trust Agreement as supported by Nortel's funding practices, the better view is that claims that have not been made but would certainly have been made in the future should participate in addition to those in (ii) above. Therefore, the following would participate for the actuarial value of future benefits: pensioner life insurance, LTD income, SIBs and STBs in pay and, on balance, LTD life insurance.

The Trust Fund should be distributed *pro rata* among those entitled to benefit (under either interpretation set out above) under the HWT on termination.

## Schedule "B"

*Nortel Health and Welfare Trust REVISED Appendix D-1  
REVISED Illustrative Allocation Scenarios Scenarios 1 to 4  
Scenario: Optional Life does not participate  
Cdn Millions*

Type of Benefit	Benefit Liabilities {6}	1 All Benefits Share Pro Rata [Distribution %: 14.6%]	2 Proposed Participating Benefits Share Pro Rata [Distribution %: 33.8%]	3 Benefits in Pay Share Pro Rata [Distribution %: 72.1%]	4 Reserved Asset Method {3,5} [Distribution %: N/A]
Pensioner Life (including ADB){1}	\$ 126.9	\$ 10.72	\$ 35.05	\$ -	\$ 33.53
Pensioner M&D	251.3	36.67	-	-	-
<b>Pensioner Benefit Total</b>	<b>378.2</b>	<b>47.39</b>	<b>35.05</b>	<b>-</b>	<b>33.53</b>
LTD Income (including IBNR)	79.9	11.66	26.98	57.57	21.47
LTD M&D{2}	29.7	4.33	-	-	-
LTD - STB accrued	0.3	0.04	-	-	-
LTD Life{2}	4.5	0.66	1.52	-	0.65
LTD Optional Life Benefit (including IBNR)	5.3	0.78	1.80	-	-
<b>LTD Benefit Total</b>	<b>119.7</b>	<b>17.47</b>	<b>30.30</b>	<b>57.57</b>	<b>22.12</b>
SIB{4}	16.2	2.36	5.47	11.67	16.55
STB - in pay	4.1	0.60	1.38	2.95	-
STB - accrued	30.0	4.38	-	-	-
Optional Life	-	-	-	-	-
<b>Total Benefits</b>	<b>\$ 548.2</b>	<b>\$ 72.2</b>	<b>\$ 72.2</b>	<b>\$ 72.2</b>	<b>\$ 72.2</b>
Pensioner Life 2010 Premiums{1}	NA	7.80	7.80	7.80	7.80
<b>Total</b>	<b>\$ 548.2</b>	<b>\$ 80.0</b>	<b>\$ 80.0</b>	<b>\$ 80.0</b>	<b>\$ 80.0</b>

**Notes:** 1. Pensioner Life Premiums for 2010 have been treated as charge against the distribution in respect of the Pensioner Life Benefit (if any)2. LTD Life and LTD M&D includes \$2.0 million and \$5.2 million, respectively, related to LTD individuals who are assumed to proceed to retirement and become eligible as pensioners.3. Optional life reserved asset of \$18.7 million has been allocated pro rata amongst the other reserved assets based on asset value4. The pro-rata allocation of the optional life reserved asset amongst the other remaining reserved asset categories results in the SIB reserved asset allocation exceeding the total benefit claim attributable to this category. No adjustments have been made to limit the SIB distribution under the reserved asset method5. The Reserved Asset Method allocates HWT Assets using the reserved asset mix as at December 31, 2009 (as disclosed in the 2009 Health Welfare Trust Financial Statements)6. Source: Mercer 2010 HWT Preliminary Valuation

*Nortel Health and Welfare Trust REVISED Appendix D-2  
REVISED Illustrative Allocation Scenarios Scenarios 5 to 8  
Scenario: Optional Life is a participating benefit  
Cdn Millions*

Type of Benefit	Benefit Liabilities {4}	5 All Benefits Share Pro Rata	6 Proposed Participating	7 Benefits in Pay Share Pro Rata	8 Reserved Asset Method {3}
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		Benefits Share Pro Rata			
	[Distribution %: 11.2%]	[Distribution %: 25.9%]	[Distribution %: 53.3%]	[Distribution %: N/A]	
Pensioner Life (including ADB){1}	\$ 126.9	\$ 6.38	\$ 25.01	\$ -	\$ 23.85
Pensioner M&D	251.3	28.08	-	-	-
<b>Pensioner Benefit Total</b>	<b>378.2</b>	<b>34.46</b>	<b>25.01</b>	<b>-</b>	<b>23.85</b>
LTD Income (including IBNR)	79.9	8.93	20.66	42.63	16.44
LTD M&D{2}	29.7	3.32	-	-	-
LTD - STB accrued	0.3	0.03	-	-	-
LTD Life{2}	4.5	0.50	1.16	-	0.50
LTD Optional Life Benefit (including IBNR)	5.3	0.60	1.38	-	-
<b>LTD Benefit Total</b>	<b>119.7</b>	<b>13.38</b>	<b>23.20</b>	<b>42.63</b>	<b>16.94</b>
SIB	16.2	1.81	4.19	8.64	12.67
STB - in pay	4.1	0.46	1.06	2.19	-
STB - accrued	30.0	3.35	-	-	-
Optional Life	-	18.74	18.74	18.74	18.74
<b>Total Benefits</b>	<b>\$ 548.2</b>	<b>\$ 72.2</b>	<b>\$ 72.2</b>	<b>\$ 72.2</b>	<b>\$ 72.2</b>
Pensioner Life 2010 Premiums{1}	NA	7.80	7.80	7.80	7.80
<b>Total</b>	<b>\$ 548.2</b>	<b>\$ 80.0</b>	<b>\$ 80.0</b>	<b>\$ 80.0</b>	<b>\$ 80.0</b>

**Notes:** 1. Pensioner Life Premiums for 2010 have been treated as charge against the distribution in respect of the Pensioner Life Benefit (if any)2. LTD Life and LTD M&D includes \$2.0 million and \$5.2 million, respectively, related to LTD individuals who are assumed to proceed to retirement and become eligible as pensioners.3. The Reserved Asset Method allocates HWT Assets using the reserved asset mix as at December 31, 2009 (as disclosed in the 2009 Health Welfare Trust Financial Statements)4. Source: Mercer 2010 HWT Preliminary Valuation

*Nortel Health and Welfare Trust REVISED Appendix D-3  
REVISED Illustrative Allocation Scenarios Scenarios 9 to 11  
Scenario: STB Liability is excluded and Optional Life does not participate  
Cdn Millions*

Type of Benefit	Benefit Liabilities{3}	9 All Benefits Share Pro Rata [Distribution %: 15.6%]	10 Proposed Participating Benefits [Distribution %: 34.4%]	11 Benefits in Pay Share Pro Rata [Distribution %: 75.1%]
Pensioner Life (including ADB){1}	\$ 126.9	\$ 11.96	\$ 35.80	\$ -
Pensioner M&D	251.3	39.13	-	-
<b>Pensioner Benefit Total</b>	<b>378.2</b>	<b>51.08</b>	<b>35.80</b>	<b>-</b>
LTD Income (including IBNR)	79.9	12.44	27.45	60.03
LTD M&D{2}	29.7	4.62	-	-
LTD - STB accrued	EXCLUDED	-	-	-
LTD Life{2}	4.5	0.70	1.55	-
LTD Optional Life Benefit (including IBNR)	5.3	0.83	1.83	-
<b>LTD Benefit Total</b>	<b>119.4</b>	<b>18.60</b>	<b>30.83</b>	<b>60.03</b>
SIB	16.2	2.52	5.57	12.17
STB - in pay	EXCLUDED	-	-	-

STB - accrued	EXCLUDED	-	-	-
Optional Life	-	-	-	-
<b>Total Benefits</b>	<b>\$ 513.8</b>	<b>\$ 72.2</b>	<b>\$ 72.2</b>	<b>\$ 72.2</b>
Pensioner Life 2010	NA	7.80	7.80	7.80
Premiums{1}				
<b>Total</b>	<b>\$ 513.8</b>	<b>\$ 80.0</b>	<b>\$ 80.0</b>	<b>\$ 80.0</b>

**Notes:** 1. Pensioner Life Premiums for 2010 have been treated as charge against the distribution in respect of the Pensioner Life Benefit (if any)2. LTD Life and LTD M&D includes \$2.0 million and \$5.2 million, respectively, related to LTD individuals who are assumed to proceed to retirement and become eligible as pensioners.3. Source: Mercer 2010 HWT Preliminary Valuation (excludes STB Liability)

***Nortel Health and Welfare Trust REVISED Appendix D-4  
REVISED Illustrative Allocation Scenarios Scenarios 12 to 14  
Scenario: STB Liability Is Excluded and Optional Life Is a Participating Benefit  
Cdn Millions***

Type of Benefit	Benefit Liabilities {3}	12 All Benefits Share Pro Rata [Distribution %: 11.9%]	13 Proposed Participating Benefits [Distribution %: 26.3%]	14 Benefits in Pay Share Pro Rata [Distribution %: 55.6%]
Pensioner Life (including ADB){1}	\$ 126.9	\$ 7.33	\$ 25.59	\$ -
Pensioner M&D	251.3	29.96	-	-
<b>Pensioner Benefit Total</b>	<b>378.2</b>	<b>37.29</b>	<b>25.59</b>	<b>-</b>
LTD Income (including IBNR)	79.9	9.53	21.02	44.45
LTD M&D{2}	29.7	3.54	-	-
LTD - STB accrued	EXCLUDED	-	-	-
LTD Life{2}	4.5	0.54	1.18	-
LTD Optional Life Benefit (including IBNR)	5.3	0.64	1.40	-
<b>LTD Benefit Total</b>	<b>119.4</b>	<b>14.24</b>	<b>23.61</b>	<b>44.45</b>
SIB	16.2	1.93	4.26	9.01
STB - in pay	EXCLUDED	-	-	-
STB - accrued	EXCLUDED	-	-	-
Optional Life	-	18.74	18.74	18.74
<b>Total Benefits</b>	<b>\$ 513.8</b>	<b>\$ 72.2</b>	<b>\$ 72.2</b>	<b>\$ 72.2</b>
Pensioner Life 2010	NA	7.80	7.80	7.80
Premiums{1}				
<b>Total</b>	<b>\$ 508.5</b>	<b>\$ 80.0</b>	<b>\$ 80.0</b>	<b>\$ 80.0</b>

**Notes:** 1. Pensioner Life Premiums for 2010 have been treated as charge against the distribution in respect of the Pensioner Life Benefit (if any)2. LTD Life and LTD M&D includes \$2.0 million and \$5.2 million, respectively, related to LTD individuals who are assumed to proceed to retirement and become eligible as pensioners. 3. Source: Mercer 2010 HWT Preliminary Valuation (excludes STB Liability)

**Schedule "C" — The Williams and Bell Affidavits**

**Part I - The Opinions and Beliefs Expressed in the Affidavits**

1. The Williams Affidavit expresses a "belief" that the LTD Beneficiaries' income replacement benefits are required to be paid in priority to Pensioner Life benefits on the distribution of assets from the HWT on its wind-up.<sup>2</sup>

Affidavit of Joann Williams, affirmed August 9, 2010, para. 2 (the "**Williams Affidavit**"); Opposing LTD Beneficiaries' Motion Record ("**Opposing Record**"), Tab 2

2. The Bell Affidavit states that it is submitted to provide Mr. Bell's "opinion on the generally accepted actuarial principles and practices used to determine sufficient contributions to fund long term disability wage replacement benefits." Mr. Bell also asserts, as a "belief," that "claims not incurred at the time of the bankruptcy of a company should be funded from a Health and Welfare Trust **after** incurred claims are provided for."

Affidavit of Jeremy Bell, sworn September 3, 2010 paras. 1 and 54 (emphasis in original) (the "**Bell Affidavit**"); Opposing LTD Beneficiaries' Supplementary Motion Record ("**Opposing Supp. Record**"), Tab 1

## Part II - The Affidavits Should Not Be Considered in This Motion

### A. Criteria for Admissibility

3. Expert opinion evidence is presumptively inadmissible and the Opposing LTD Beneficiaries have the burden of establishing its admissibility. *R. v. Abbey*, 2009 ONCA 624 at para. 71 (C.A.); leave to appeal refused [2010] S.C.C.A. No. 125 (S.C.C.) ("**R. v. Abbey**"); BOA, Tab G.

4. The preconditions to overcoming the inadmissibility of expert opinion evidence are:

- the witness must be a properly qualified expert;
- the proposed opinion must be necessary in assisting the trier of fact and must relate to a subject matter that is properly the subject of expert opinion evidence;
- the proposed opinion must be logically relevant to a material issue; and
- the absence of any exclusionary rule.

*R. v. Abbey, supra*, at paras. 75 and 80; BOA, Tab G

5. To be admissible, the expert opinion evidence must provide technical information that is outside the experience and knowledge of the trier of fact. Expert opinion evidence that brings no added benefit to the process inevitably will be excluded. As stated by the Supreme Court of Canada:

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. "[...] If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary".

*R. v. Mohan*, [1994] 2 S.C.R. 9 at para. 25 (S.C.C.) (emphasis added, citing *R. v. Abbey*, [1982] 2 S.C.R. 24 at 42 (S.C.C.) that in turn cites *Turner* (1974), 60 Crim. App. R. 80 at 83); BOA, Tab H

*R. v. Abbey, supra*, at para. 94; BOA, Tab G

*Tavernese v. Economical Mutual Insurance*, 2009 CarswellOnt 3204 at paras. 13 and 15 (S.C.J.); BOA, Tab I

6. The *Rules* further codify that experts have a duty to provide opinion evidence "that is related only to matters that are within the expert's area of expertise," and that it must be "fair, objective and non-partisan". The Court of Appeal has stated that overreaching by expert witnesses is probably the most common fault leading to reversals on appeal.

Rules 4.1.01(1)(a) and (b), *Rules of Civil Procedure R. v. Abbey, supra*, para. 62; BOA, Tab G

### ***B. The Affiants are Not Qualified Experts***

7. It is apparent from the Affidavits that:

- neither Ms Williams nor Mr. Bell have any legal qualifications or legal expertise, including qualifications or expertise to interpret the Trust Agreement or to reach legal conclusions on the terms of the Trust Agreement or priorities with respect to the HWT;
- they have no published or academic works, peer-reviewed or otherwise, including in respect of health and welfare trusts or plans or legal, actuarial or insurance principles in relation to them;
- they have had no experience with the termination, wind-up or distribution of assets on wind-up in respect of any health and welfare trust;
- they have had no experience or involvement with the HWT itself; and
- Mr. Bell's experience with health and welfare trusts is extremely limited, being in respect of a singular multi-employer trust in British Columbia, whose liabilities are backed by public-institutions.

8. Accordingly, the affiants of the Affidavits do not demonstrate the requisite expert qualifications for the expressed beliefs or opinions.

### ***C. Legal Opinion is Not the Proper Subject of Expert Evidence***

9. It is firmly established that purported expert opinion evidence on the issues of domestic law before the Court is not of assistance to the Court, does not meet the criterion of necessity, and as a matter of law is outside the scope of proper expert evidence.

*Pente Investment Management Ltd. v. Schneider Corp.*, [1998] CarswellOnt 5952 at paras. 4-5 and 10 (Gen. Div.), aff'd (1998), 42 O.R. (3d) 177 at paras. 40-43 (C.A.); BOA, Tab J

*Royal Bank of Canada v. Société Générale (Canada)*, 2005 CarswellOnt 2201 at para. 1 (S.C.J.); BOA, Tab K

*Webb v. Waterloo Regional Police Services Board (2002)*, 95 C.R.R. (2d) 297 at paras. 7-14 (C.A.); BOA, Tab L

10. Expert witnesses take information accumulated from their own work and experience, combine it with evidence offered by other witnesses, and present an opinion as to a *factual inference* that should be drawn from the material.

*R. v. Abbey, supra* at para. 71; BOA, Tab G

11. Here, the opinions or "beliefs" expressed by Ms Williams and Mr. Bell purport to be expert opinion (or "belief") precisely as to how the Court should answer the very legal question of law before it: namely, how the HWT assets are distributable upon wind-up and whether any "priorities" are applicable.

***D. Lack of Relevance to the Subject Matter - Williams Affidavit***

12. As well as being inadmissible as expert opinion evidence on a matter of law, the Williams Affidavit on its own terms does not logically bear on the Proposed Allocation Methodology for the HWT wind-up.

13. The issue on the motion is the appropriate allocation of the assets in the HWT upon termination of the HWT.

14. Ms Williams posits that actuarial principles (and, in some cases, insurance principles) mandate that the liabilities of the HWT are to be calculated "in respect of all claims for insured events occurring up to the date of the wind-up", and that, by contrast, they require that premiums payable after wind-up for "group term life insurance" not be considered "incurred expenses" or liabilities of the HWT on wind-up. Ms Williams also suggests that Nortel was required by actuarial practice to maintain a present value reserve for the LTD Beneficiaries' income benefit, and so on wind-up a reserve amount must be given priority in the distribution of HWT assets.

Williams Affidavit, paras. 2, 21 and 29; Opposing Record, Tab 2

15. However, it is the Trust Agreement that provides for the determination (upon termination) of all expenses, claims and obligations arising under the terms of the Trust Agreement and the HWT, and for the inclusion or exclusion of future benefits and claims. The Trust Agreement makes no reference to a priority for "insured" claims over non-insured claims, or a priority for liability for "insured events" having occurred over liability for "future premiums" for group life premiums not yet incurred. Ms Williams' thesis fails to take this into account, and is premised on alleged actuarial or insurance principles that the Trust Agreement's termination provision does not reference or invoke.<sup>3</sup>

16. Further, this motion is not an inquiry into what "could" have or "should" have been done by way of funding the HWT. How it was in fact funded, and whether particular reserves were in fact set up, is a simple historical, factual question on which Ms Williams offers no evidence.

17. Ms Williams' thesis in other parts of her affidavit turns on various CRA published statements (Interpretation Bulletins and other publications) about the taxation of health and welfare trusts and other benefit programs. However, CRA statements are not law and do not prescribe any legal requirements for any transactions or arrangements.

*Caballero v. R.*, 2009 TCC 390 at para. 8 (T.C.C.); BOA, Tab M

18. As the CRA itself emphasizes in one of the very documents cited in the Williams Affidavit:

**Notice to the reader**

- Bulletins do not have the force of law.

Interpretation Bulletin IT 85R2, dated July 31, 1986, attached as Exhibit "B" to the Williams Affidavit at pg. 1 (emphasis in the original); Opposing Record, Tab 2(B)

19. CRA's publications bear no logical relevance, in any event. These are non-binding statements from CRA as to the tax treatment that it *may* afford to certain arrangements or transactions *if* specified factual conditions exist and/or certain arrangements are in place. The characteristics of a benefit plan such as the HWT are whatever they are in fact, and their reality is not changed by virtue of CRA's income tax treatment. Rather, it is the characteristics of a benefit plan that determine the tax treatment.

20. The current and historical reality of any funding for the HWT does not change as a result of any CRA criteria, and any speculation about what the funding would or might have been if certain approaches had been taken is irrelevant.

21. In any event, the conclusion that "as a result [of various CRA statements], there would be no accumulation of assets in an HWT to fund life insurance coverage into the future" is contradicted by Ms Williams' own statement that "[t]he nature of the employer's legal obligation to make contributions is governed by the terms of the trust agreement."

Williams Affidavit, paras. 11 and 15; Opposing Record, Tab 2

22. This primacy of the trust agreement is in fact also recognized by Deloitte & Touche LLP in its report on another trust that Mr. Bell cites:

A trust is created by a formal written document known as a Trust Agreement. The Trust Agreement outlines all matters relating to governance such as the number of trustees, the manner in which they are appointed, trustee responsibilities and powers, requirements for meetings, provisions for amending and terminating the trust, for example.

Deloitte & Touche LLP Report, dated January 29, 2004, attached as "B" to the Bell Affidavit, p. 14 ("**Deloitte Report**"); Opposing Supp. Record, Tab 1(B)

23. Moreover, the HWT was established in the context of a (very specific) "Ruling Request Letter" and a ruling from CRA (the "**Ruling**"), as opposed to any other CRA statements. If any inferences are to be drawn from CRA's treatment of the HWT, it is the Ruling (and the Ruling Request Letter), and CRA's treatment of the HWT since then, that constitute the relevant context. As set out in the Monitor's 51st Report, pursuant to the Ruling (and consistent with the express provisions of the Trust Agreement) there was no requirement for funding of all expected future LTD Beneficiaries' income benefits and no prohibition on the funding of future premiums for Pensioner Life benefits.

Monitor's 51st Report, paras. 36-38; Monitor's Record, Tab 2, pp. 52-54

24. The Williams Affidavit further expresses a thesis based on a misconception of the Pensioner Life benefit and the nature of Nortel's liability for this benefit, and an ensuing flawed contrast of the Pensioner Life benefit to the LTD Beneficiaries' income benefit (and the nature of Nortel's liability for it). The Williams Affidavit asserts that "future premiums paid to third party insurers for group term life insurance are not incurred expenses" (i.e., they are "contingent" only) and accordingly are not deductible under the CRA's criteria for health and welfare trusts, leading to a conclusion that "there would be no accumulation of assets in [a health and welfare trust] to fund life insurance coverage into the future."

Williams Affidavit, para. 15; Opposing Record, Tab 2

25. Ms Williams conflates funding theories with Nortel's obligation to provide the Pensioner Life benefit, which is a non-contingent liability. Once a Pensioner retires, he or she has met all the eligibility requirements for the life insurance and the coverage continues for life, unless he or she ceases to be a Canadian resident. The life insurance policies themselves expressly provide that there is no termination of their benefits.

Sun Life Policies, attached as Appendix "L" to the Monitor's 51st Report; Motion Record, Vol. III, Tab 2(L), pp. 792-93, 795, 797-98 and 861-65

26. Ms Williams' thesis is further premised on lump-sum, reserve-type funding in respect of future years' life insurance premiums being characterized as funding in respect of "contingent" benefits, within the meaning as set out in a 1998 Ontario Court of Appeal decision.

*Canadian Pacific Ltd. v. Ontario (Minister of Revenue)* (1998), 114 O.A.C. 217 at para. 11 (C.A.) ("*Canadian Pacific*"); BOA, Tab N

27. However, the Pensioner Life benefits in the HWT fall squarely within the criteria for a non-contingent liability as set out in the holding in *Canadian Pacific*. Nortel's pensioners are entitled to Pensioner Life benefits for their lifetime with the insurance proceeds payable on death (at any age). That entitlement is not contingent, but rather is certain since the triggering events (namely, retirement and death) are certain (one having occurred and the other certain to occur). The precise total amount of future annual group life premiums to be paid may not be certain, but, as stated in *Canadian Pacific*, that uncertainty does not make the liability a contingent one.

*Canadian Pacific, supra*, at para. 43; BOA, Tab N

28. Further, Ms Williams' statements to the effect that CRA recognizes a distinction between (i) lump-sum funding of future expected LTD income benefits (as being fully deductible when the funding is made); and (ii) future expenses for life insurance premiums (as not being fully deductible when made as a lump sum) is incorrect. In fact, CRA's stated position (whether correct or not, as a matter of income tax law) is that lump-sum funding of future expected LTD income benefits is not deductible in the year of contribution.

CRA Technical News - Health and Welfare Trusts 10302002, p.6, attached as Exhibit "C" to the Williams Affidavit; Opposing Record, Tab 2(C)

#### ***E. Lack of Relevance to the Subject Matter - Bell Affidavit***

29. As submitted above, the Bell Affidavit, as purported expert evidence on a legal principle, is *ipso facto* not admissible as a matter of law. In any event, it is respectfully submitted, the evidence proffered by the Bell Affidavit on its own terms does not bear on the issue before the Court, being the Proposed Allocation Methodology for the HWT wind-up.

30. In the case of the Bell Affidavit, the entire discussion concerns Mr. Bell's experience with the funding of disability benefits under an ongoing, publicly sponsored, multi-employer trust in British Columbia. His evidence does not address, concern or take into consideration the HWT or the Trust Agreement. Further, the B.C. trust is not only entirely unrelated to the HWT, but it is not distributing its assets or being wound-up.

31. This motion is not about the B.C. trust. The terms and practices of the B.C. trust are not in issue before this Court. Mr. Bell's evidence is not logically relevant to the matters in issue in the motion.

32. The Bell Affidavit further appears to suggest that principles for a wind-up of all health and welfare trusts can be drawn from certain specific employers' "exits" from the ongoing B.C. trust, whereby coverage stops and no payments are made "related to any event occurring after the date of termination". While this may be an accurate description of the one health and welfare plan that Mr. Bell is familiar with, it bears no logical connection to the HWT or the terms of the Trust Agreement that address the parameters of claims upon termination of the HWT.

Bell Affidavit, paras. 48-52; Opposing Supp. Record, Tab 1

33. In addition, the Bell Affidavit, in suggesting that general actuarial principles and practices can be drawn from certain specific practices relating to the B.C. trust, is inherently flawed as there are no actuarial standards or practice requirements in respect of the funding of self-insured long-term disability income benefits. The Actuarial Standards Board's own criteria for what constitutes accepted actuarial practice states that the *only*

explicit articulation of accepted actuarial practice are the Board's "rules and standards." Mr. Bell himself admits that he has identified no "useful public written account providing direction on accepted actuarial practice as it pertains to funding self-insured long-term disability income benefits." Nortel's actuaries, Mercer, confirm that they too are not aware of any actuarial standards or practice requirements specifically designed for settlement of non-pension benefits.

Bell Affidavit, para. 15; Opposing Supp. Record, Tab 1

Mercer Valuation, pg. 4; Monitor's Record, Vol. I, Tab 2(C), p. 109

Standards of Practice - General Standards for the Canadian Institute of Actuaries, pg. 1013, section 1210, attached as Exhibit "A" to the Bell Affidavit; Opposing Supp. Record, Tab 1(A)

*Application granted; cross-motion dismissed.*

#### **Appendix "A" — List of Authorities in Schedule "C"**

1. *Caballero v. R.*, 2009 TCC 390 (T.C.C.)
2. *Canadian Pacific Ltd. v. Ontario (Minister of Revenue)* (1998), 114 O.A.C. 217 (C.A.)
3. *Pente Investment Management Ltd. v. Schneider Corp.*, [1998] CarswellOnt 5952 (Gen. Div.), aff'd (1998), 42 O.R. (3d) 177 (C.A.)
4. *R. v. Abbey*, 2009 ONCA 624 (C.A.); leave to appeal refused [2010] S.C.C.A. No. 125 (S.C.C.)
5. *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.)
6. *Royal Bank of Canada v. Société Générale (Canada)*, 2005 CarswellOnt 2201 (S.C.J.)
7. *Tavernese v. Economical Mutual Insurance*, 2009 CarswellOnt 3204 (S.C.J.)
8. *Webb v. Waterloo Regional Police Services Board* (2002), 95 C.R.R. (2d) 297 (C.A.)

#### **Appendix "B" — Statutory References in Schedule "C"**

##### **Rules of Civil Procedure, R.R.O. 1990, reg. 194**

4.1.01(1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

- (a) to provide opinion evidence that is fair, objective and non-partisan;
- (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
- (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

##### Footnotes

- 1 In *Canadian Dental Association v. Association des Chirugiens-Dentistes du Québec*, 1994 CLB 4402, 17 O.R. (3d) 817, the Ontario Court of Appeal considered a similar fact scenario. The national association of dentists ("CDA") developed an insurance program for dentists. Coverage was provided on an experience-rated basis. Surpluses were declared in several consecutive years with respect to the life and disability plans, and such surpluses were paid to CDA. The trial court determined that surplus funds belonged to the participants who had paid the premiums. The Court of Appeal allowed the appeal. It relied

on the fact that, when a participant pays a premium in respect of an insurance policy, the expectation is that he or she will have protection against the insured risk under the policy and nothing further.

- 2 A.H. Oosterhoff *et al.*, *Oosterhoff on Trusts: Text, Commentary and Materials*, 7<sup>th</sup> ed. (Toronto: Carswell, 2009) at 590.
- 3 Roy Goode, "Property and Unjust Enrichment" in Andrew Burrows, ed., *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991) 215 at 217; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 43.
- 4 *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 at para. 9.
- 5 *Soulos v. Korkontzilas*, *Supra* Note 3 at paras. 17, 29-34.
- 6 *I.U.O.E., Local 894 v. Smurfit-Stone Container (Canada) Inc.*, 2005 CarswellNB 209 (C.A.).
- 7 *Nortel Networks Corp. (Re)*, 2010 ONSC 3061.
- 8 *Northern Alberta Institute of Technology Academic Staff Assn. v. Northern Alberta Institute of Technology*, 2002 ABQB 750; the Alberta Court of Appeal affirmed the decision, but sent the matter back to the Court of Queen's Bench to recalculate the amount of money for which NASA should have its constructive trust, 2004 ABCA 42 (leave to appeal to the SCC refused, 2004 SCCA 154)
- 9 In *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230 at para. 87, the Supreme Court expressed the view, in *obiter*, that retirement rights that survive expiration of the underlying agreement vest at the time of retirement and cannot be taken away.
- 10 Other than the special case of STBs in pay.
- 11 John McGhee Q.C., *Snell's Equity*, 31<sup>st</sup> ed. (London: Sweet and Maxwell, 2005) at paras. 5-20 to 5-23.
- 2 The Williams Affidavit uses the term "Retiree Life Benefits" instead of "Pensioner Life benefits".
- 3 Indeed, even if they were relevant, none of the alleged actuarial or insurance principles asserted by Ms Williams prescribe any priorities upon termination of a health and welfare trust. There are no actuarial principles cited that mandate that a reserve be set up to fully fund expected LTD Beneficiaries' income benefits.



**Most Negative Treatment:** Application/Notice of Appeal

**Most Recent Application/Notice of Appeal:** Nortel Networks Corp., Re | 2011 CarswellOnt 2491 | (S.C.C., Mar 8, 2011)

2011 ONCA 10  
Ontario Court of Appeal [In Chambers]

Nortel Networks Corp., Re

2011 CarswellOnt 11, 2011 ONCA 10, [2011] O.J. No. 22, 196 A.C.W.S. (3d) 923, 86 C.C.P.B. 178

**In the Matter of the Companies' Creditors  
Arrangement Act, R.S.C. 1985, c. C-36, as Amended**

In the matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

K.M. Weiler J.A.

Judgment: January 7, 2011

Docket: CAM39469

Proceedings: refusing leave to appeal *Nortel Networks Corp., Re* (2010), 2010 ONSC 5584, 2010 CarswellOnt 8462, 85 C.C.P.B. 161 (Ont. S.C.J. [Commercial List])

Counsel: Joel P. Rochon, Sakie Tambakos, John Archibald for Moving Party, Dissenting LTD Beneficiaries  
Derrick Tay, Jennifer Stam for Nortel Networks Corporation et al.  
Fred Myers, Gale Rubenstein for Monitor, Ernst & Young Inc.  
William E. Pepall for Former Employees' Representatives  
Fiona Campbell, Peter Engelmann for LTD Beneficiaries' Representative  
Janice Payne, Steven Levitt, Arthur O. Jacques, Thomas McRae for Nortel Canadian Continuing Employees  
Barry E. Wadsworth for CAW-Canada et al.

Subject: Estates and Trusts; Evidence; Employment; Public; Insolvency; Corporate and Commercial

MOTION for leave to appeal judgment reported at *Nortel Networks Corp., Re* (2010), 2010 ONSC 5584, 2010 CarswellOnt 8462, 85 C.C.P.B. 161 (Ont. S.C.J. [Commercial List]).

***K.M. Weiler J.A.:***

1 The moving party has brought a motion in writing seeking leave to appeal the order of the motion judge sanctioning the monitor's application for approval of the methodology for distributing funds in Nortel's Health and Welfare Trust (HWT), scenario 2 of the "Illustrative Allocation Scenarios" (see: Schedule "B" of the motion judge's decision).

2 The test for leave to appeal in proceedings ongoing under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, is that there be a serious and arguable issue of real and significant interest with reference to the following four factors:

- (a) whether the point on appeal is of significance to the practice;
- (b) whether the point raised is of significance to the action itself;

(c) whether the appeal is prima facie meritorious; and

(d) whether the appeal will unduly hinder the progress of the action.

3 The moving party has not satisfied me in relation to factors a, c, and d that the test is met.

4 The interpretation of the specific termination clause in issue in the HWT, especially when viewed in the context of the unique factual matrix giving rise to the dispute, is not of significance to the practice.

5 Nor is the appeal *prima facie* meritorious. The judge at first instance did not read words into the termination clause. He correctly applied principles of construction of documents and did not reverse the onus of proof. His reasons for rejecting the proffered "expert" evidence do not disclose any error in principle.

6 In addition, granting leave to appeal would unduly hinder the progress of the action. In the event that leave to appeal were granted and the appeal were to be allowed, the motion judge's approval of the distribution in accordance with scenario 2 would be overturned. A number of outcomes relating to the allocation of the HWT corpus would then be possible. The bondholders and the unsecured creditors' committee reserved their rights if the distribution was not made in accordance with scenario 2. The responding parties all requested an opportunity to make submissions respecting the moving party's preferred option, scenario 3, as that scenario was not before the motion judge and it was acknowledged that a further hearing would be required if scenario 2 was not approved. Any subsequent order for distribution of the corpus of the HWT could, in turn, become the subject of a further application for leave to appeal. The restructuring of Nortel would be unduly delayed.

7 For these reasons, the motion for leave to appeal is dismissed with costs to the Monitor, the only party requesting costs. Subject to the Monitor and the moving party wishing to make further submissions in writing respecting the amount of costs, I would fix those costs in the amount of \$2500.

*Motion dismissed.*

3

2013 ONCA 518  
Ontario Court of Appeal

Nortel Networks Corp., Re

2013 CarswellOnt 11241, 2013 ONCA 518, 231 A.C.W.S. (3d) 575, 25 C.C.L.I. (5th) 6

**In the Matter of the Companies' Creditors Arrangement  
Act, R.S.C. 1985, Chapter C-36, as Amended**

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks  
Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel  
Networks International Corporation and Nortel Networks Technology Corporation

Laskin, Rosenberg, Tulloch J.J.A.

Judgment: August 15, 2013

Docket: CA M42159

Proceedings: refusing leave to appeal *Nortel Networks Corp., Re* (2012), 16 C.C.L.I. (5th) 150, 97 C.B.R. (5th) 85, 2012  
ONSC 5653, 2012 CarswellOnt 14672 (Ont. S.C.J. [Commercial List])

Counsel: Alan D'Silva, Ellen M. Snow, Ingrid Minott, for Chartis Insurance Company of Canada  
Lyndon A.J. Barnes, for Board of Directors of Nortel Networks Corporation and Nortel Networks Limited  
Gavin H. Finlayson, for Canadian Lawyers, for The Informal Nortel Noteholder Group  
R. Shayne Kukulowicz, for Canadian Lawyers, for the Official Committee of Unsecured Creditors  
Barbara Walacik, for Former Employees of Nortel  
Robin B. Schwill, for Joint Administrators of Nortel Networks UK Limited  
Joseph Pasquariello, for Monitor, Ernest & Young Inc.  
Thomas McRae, for Nortel Canadian Continuing Employees  
Alan Merskey, for Applicants  
Scott A. Bomhof, for Nortel Networks Inc.

Subject: Insurance; Civil Practice and Procedure; Insolvency

APPLICATION by insurer for leave to appeal decision reported at *Nortel Networks Corp., Re* (2012), 16 C.C.L.I. (5th)  
150, 97 C.B.R. (5th) 85, 2012 ONSC 5653, 2012 CarswellOnt 14672 (Ont. S.C.J. [Commercial List]).

***Per curiam:***

1 The applicant, Chartis Insurance Company of Canada, seeks leave to appeal the order of the motion judge that it is required to pay the legal fees of Nortel's executives in respect of two proceedings without reference to the ten million dollar retention amount or the directors and officers trust fund.

2 The motion judge held that Nortel Networks Corporation was subject to a pre-filing obligation to indemnify its directors and officers for their legal fees, but that it was precluded from doing so by the CCAA stay of proceedings. He interpreted the directors' and officers' insurance policy to mean that the retention amount did not apply, because payment was not "permitted". Therefore the insurer, Chartis, was required to indemnify the directors and officers now and not after the \$10 million retention amount was depleted. He also interpreted the trust indenture to mean that the trustee of the \$12 million trust account for the benefit of the directors and officers had full discretion as to whether to

provide access to the trust funds. He was of the view that to permit Chartis to access those funds would be to improperly elevate Chartis over other unsecured creditors.

3 Chartis argues that the motion judge erred in finding the indemnification to be a pre-filing claim and therefore subject to the stay. Had he found that the obligation continued after the stay, he would have found that the retention amount applied. Chartis also argues that the motion judge erred in his interpretation of the trust indenture, in that the liability claims should be paid out of the trust.

4 In our view, the motion judge's finding that the indemnification was a pre-filing claim and that allowing access to the trust would improperly elevate Chartis' priority were findings that were squarely within his expertise and entitled to deference. They involved the interpretation of his own Initial Order. His legal analyses of the directors and officers insurance policy and the trust indenture were not shown to contain any *prima facie* errors. These issues are specific to this case and not of broader interest to the practice or the public.

5 In a CCAA proceeding, leave to appeal is granted sparingly and only where there are serious and arguable grounds of significant interest to the parties. The applicant has not succeeded in meeting the stringent test for leave to appeal as set out in *Timminco Ltd., Re*, 2012 ONCA 552 (Ont. C.A.), at paras. 2-3.

6 The moving party included an unsealed affidavit in the moving party's Motion Record that was not before the motion judge. Fresh evidence on motions for leave to appeal is not admissible as of right. On a motion for leave from Divisional Court, it is only admissible with leave of the court and then only for a limited purpose. Weiler J.A. set out the appropriate procedure to follow for tendering fresh evidence on motions for leave to appeal in *Canada Mortgage & Housing Corp. v. Iness* (2002), 62 O.R. (3d) 255 (Ont. C.A. [In Chambers]), at para. 15:

[T]he party seeking to adduce evidence on the matter of public importance should file a motion to admit evidence on the matter and a supporting affidavit with the application for leave to appeal. Similarly, any response to the affidavit should be filed with the responding materials on the leave motion. The panel hearing the application for leave to appeal would then consider the motion to admit the evidence on the issue of public importance when considering the leave application. Motions to strike affidavits and motions to cross-examine on such affidavit material would properly be made to the chambers judge.

7 The moving party did not bring a motion for leave to admit the fresh evidence. The respondents did not bring a motion to strike, but the applicants below and the Monitor objected to its admissibility before the panel. The parties have not provided any submissions on the test to be applied on a motion for fresh evidence on an application for leave to appeal in CCAA proceedings. In the circumstances, we think it preferable to deal with the question of the appropriate test for fresh evidence on a motion in which the issue has been fully argued.

8 Given that there was no motion for leave to admit the fresh evidence, it was not considered.

9 Leave to appeal is denied.

10 Costs are awarded to the three groups of responding parties as follows: \$3,000 to the applicants below (the Nortel companies) and the Monitor (who filed joint materials), \$1,000 to the former directors and officers of Nortel, and \$1,000 to Nortel Networks Inc. and the other U.S. Debtors and the Official Committee of Unsecured Creditors (who filed joint materials).

*Application dismissed.*

4

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** Nortel Networks Corp., Re | 2013 ONCA 427, 2013 CarswellOnt 8231, 230 A.C.W.S. (3d) 125, 5 C.B.R. (6th) 254 | (Ont. C.A., Jun 20, 2013)

2012 ONCA 552  
Ontario Court of Appeal

Timminco Ltd., Re

2012 CarswellOnt 9633, 2012 ONCA 552, [2012] O.J. No. 596, 219 A.C.W.S. (3d) 11, 2 C.B.R. (6th) 332

**In the Matter of the Companies' Creditors  
Arrangement Act, R.S.C. 1985, c. C-36, as Amended**

In the Matter of a Proposed Plan of Compromise or Arrangement with  
Respect to Timminco Limited and Becancour Silicon Inc. Applicants

Simmons, Juriansz, Epstein J.J.A.

Judgment: July 20, 2012  
Docket: CA M41062, M41085

Proceedings: refused leave to appeal *Timminco Ltd., Re* (2012), 2012 CarswellOnt 1466 , 2012 ONSC 948, 2012 CarswellOnt 1466, 95 C.C.P.B. 222, 86 C.B.R. (5th) 171 ((Ont. S.C.J. [Commercial List]))

Counsel: Ashley J. Taylor, Erica Tait for Applicants  
Douglas J. Wray, Jesse Kugler for Communications, Energy and Paperworkers Union of Canada  
Charles E. Sinclair for United Steelworkers

Subject: Insolvency; Corporate and Commercial

APPLICATION for leave to appeal a decision reported at *Timminco Ltd., Re* (2012), 2012 CarswellOnt 1466 , 2012 ONSC 948, 2012 CarswellOnt 1466, 95 C.C.P.B. 222, 86 C.B.R. (5th) 171 ((Ont. S.C.J. [Commercial List])).

***Per curiam:***

- 1 Leave to appeal is denied.
- 2 In the CCAA context, leave to appeal is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. In determining whether leave ought to be granted, this Court is required to consider the following four-part inquiry:
  - whether the point on the proposed appeal is of significance to the practice;
  - whether the point is of significance to the action;
  - whether the proposed appeal is *prima facie* meritorious or frivolous; and
  - whether the appeal will unduly hinder the progress of the action.

See *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.)

3 In our view, the proposed appeals lack sufficient merit to meet this stringent test.

4 This court's decision in *Indalex Ltd., Re* (2011), 104 O.R. (3d) 641 (Ont. C.A.), affirms that a CCAA court may invoke the doctrine of paramouncy to override conflicting provisions of provincial statutes where the application of provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

5 Here, the motion judge recognized that in the circumstances of this case there was a conflict between the federal CCAA and the provincial PBA and SPPA. He found that, "[i]n the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated". Further, he concluded that "to ensure that the objectives of the CCAA are fulfilled, it is necessary to invoke the doctrine of paramouncy such that the provisions of the CCAA override those of the QSPPA and the OPBA".

6 We see no basis on which this court could interfere with the motion judge's decision, including his unassailable findings of fact that: (1) without DIP financing, Timminco would be forced to cease operating; (2) bankruptcy would not be in the interests of anyone, including members of the pension plan; (3) if the DIP lender did not get super priority, it would not have agreed to provide financing; and (4) there was insufficient liquidity or unfavourable terms associated with the rejected DIP proposals. In short, he found that there was "no real alternative" to approving the DIP facility and DIP super priority charge.

7 The motion judge also addressed the union's fiduciary arguments, primarily in his earlier reasons released February 2, 2012, that are incorporated by reference into his February 9, 2012 reasons. He concluded that it was in the best interests of all parties to proceed with the restructuring. We see no basis on which this court could interfere with this finding.

8 Costs are to the responding parties on the motions on a partial indemnity scale fixed in the amount of \$1,500 per motion inclusive of disbursements and applicable taxes.

*Application dismissed.*

5

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** *Stelco Inc., Re* | 2006 CarswellOnt 3050, 210 O.A.C. 129, 21 C.B.R. (5th) 157, [2006] O.J. No. 1996 | (Ont. C.A., May 16, 2006)

2005 CarswellOnt 6818  
Ontario Court of Appeal

*Stelco Inc., Re*

2005 CarswellOnt 6818, [2005] O.J. No. 4883, 11 B.L.R. (4th) 185, 144 A.C.W.S. (3d) 15, 15 C.B.R. (5th) 307, 204 O.A.C. 205, 261 D.L.R. (4th) 368, 78 O.R. (3d) 241

**IN THE MATTER OF THE COMPANIES' CREDITORS  
ARRANGEMENT ACT, R.S.C., c. C-36, AS AMENDED**

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT  
WITH RESPECT TO STELCO INC., AND OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS  
ARRANGEMENT ACT, R.S.C. 1985, c. C-36 AS AMENDED

Goudge, Sharpe, Blair JJ.A.

Heard: November 14, 2005  
Judgment: November 17, 2005  
Docket: CA C44436, M33171

Proceedings: additional reasons at *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305 ((Ont. C.A.)); affirmed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 6483, 15 C.B.R. (5th) 297 ((Ont. S.C.J. [Commercial List]))

Counsel: Paul Macdonald, Andrew Kent, Brett Harrison for Informal Independent Converts' Committee  
Michael E. Barrack, Geoff R. Hall for Stelco Inc.

Robert Staley, Alan Gardner for Senior Debenture Holders

Fred Myers for Her Majesty the Queen in Right of Ontario, Superintendent of Financial Services

Ken Rosenberg for United Steelworkers of America

A Kauffman for Tricap Management Ltd.

Kyla Mahar for Monitor

Murray Gold for Salaried Retirees

Heath Whitley for CIBC

Steven Bosnick for U.S.W.A. Loc. 5328, 8782

Subject: Insolvency; Civil Practice and Procedure

ADDITIONAL REASONS to judgment reported at *Stelco Inc., Re* (2005), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305 (Ont. C.A.).

***Blair J.A.:***

**Background**

1 This appeal arises out of the reorganization of Stelco Inc., and related companies, pursuant to the *Companies' Creditors Arrangement Act* ("CCAA").<sup>1</sup> Stelco has been in the midst of this fractious process for approximately twenty-one months. Justice Farley has been the supervising judge throughout.

2 Stelco has presented a Proposed Plan of Compromise or Arrangement to its creditors for their approval. The vote was scheduled for Tuesday, November 15, 2005. On Thursday, November 10, a group of creditors known as the Informal Independent Converts' Committee ("the Converts' Committee) sought an order from the supervising judge, amongst other things, classifying the Subordinated Debenture Holders whom they represent as a separate class for voting purposes. Justice Farley dismissed the motion. In the face of the pending vote, the Converts' Committee sought leave to appeal on Thursday afternoon (The courts were closed on Friday, November 11, for Remembrance Day). Rosenberg J.A. dealt with the matter and directed that the application for leave, and if leave be granted, the appeal, be heard by a panel of this court on Monday, November 14, 2005.

3 This panel heard the application for leave and the appeal on Monday. We concluded that leave should be granted, but that the appeal must be dismissed, and at the conclusion of argument — and in order to clarify matters so that the vote could proceed the following day — we issued a brief endorsement with our decision, but indicating that more detailed reasons would follow.

4 The endorsement read as follows:

In our view, the appellants have not demonstrated a different legal interest from the other unsecured creditors vis à vis the debtor, nor any basis for setting aside the finding of Farley J. that there are no different practical interests such that the appellants deserve a separate class. We see no legal error or error in principle in his exercise of discretion.

Leave to appeal is granted, but the appeal must therefore be dismissed. Because of the importance of the issue for Ontario practice in this area, we propose to expand somewhat on these reasons in due course.

5 These are those expanded reasons.

## Facts

6 Stelco's Proposed Plan is made to unsecured creditors only. It is not intended to affect the claims of secured creditors.

7 The Converts' Committee represents unsecured creditors who hold \$90 million of convertible unsecured subordinated debentures issued by Stelco pursuant to a Supplemental Trust Indenture dated January 21, 2002, and due in 2007. With interest, the claims of the Subordinated Debenture Holders now amount to approximately \$110 million. Those claims are subordinated to approximately \$328 million in favour of Senior Debt Holders. In addition, Stelco has unsecured trade debts totalling approximately, \$228 million. In the Proposed Plan, these three groups of unsecured creditors — the Subordinated Debenture Holders (represented by the Converts' Committee), the Senior Debt Holders, and the Trade Creditors — have all been included in the same class for the purposes of voting on the Proposed Plan or any amended version of it.

8 The Converts' Committee takes issue with this, and seeks to have the Subordinated Debenture Holders classified as a separate class of creditors for voting purposes. They argue that their interests are different than those of the Bondholders and that creditors who do not have common interests should not be classified in the same group for voting purposes. They submit, therefore, that the supervising judge erred in law in not granting them a separate classification. In that regard, they rely upon this court's decision in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.). They also argue that the supervising judge was wrong, on the facts contained in the record, in finding that the Subordinated Debenture Holders and the Bondholders did not have conflicting interests.

9 In making their argument about a different interest, the appellants rely upon their status as subordinated debt holders as shaped particularly by Articles 6.2 and 6.3 of the Supplemental Trust Indenture. In essence those provisions reinforce the subordinated nature of their debt. They stipulate (a) that if the Subordinated Debenture Holders receive any payment from Stelco, or any distribution from the assets of Stelco, before the Senior Debt is fully paid, they are obliged to remit any such payment or distribution to the Senior Debt Holders until the latter have been paid in full (Art. 6.2(3)), but (b) that no such payment or distribution by Stelco shall be deemed to constitute a payment on the Subordinated Debenture Holders' debt (Art. 6.3). The parties refer to these provisions as the "Turnover Payment" provisions.

10 In short, although Stelco is obliged to pay both groups of creditors in full, as between the Subordinated Debenture Holders and the Senior Debt Holders, the latter are entitled to be paid in full before the former receive anything. The Supplemental Trust Indenture makes it clear that the provisions of Article 6 "are intended solely for the purpose of defining the relative rights of [the Subordinated Debenture Holders] and the holders of the Senior Debt" (Art. 6.3).

11 The appellants contend that the Turnover Payment provisions distinguish their interests from those of the Subordinated Debenture Holders when it comes to voting on Stelco's Proposed Plan. They say that the Subordinated Debenture Holders' interest in maximizing the amounts to be made available to unsecured creditors ends once they have received full recovery, in part as a result of the Turnover Payments that the Subordinated Debenture Holders will be required to make from their portion of the funds. On the other hand, the Subordinated Debenture Holders will have an interest in seeking more because their recovery, for practical purposes, will have only begun once that point is reached.

12 The respondents submit, for their part, that the appellants are seeking a separate classification for a collateral purpose, i.e., so that they will be able to veto the Proposed Plan, or at least threaten to veto it, unless they are granted a benefit to which they are not entitled — the elimination of their subordinated position by virtue of the Turnover Payment provisions.

13 Farley J. rejected the appellants' arguments. The thrust of his decision in this regard is found in paragraphs 13 and 14 of his reasons:

[13] I would note as well that the primary and most significant attribute of the ConCom debt and that of the BondCom debt/Senior Debt<sup>2</sup> plus the trade debt vis-à-vis Stelco is that it is all unsecured debt. Thus absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid any unnecessary fragmentation — and in this respect multiplicity of classes does not mean that that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.

[14] Is it necessary to have more than one class? Firstly, it would not appear to me that as between Stelco and the unsecured creditors overall there is any material distinction. Secondly, there would not appear to me to be any confiscation of any rights (or the other side of the coin any new imposition of obligations) upon the holders of the ConCom debt. The subrogation issue was something which these holders assumed on the issue of that debt. Thirdly, I do not see that there is a realistic conflict of interest. Each group of unsecured creditors including the ConCom debt holders and the BondCom debt holders has the same general interest vis-à-vis Stelco, namely to extract from Stelco through the Plan the maximum value in the sense of consideration possible. . . . That situation is not impacted for our purposes here in this motion by the possibility that in a subsequent dispute between the ConCom holders and the BondCom holders there may be a difference of opinion as to the variation of the consideration obtained.

14 We agree with his conclusion and see no basis to interfere with his findings in that regard.

### **The Leave Application**

15 The principles to be applied by this court in determining whether leave to appeal should be granted to someone dissatisfied with an order made in a CCAA proceeding are not in dispute. Leave is only sparingly granted in such

matters because of their "real time" dynamic and because of the generally discretionary character underlying many of the orders made by supervising judges in such proceedings. There must be serious and arguable grounds that are of real and significant interest to the parties. The court has assessed this criterion on the basis of a four-part test, namely,

- a) whether the point on appeal is of significance to the practice;
- b) whether the point is of significance to the action;
- c) whether the appeal is *prima facie* meritorious or frivolous; and
- d) whether the appeal will unduly hinder the progress of the action.

See *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 24; *Country Style Food Services Inc., Re*, [2002] O.J. No. 1377, 158 O.A.C. 30 (Ont. C.A. [In Chambers]) at para. 15; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 7.

16 Here, we granted leave to appeal because the proposed appeal raised an issue of significance to the practice, namely the nature of the "common interest" test to be applied by the courts for purposes of the classification of creditors in CCAA proceedings. Although the law seems to have progressed in the lower courts along the lines developed in Alberta, beginning with the decision of Paperny J. in *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), this court has not dealt with the issue since its decision in *Nova Metal Products Inc. v. Comiskey (Trustee of)*, *supra*, and the Converts' Committee argues that the Alberta line of authorities is contrary to *Nova Metal Products Inc.*

17 A brief further comment respecting the leave process may be in order.

18 The court recognizes the importance of its ability to react in a responsible and timely fashion to the appellate needs arising in the "real time" dynamics of CCAA restructurings. Often, as in the case of this restructuring, they involve a significant public dimension. For good policy reasons, however, appellate courts in Canada — including this one — have developed relatively stringent parameters for the granting of leave to appeal in CCAA cases. As noted, leave is only sparingly granted. The parameters as set out in the authorities cited above remain good law.

19 Merely because a corporate restructuring is a big one and money is no object to the participants in the process, does not mean that the court will necessarily depart from the normal leave to appeal process that applies to other cases. In granting leave to appeal in these circumstances, we do not wish to be taken as supporting a notion that the fusion of leave applications with the hearing of the appeal in CCAA restructurings — particularly in major ones such as this one involving Stelco — has become the practice. Where there is an urgency that a leave application be expedited in the public interest, the court will do so in this area of the law as it does in other areas. However, where what is involved is essentially an attempt to review a discretionary order made on the facts of the case, in a tightly supervised process with which the judge is intimately familiar, the collapsed process that was made available in this particular situation will not generally be afforded.

20 As these reasons demonstrate, however, the issues raised on this particular appeal, and the timing factor involved, warranted the expedited procedure that was ordered by Justice Rosenberg.

## The Appeal

### *No Error in Law or Principle*

21 Everyone agrees that the classification of creditors for CCAA voting purposes is to be determined generally on the basis of a "commonality of interest" (or a "common interest") between creditors of the same class. Most analyses of this approach start with a reference to *Sovereign Life Assurance Co. v. Dodd* (1892), [1891-94] All E.R. Rep. 246 (Eng. C.A.), which dealt with the classification of creditors for voting purposes in a winding-up proceeding. Two passages from the judgments in that decision are frequently cited:

At pp. 249-250 Lord Esher said:

The Act provides that the persons to be summoned to the meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act<sup>3</sup> recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.

At p. 251, Bowen L.J. stated:

The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term 'class' as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

22 These views have been applied in the CCAA context. But what comprises those "not so dissimilar" rights and what are the components of that "common interest" have been the subject of debate and evolution over time. It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process — a flexibility which is its genius — there can be no fixed rules that must apply in all cases.

23 In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:

In summary, the cases establish the following principles applicable to assessing commonality of interest:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if possible.
4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

24 In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: *Sklar-Pepler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.); *Woodward's Ltd., Re* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.); *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *NsC Diesel Power Inc., Re* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.), (*sub nom. Amoco Acquisition Co. v. Savage*); *Wellington Building Corp.,*

*Re* (1934), 16 C.B.R. 48 (Ont. S.C.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent *Canadian Airlines Corp., Re* decision: *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 27.

25 In the passage from his reasons cited above (paragraphs 13 and 14) the supervising judge in this case applied those principles. In our view he was correct in law in doing so.

26 We do not read the foregoing principles as being inconsistent with the earlier decision of this court in *Nova Metal Products Inc. v. Comiskey (Trustee of)*. There the court applied a common interest test in determining that the two creditors in question ought not to be grouped in the same class of creditors for voting purposes. But the differing interests in question were not different legal interests as between the two creditors; they were different legal interests as between each of the creditors and the debtor company. One creditor (the Bank) held first security over the debtor company's receivables and the other creditor (RoyNat) held second security on those assets; RoyNat, however, held first security over the debtor's building and realty, whereas the Bank was second in priority in relation to those assets. The two creditors had differing commercial interests in how the assets should be dealt with (it was in the interests of the bank, with a smaller claim, to collect and retain the more realizable receivable assets, but in the interests of RoyNat to preserve the cash flow and have the business sold as a going concern). Those differing commercial interests were rooted in differing legal interests as between the individual creditors and the debtor company, arising from the different security held. Because of the size of its claim, RoyNat would dominate any group that it was in, and Finlayson J.A. was of the view that RoyNat, as the holder of second security, should not be able to override the Bank's legal interest as the first secured creditor with respect to the receivables by virtue of its voting rights. On the basis that there was "no true community of interest" between the secured creditors (p. 259), given their different legal interests, he ordered that the Bank be placed in a separate class for voting purposes.

27 *Nova Metal Products Inc. v. Comiskey (Trustee of)* did not deal with the issue of whether creditors with divergent interests as amongst themselves — as opposed to divergent legal interests vis-à-vis the debtor company — could be forced to vote as members of a common class. Nor did it apply an "identity of interest" test — a test that has been rejected as too narrow and too likely to lead to excessive fragmentation: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia, supra.*; *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd., supra.*; *Fairview Industries Ltd., Re, supra.*; *Woodward's Ltd., Re, supra.* In our view, there is nothing in the decision in *Nova Metal Products Inc.* that is inconsistent with the evolutionary set of principles developed in the Alberta jurisprudence and applied by the supervising judge here.

28 In addition to commonality of interest concerns, a court dealing with a classification of creditors issue needs to be alert to concerns about the confiscation of legal rights and about avoiding what the parties have referred to as "a tyranny of the minority". Examples of the former include *Nova Metal Products Inc. v. Comiskey (Trustee of)*<sup>4</sup> and *Wellington Building Corp., Re, supra*<sup>5</sup>. Examples of the latter include *Sklar-Peppler, supra*<sup>6</sup> and *Campeau Corp., Re* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.)<sup>7</sup>.

29 Here, as noted earlier in these reasons, the respondents argue that the appellants are seeking a separate classification in order to extract a benefit to which they are not entitled, namely a concession that the Turnover Payment requirements of their subordinated position be extinguished by the Proposed Plan, thus avoiding their obligation to transfer payments to the Senior Debt Holders until they have been paid in full, and freeing up all of the distribution the appellants will receive from Stelco for payment on account of their own claims. On the other hand, the appellants point to this conflict between the Subordinated Debenture Holders and the Senior Debt Holders as evidence that they do not have a commonality of interest or the ability to consult together with a view to whatever commonality of interest they may have vis-à-vis Stelco.

30 We agree with the line of authorities summarized in *Canadian Airlines Corp., Re* and applied by the supervising judge in this case which stipulate that the classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. To the extent that other authorities

at the trial level in other jurisdictions may suggest to the contrary — see, for example *NsC Diesel Power Inc., Re, supra* — we prefer the Alberta approach.

31 There are good reasons for such an approach.

32 First, as the supervising judge noted, the CCAA itself is more compendiously styled "An act to facilitate compromises and arrangements between companies and their creditors". There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (B.C. S.C.) at para. 24 (after referring to the full style of the legislation):

[The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

33 In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

34 Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar. Rev. 587, at p. 602.

35 Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring, runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", *supra*; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association — Ontario Continuing Legal Education, 5<sup>th</sup> April 1983 at 19-21; *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.*, *supra*, at para. 27; *Northland Properties Ltd., Re, supra*; *Sklar-Peppler, supra*; *Woodward's Ltd., Re, supra*.

36 In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in *Canadian Airlines Corp., Re*, "the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans."

### ***Discretion and Fact Finding***

37 Having concluded that the supervising judge made no error in law or principle in his approach to the classification issue, we can find no error in his factual findings or in his exercise of discretion in determining that the Subordinate Debenture Holders should remain in the same class as the Senior Debt Holders and Trade Creditors in the circumstances of this case.

38 We agree that there is no material distinction between the legal rights of the Subordinated Debenture Holders and those of the Senior Debt Holders vis-à-vis Stelco. Each is entitled to be paid the monies owing under their respective debt contracts. The only difference is that the former creditors are subordinated in interest to the latter and have agreed to pay over to the latter any portion of their recovery received until the Senior Debt has been paid in full. As between the two groups of creditors, this merely reflects the very deal the Subordinated Debenture Holders bought into when they purchased their subordinated debentures. For that reason, the supervising judge was also entitled to determine that this was not a case involving any confiscation of legal rights.

39 Finally, the supervising judge's finding that there is no "realistic conflict of interest" between the creditors is supported on the record. Each has the same general interest in relation to Stelco, namely to be paid under their contracts, and to maximize the amount recoverable from the debtor company through the Plan negotiation process. We do not accept the argument that the Senior Debt Holder's efforts will be moderated in some respect because they will be content to make their recovery on the backs of the Subordinated Debenture Holders through the Turnover Payment process. In order to carry the class, the Senior Debt Holders will require the support of the Trade Creditors, whose interest is not affected by the subordination agreement. Thus the Senior Debt Holders will be required to support the maximization approach.

40 We need not deal with whether a realistic and genuine conflict of interest, produced by different legal positions of creditors vis-à-vis each other, could ever warrant separate classes, as we are satisfied that even if it could, this is not such a case.

### **Disposition**

41 Accordingly, we would not interfere with the supervising judge's decision that the appellants had not made out a case for a separate class. The appeal is therefore dismissed.

### ***Goudge J.A.:***

I agree.

### ***Sharpe J.A.:***

I agree.

*Application granted; appeal dismissed.*

### Footnotes

- 1 R.S.C. 1985, c. C-36, as amended.
- 2 Farley J. uses the term "ConCom debt" to refer to the debt represented by the Converts' Committee (i.e., that of the Subordinated Debenture Holders), and the term "BondCom debt" to refer to that of the Senior Debt Holders.
- 3 *The Joint Stock Companies Arrangement Act*, 1870.
- 4 A second secured creditor with superior voting power was separated from a first secured creditor for voting purposes, in order prevent the former from utilising its superior voting strength to adversely affect the latter's prior security position.
- 5 The court refused to allow subsequent mortgagees to vote in the same class as a first mortgagee because in the circumstances the subsequent mortgagees would be able to use their voting power to destroy the priority rights and security of the first mortgagee.
- 6 Borins J., as he then was, warned against the dangers of "excessive fragmentation" and of creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power".
- 7 Montgomery J. declined to grant a separate classification to a minority group of creditors who would use that classification to extract benefits to which it was not otherwise entitled.

6

2001 CarswellOnt 1742  
Ontario Court of Appeal

Algoma Steel Inc., Re

2001 CarswellOnt 1742, [2001] O.J. No. 1943, 105 A.C.W.S. (3d) 585, 147 O.A.C. 291, 25 C.B.R. (4th) 194

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT  
ACT, R.S.C. 1985, c. C-36 AND THE BUSINESS CORPORATIONS  
ACT, R.S.O. 1990, c. B.16; AND IN THE MATTER OF A PROPOSED  
PLAN OF ARRANGEMENT WITH RESPECT TO ALGOMA STEEL  
INC.; ALGOMA STEEL INC. (Applicant/Responding Party)**

Osborne A.C.J.O., Doherty, MacPherson JJ.A.

Heard: May 18, 2001

Judgment: May 25, 2001

Docket: CA M27359

Proceedings: Refusing leave to appeal from 2001 CarswellOnt 1999, (April 23, 2001), Doc. 01-CL-4115 (Ont. S.C.J. [Commercial List]); refusing leave to appeal (April 23, 2001), Doc. 01-CL-4115 (Ont. S.C.J. [Commercial List])

Counsel: *John B. Laskin, David Outerbridge*, for Moving Party, First Mortgage Noteholders

*Michael Barrack, Geoff Hall, Sarit Batner*, for Responding Party, Algoma Steel Inc.

*John T. Porter, Alan Merskey, Mario Forte*, for DIP Lenders

*Ken Rosenberg, Lily Harmer, Marcus Knapp*, for United Steelworkers of America

*James H. Grout*, for Monitor

*Andrew Hatnay*, for Superintendent of Financial Services

*Michael Weinczok*, for Directors of Algoma Steel Inc.

Subject: Insolvency; Corporate and Commercial

APPLICATION for leave to appeal from judgment respecting mortgage arrangement, 2001 CarswellOnt 1999 (Ont. S.C.J. [Commercial List]).

**Endorsement. *Per curiam*:**

1 The First Mortgage Noteholders ("the Noteholders") seek leave to appeal, pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("the *CCAA*"), from the order of Farley J. dated April 23, 2001 [2001 CarswellOnt 1999 (Ont. S.C.J. [Commercial List])]. The Noteholders are a consortium of about a dozen companies and groups which holds first mortgage notes totalling about \$550 million issued by the respondent Algoma Steel Inc. ("Algoma").

2 Farley J.'s order was an initial order made pursuant to s. 11(3) of the *CCAA*, on a motion by Algoma. It was made without notice to the Noteholders. The essence of Farley J.'s order was an authorization to Algoma to obtain additional financing ("the DIP Financing") from its existing bank lenders during the 30 day stay period permitted by s. 11(3) of the *CCAA*. The purpose of the order was to respond, on an urgent and interim basis, to a serious negative cash flow crisis at Algoma. Indeed, without short-term financial assistance designed to serve as a base for restructuring Algoma's current indebtedness, Algoma might well have had to cease operations. The order also gave priorities (which the parties call superpriorities) to the DIP Financing charge and to certain Administration and Directors Charges over the Noteholders' existing security.

3 In his endorsement, Farley J. said, *inter alia*:

Algoma qualifies as a corporation with the threshold debt re seeking relief under the CCAA.

.....

The noteholders who are owed in excess of \$1/2 billion were not represented today for the very simple reason that none of them were served. The reason for that as I understand it is that there is no set up at the present time of a Creditor's Committee or any equivalent. *I note that there is a comeback clause and I would particularly emphasize that if it is felt appropriate and needed, this clause should be used on a timely basis.*

Order to issue as per my fiat.

[Emphasis added.]

4 The comeback clause in the underlined passage is reflected in paragraph 48 of Farley J.'s order:

48. THIS COURT ORDERS that any interested person may apply to this court to vary or rescind this order or seek other relief upon seven (7) days' notice to the Applicant, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this court may order.

5 Once the Noteholders became aware of Farley J.'s order, they decided to challenge it. They did so in two ways: by seeking leave to appeal to this court and by initiating a motion to vary before Farley J. The former proceeded before this court, on a preliminary basis, on May 15 and, on the merits, on May 18. The latter was scheduled to be heard by Farley J. on May 23.

6 The Noteholders seek leave to appeal Farley J.'s order on three bases, which they frame as Proposed Questions for this court:

(1) Did the motions judge exceed his jurisdiction in making the initial order by altering existing priorities of and between secured creditors through the granting of superpriorities without the consent of the First Mortgage Noteholders?

(2) Did the motions judge exceed his jurisdiction or otherwise err in law by granting these superpriorities without any notice to the First Mortgage Noteholders or to the trustee under the trust indenture?

(3) Did the motions judge err in law by failing: (a) to treat the First Mortgage Noteholders in an equitable and even-handed manner relative to the Bank Lenders; and (b) to give due regard to the prejudice suffered by the First Mortgage Noteholders as a result of the initial order?

7 In our view, the motion for leave to appeal is premature. Initial orders, made on a without notice basis, are specifically authorized by s. 11(1) of the CCAA. Proceedings under the CCAA are often urgent, complex and dynamic. The Algoma proceedings fit that description. Farley J. was faced with complex facts and a difficult decision potentially implicating the closure of one of the largest companies in Ontario. Moreover, he had to make his decision in a very timely fashion. In these circumstances, he recognized that his initial order might not be acceptable to all interested parties, including some of Algoma's creditors. That is why he included a comeback clause in his order and specifically invited parties to resort to it in his endorsement.

8 The fact that the CCAA provides that an appeal of an initial order is only available with leave indicates that appeals in CCAA proceedings should be limited. An appeal court should be cautious about intervening in the CCAA process, especially at an early stage. On this point, we are attracted to the reasoning of MacFarlane J.A. (in chambers) in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 ((B.C. C.A. [In Chambers])), at 272:

[T]here may be an arguable case for the petitioners to present to a panel of this court on discrete questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. . . .

A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.

. . . In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellant proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

9 Like MacFarlane J.A., we do not say that leave to appeal should never be granted in the midst of *CCAA* proceedings. However, it is premature to grant such leave at this juncture in the Algoma proceedings. Farley J.'s order was only an initial order brought on an urgent basis to deal with seemingly desperate circumstances. Moreover, the order specifically opened the proceedings to all interested parties and invited dissatisfied parties to bring their concerns to the court on a timely basis. The Noteholders availed themselves of this opportunity by initiating a motion to vary which was scheduled to be heard on the very day the initial order expired. In our view, this is precisely how a dynamic *CCAA* proceedings should unfold. Accordingly, it would be unwise to interrupt this normal and desirable process by granting leave to appeal at this juncture. The issues that the Noteholders want to raise can be considered by Farley J., importantly in the context of the entire proceedings with which he is familiar. Moreover, if at a later point in time this court grants leave to appeal, it will then have the benefit of the considered reasons of the motions judge flowing from a complete record and from full argument by all interested parties.

10 For these reasons, the motion for leave to appeal is dismissed, without prejudice to the right of the Noteholders, or any other interested party, to make a similar motion at a later juncture in the proceedings, and to do so on an expedited basis. Only the United Steelworkers of America requested their costs of the motion. They are entitled to their costs which we would fix at \$1000.

*Application dismissed.*

7

2003 BCCA 347

British Columbia Court of Appeal [In Chambers]

Houweling Nurseries Ltd. v. Amethyst Greenhouses Ltd.

2003 CarswellBC 1603, 2003 BCCA 347, [2003] B.C.J. No. 1322, 123

A.C.W.S. (3d) 11, 183 B.C.A.C. 70, 301 W.A.C. 70, 44 C.B.R. (4th) 224

**In the Matter of the Companies' Creditors Arrangement Act R.S.C. 1985, c. C-36 and In the Matter of the Company Act, R.S.B.C. 1996, C. 62 and In the Matter of Houweling Nurseries Ltd. and HNL Holdings, Respondents (Petitioners) and Amethyst Greenhouses Ltd. and Paul Houweling, Appellants (Respondents)**

Finch C.J.B.C.

Heard: May 16, 2003

Judgment: May 16, 2003

Docket: Vancouver CA030795

Counsel: P. Houweling for himself

R.A. Millar for Respondent

Subject: Corporate and Commercial; Insolvency

APPLICATION by creditors for leave to appeal earlier orders made in proceedings under Companies' Creditors Arrangement Act.

***Finch C.J.B.C. (orally):***

1 This is an application by Amethyst Greenhouses Ltd. and by Mr. Paul Houweling for directions. As I understand the material put before me and the submissions made by Mr. Houweling on his own behalf and on behalf of Amethyst and the submissions of counsel for the petitioners, what is really sought is an order for leave to appeal orders that were made in these proceedings under the *Company's Creditors Arrangement Act*. The order of 13 March 2003 approves a plan presented by the petitioners under the provisions of that *Act*. The Plan presented had the required agreements or consents of the creditors.

2 The petitioners sought an order at the time, the plan was presented declaring that the proof of claim filed by Amethyst be declared invalid for voting and distribution purposes.

3 The order which he seeks to appeal is this:

THIS COURT FURTHER DECLARES that:

(a) the Plan has been agreed to by the requisite percentages of General Creditors in the General Creditors Class created under the Plan in conformity with section 6 of the CCAA;

(b) the amendment to the Plan set forth in Schedule "B" is approved; and

(c) The Proof of Claim filed by Amethyst Greenhouses Ltd. in the sum of \$32,500,000 is null and void both for voting and distribution purposes under the Plan.

4 Today, in addition to the claim of Amethyst in the sum of \$32 million, rejected by the order, Mr. Houweling also presents a personal claim which he says is in the amount of \$1.4 million.

5 I do not think it will be useful to attempt to record the full history of proceedings that led to this Plan being presented for approval. Two subsequent orders were made; one on 4 April 2003 amending the plan of arrangement by amending the definition of "effective date" from April 4, 2003 to April 30, 2003. A further order was made by the learned chambers judge on 16 April 2003 in these terms:

THIS COURT ORDERS that:

1. the appeal of Paul Houweling from the disallowance of his Proof of Claim filed herein be and hereby is dismissed.

6 I had some difficulty in telling from Mr. Houweling's submission which of these various orders leave is sought to appeal against, but for the purposes of these reasons I will treat the applicant's request as one for an order granting leave to appeal in respect of all three of the orders to which I have referred. The petitioner opposes the leave application on the basis that the application is out of time with respect to the first two orders, and that there is no merit, to the proposed appeal against the third order.

7 Section 14(2) of the *Companies Creditors Arrangement Act* provides that:

... no appeal shall be entertained unless within 21 days after the rendering of the order or decision being appealed or within such further time as to the court appealed from ... allows, the appellant has taken proceedings therein to perfect his appeal...

8 This provision has been construed to mean not that the leave application must be heard within 21 days but that the appellant must have taken some proceedings to have such an application heard: see *Westar Mining Ltd., Re* (1993), 75 B.C.L.R. (2d) 16 (B.C. C.A.). In this case, Mr. Houweling's and Amethyst Greenhouse's notice of appeal, which for these purposes I treat as a notice of application for leave to appeal, was filed on 5 May 2003, the same day on which they filed their notice of motion for "directions".

9 It appears, therefore, that the provisions of s. 14(2) of the *Act* have not been complied with in respect of the orders made on 13 March 2003 and 4 April 2003. The application in respect of those two orders must therefore be dismissed on the basis that it is not brought within the time provided under the *Act*.

10 With respect to the order of 16 April 2003 one must keep in mind that leave to appeal in *C.C.A.* proceedings is granted sparingly. For leave to be granted, the Court must be satisfied that there are serious and arguable grounds that are of real and significant interest to the parties, and that any appeal proceedings will not unduly delay the balance of the proceedings: see *Quinsam Coal Corp., Re* (2000), 20 C.B.R. (4th) 145 (B.C. C.A. [In Chambers]).

11 The factors to consider on the issue of whether there is sufficient merit include whether the point on appeal is of significance to the practice, whether the point on appeal is of significance to the action, whether there is *prima facie* merit to the appeal, and whether the appeal will unduly hinder the progress of the action.

12 In general, a higher threshold must be met before leave to appeal is granted in *C.C.A.* proceedings than in other cases, in order to justify the delay and other prejudicial effects on the proposed arrangements that would result from the commencement of an appeal. For that reason this Court is reluctant to alter the balance of interests that the chambers judge has attempted to address in making an order to meet the objectives of the *Act*.

13 I must say that I have been unable to detect or identify any error of law or of principle or any misapprehension of fact or any issue which would give rise to an arguable appeal on behalf of either Mr. Houweling or Amethyst.

14 In my respectful view, there is no merit to the appeal sought to be launched against the order of April 16. I may say as well that I can see no merit to any appeal against the earlier two orders, even if the application in respect of those orders had been brought within the time limited. In addition, it is clear to me that an appeal against any of these orders would hinder unduly the progress of proceedings under the C.C.R.A. plan.

15 For those reasons the application for leave to appeal is dismissed.

*Application dismissed.*

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2012 QCCA 665  
Cour d'appel du Québec

Homburg Invest Inc., Re

2012 CarswellQue 3445, 2012 QCCA 665, 230 A.C.W.S. (3d) 357, J.E. 2012-824, EYB 2012-205048

**In the matter of the plan of compromise or arrangement of: Statoil Canada Ltd., Petitioner-Impleaded party, and Homburg invest inc., Respondent-debtor-petitioner, v. The Cadillac Fairview Corporation Limited, Bos Solutions Ltd., Canadian Tubular Services Inc., Keywest Projects Ltd., Mhi Fund Management Inc., SPT Group Canada Ltd. formerly Neotechnology Consultants Ltd., Premier Petroleum Corp., Tucker Wireline Services Canada Inc., Surge Energy Inc., Moe Hannah Mcneil LLP, Logan Completion Systems Inc. and CE Franklin Ltd., Impleaded third parties-Impleaded third parties, and Samson Belair/Deloitte & Touche, Impleaded party-Monitor**

Hilton J.C.A.

Heard: 1 march 2012

Judgment: 12 april 2012

Docket: C.A. Qué. Montréal 500-09-022267-116

Counsel: *Me Gerald N. Apostolatos, Me Stefan Chripounoff*, for Petitioner  
*Me Éric Préfontaine, Me Martin Desrosier, Me Alexandre Fallon*, for Respondent  
*Me Mark Meland*, for Cadillac Fairview Corporation Limited  
*Me Mathieu Lévesque*, for Canadian Tubular services inc.; Premier Petroleum Corp.; Moe Hannah McNeil LLP  
*Me Louis Dumont*, for Tucker Wireline Services Canada Inc.  
*Me Michael John Hanlon*, for Surge Energy Inc.  
*Me Jocelyn Perreault*, for Samson Belair/Deloitte & Touche

Subject: Insolvency

**Allan R. Hilton, J.A.:**

1 The Debtor Homburg Invest Inc. applied for relief under the *Companies' Creditors Arrangement Act*,<sup>1</sup> and an initial order was issued on September 9, 2011. The supervising judge, the Honourable Mr. Justice Louis J. Gouin, rendered judgment on December 5, 2011 granting Homburg's application for an order confirming the re-assignment and assignment of certain agreements relating to its position as a debtor with respect to commercial real estate premises in Alberta, and Homburg's release from obligations it had contracted thereunder. The effect of the order was to immediately enforce the obligations of Statoil Canada Ltd. under those agreements with respect to the landlord and subtenants of the premises. Statoil now seeks leave to appeal that judgment pursuant to sections 13 and 14 of the *CCAA*.

2 Statoil urges a barrage of reasons why leave should be granted,<sup>2</sup> which are conveniently summarized in paragraph 52 of its motion:

- a) Did the motions judge have the power and jurisdiction to grant the orders sought in the Motion?
- b) Did Homburg have the legal standing and interest to seek the conclusions of the Motion?

c) Could the motions judge exercise his powers so as to interfere with the contractual rights of third parties (Statoil, Cadillac Fairview and subtenants) in the manner that he did in the judgment?

3 A threshold issue is the criteria to be considered upon such an application for leave. Based on the judgment of Wittman, J.A., as he then was, in *Resurgence Asset Management LLC v. Canadian Airlines Corp.*,<sup>3</sup> there are four such criteria:

whether the point on appeal is of significance to the practice;

whether the point raised is of significance to the action itself;

whether the appeal is prima facie meritorious, or, on the other hand, whether it is frivolous, and;

whether the appeal will unduly hinder the progress of the action.

4 Judges of this Court to whom such applications have been addressed have held unanimously that the four criteria are cumulative; with the result that an applicant's failure to establish any one of them will result in the dismissal of the application.<sup>4</sup> In addition, it is also generally understood that an applicant carries a heavy burden in order to obtain leave, and that appellate courts will only grant such applications sparingly.

5 Without disputing the applicability of these four criteria, Statoil urges me to consider that they need not be cumulative, but weighed together, even if one or more of them are not established. In this respect, it points to the reasons of Yamauchi, J., of the Alberta Court of Queen's Bench in *Royal Bank of Canada v. Cow Harbour Construction Ltd.*,<sup>5</sup> who was hearing a CCAA leave application of the type before me. In doing so, Yamauchi, J. referred to reasons given in Alberta that advocate a different approach than the one that has been unanimously followed by judges of this Court. Here is what he said:

**For DLL to obtain leave to appeal under the CCAA, it must meet the test set out by the Alberta Court of Appeal in *Fairmont Resort Properties Ltd. (Re)*, 2009 ABCA 360 at para. 10, where the court said:**

The test for leave involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; (4) whether the appeal will unduly hinder the progress of the action.

**Before this Court considers the factors involved in the « test for leave, » it is worthwhile to outline the applicable standard of review that the Court of Appeal will apply if leave were to be granted. In *Canadian Airlines Corp. (Re)*, 2000 ABCA 149 at paras. 28-29, the court held that:**

28 The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the CCAA. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) where she stated for the Court at p. 95:

.... this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

**In Smoky River Coal Ltd. (Re) (1999), 237 A.R. 326 (Alta. C.A.), Hunt, J.A., speaking for the unanimous Court, extensively reviewed the CCAA's history and purpose, and observed at p. 341:**

The fact that an appeal lies only with leave of an appellate court (s. 13 CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

The standard of review of this Court, in reviewing the CCAA decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

[ . . . ]

29 *Fairmont Resort* provides us with the « test for leave. » The test is but one test, in which « there must be serious and arguable grounds that are of real and significant interest to the parties. » To determine whether DLL has met its onus, we must consider the four factors that *Fairmont Resort* outlines. The question then becomes whether DLL must satisfy all the factors. In other words, if it fails on one (or more), does fail to meet the test? The answer to this question lies in the decision of O'Brien J.A. in *Ketch Resources Ltd. v. Gauntlet Energy Corp. (Monitor of)*, 2005 CarswellAlta 1527, 15 C.B.R. (5th) 235 (C.A.). In that case, Justice O'Brien went through and applied the four factors to the facts with which he was dealing. The applicant in that case had met some of the factors, but not others. Justice O'Brien at para. 15, made his decision not to grant leave after « weighing all the factors. » In other words, success or failure to prove one or more of the factors does not guarantee that the applicant has met the « test for leave. » The court must weigh all the factors.

[Emphasis added.]

6 In analyzing whether I should follow what was suggested in the foregoing extract or the judicial history that has prevailed in this province, I am mindful that the Supreme Court of Canada granted leave to appeal<sup>6</sup> the judgment of my colleague Chamberland, J.A. in *Newfoundland and Labrador v. AbitibiBowater*<sup>7</sup> in which he dismissed an application for leave to appeal. I can only assume the Court decided to hear the appeal to look at the merits of the Superior Court judgment of Gascon, J., as he then was,<sup>8</sup> rather than to decide whether Chamberland, J.A. had erred by refusing leave. Only time will tell once the Court's judgment on the merits is released.<sup>9</sup>

7 That being said, unless and until the Supreme Court determines a different test to apply by an appellate judge hearing a CCAA leave application, or until a panel of this Court holds that the test articulated in the extract I have quoted in paragraph [5] above is the one that should be followed, I believe that the better course for me is to apply the principles that have been repeatedly stated by judges of this Court. Counsel in Quebec are entitled to stability in knowing what test they will need to satisfy in bringing a CCAA leave application. The parameters of that test should not depend on who, as a matter of chance, happens to be the judge in chambers on the day they present their motion. I will therefore consider Statoil's application on the basis that the four recognized criteria are cumulative.

8 I turn now to the three grounds of appeal mentioned in paragraph [2] above.

9 With respect to the jurisdictional issue, Statoil argues that the motions judge overstepped the limits to which he was subject in a CCAA application of the type with which he was seized because the orders issued were not « necessary »<sup>10</sup> to facilitate Homburg's reorganization and to achieve the CCAA objectives. Instead, it says that he adopted what it characterizes as a « broad and result-driven » approach that is reflected in paragraph [114] of the judgment to the effect that granting the orders sought in Homburg's motion is a « fair, equitable, practical and efficient solution to HII's<sup>11</sup> default under the Head Lease ».

10 To this argument, Homburg replies that Statoil misstates the law, and notes that section 11 *CCAA* refers not to necessity but to the power of a supervising judge « to make any order that it considers appropriate in the circumstances ». It adds that by releasing Homburg from financial obligations under the agreements, the judgment promotes the remedial purpose of the *CCAA* by enhancing the possibility of a successful restructuring.

11 Next is the issue of standing.

12 Statoil argues that Homburg had no legal standing, with the exception of one conclusion that it does not contest, to seek declarations that relating to the enforcement of its obligations to Cadillac Fairview under the Head Lease between it and Statoil, the effect of which is to remove Homburg from the line of fire. Statoil contends that only Cadillac Fairview had the required standing, and that Gouin, J. misconstrued the identity of the proper party before him.

13 As for Homburg, it says that it is at the centre of the various agreements whereby Statoil undertook to step into its shoes in the event of its default under the agreements, which has now happened. All that it sought by the conclusions of the motion, therefore, is a declaration that Statoil live up to the obligations it had contractually undertaken, and acknowledged subsequently in writing.

14 Finally, there is the issue of the interference with the contractual rights of third parties by the effect of the orders, in this case not only Statoil, but also Cadillac Fairview and the subtenants of the premises. All of them are third party non-debtors, and Statoil says that Gouin, J. simply lacked the authority to interfere with the exercise of their respective contractual rights between themselves. Statoil acknowledges what it describes as a « certain jurisprudential controversy on this issue », but says the controlling case is that of the Ontario Court of Appeal in *Stelco Inc. (Re)*.<sup>12</sup> Blair, J.A., for the Court, remarked that the *CCAA* contains « no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves », <sup>13</sup> and that the trial judge had been « very careful to say that nothing in his reasons should be taken to determine or affect the relationship between (categories of debenture holders). »<sup>14</sup>

15 I note immediately that the issue in *Re Stelco* arose in a very different context, namely, the classification of categories of debenture holders for voting purposes on a proposed plan of arrangement or compromise of a debtor company. The proposed classification was dismissed at trial and confirmed on appeal by the same panel that granted leave. The ratio of the judgment does not appear to be of much significance to the resolution of the issues that were before Gouin, J.

16 In a nutshell, while at the same time disputing Statoil's interpretation of the contractual agreements, Homburg argues that the issue is not, in and of itself, of any relevance to the ongoing *CCAA* proceedings, nor likely to be of any precedential value to insolvency practice in Canada.

17 In my view, whether individually or collectively, I do not consider that Statoil has satisfied the test incumbent upon it to be granted leave.

18 Any appeal would have to proceed based on the trial judge's findings of fact. Whatever may be said of them, Statoil's motion does not satisfy me that they could be found to be manifestly unfounded with the necessary determinative effect if the Court were to intervene. Moreover, the great latitude given *CCAA* supervising judges would weigh heavily against any appeal succeeding given the apparent novelty of some of the questions raised. In addition, although some of the legal issues appear interesting from an objective standpoint, they fall short of being significant to the action in the overall scheme of things, nor do they appear to be *prima facie* meritorious, although I would hesitate to characterize them as frivolous.

19 One final point, which is in and of itself dispositive, leads to the motion failing.

20 The judgment of Gouin, J. granted the relief claimed with provisional effect notwithstanding appeal, and no attempt was made to suspend provisional execution of the judgment. To the extent the terms of the judgment may already have

been implemented, it would be akin to unscrambling scrambled eggs to put matters back where they were before the orders were implemented, not to mention the uncertainty that would be created by the mere fact of leave being granted.

21 Statoil's motion is accordingly dismissed with costs.

#### Footnotes

1 R.S.C. c.-36.

2 I omit from consideration any grounds that essentially argue questions of interpretation of fact, which, even in the context of complicated commercial real estate transactions, would be highly unlikely to persuade a judge in chambers to grant leave. I also take no account of its argument that it was more or less bulldozed into a hearing that occurred 13 days after the service of the proceeding, thus, it says, preventing it from adequately conducting pre-trial discovery, since it seeks no relief, such as a new trial, that is directly related to the expedited process about which it complains.

3 [2000] A.J. No. 610, 2000 ABCA 149, at paras. 6 and 7.

4 See, for example, *4370422 Canada inc. (Davie Yards inc.) (Arrangement relatif à)*, J.E. 2012-159, 2011 QCCA 2442, at paras. 11 and 12 per Pelletier, J.A.; *Newfoundland and Labrador v. AbitibiBowater inc.*, , 68 C.B.R. (5th) 57, 2010 QCCA 965, at paras. 25-29 per Chamberland, J.A.; *Papiers Gaspésia inc. (Arrangement relative à)*, 9 C.B.R. (5th) 103, per Bich, J.A. at para. 5; *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, J.E. 2010-568, 2010 QCCA 403, per Bich, J.A., at para 9; and, *Imprimerie Mirabel inc. v. Ernst & Young inc.*, J.E. 2010-1256, 2010 QCCA 1244, per Dufresne, J.A., at para. 5.

5 72 C.B.R. (5th) 261, 2010 ABQB 637.

6 Supreme Court of Canada file 33797.

7 *Supra* note 3.

8 2010 QCCS 1061.

9 The appeal was heard by the full bench on November 16, 2011, after which judgment was reserved.

10 Relying on *Century Services Inc. v. Canada (A.G.)*, [2010] 3 S.C.R. 379, 2010 SCC 60.

11 For ease of understanding, I am using the first name of the company, Homburg, rather than its initials, HII, to identify the respondent.

12 261 D.L.R. (4th) 368; [2005] O.J. No. 4883.

13 *Ibid.*, para. 32.

14 *Ibid.*, para. 33.

9

**Most Negative Treatment:** Not followed

**Most Recent Not followed:** R. c. Cliche | 2010 QCCA 408, 2010 CarswellQue 1822, EYB 2010-170543, J.E. 2010-579, 91 W.C.B. (2d) 479, [2010] R.J.Q. 775, 76 C.R. (6th) 90 | (C.A. Que, Feb 26, 2010)

2003 SCC 63  
Supreme Court of Canada

Toronto (City) v. C.U.P.E., Local 79

2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 SCC 63, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, 120 L.A.C. (4th) 225, 179 O.A.C. 291, 17 C.R. (6th) 276, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 311 N.R. 201, 31 C.C.E.L. (3d) 216, 59 W.C.B. (2d) 334, 9 Admin. L.R. (4th) 161, J.E. 2003-2108, REJB 2003-49439

**Canadian Union of Public Employees, Local 79, Appellant v. City of Toronto and Douglas C. Stanley, Respondents and Attorney General of Ontario, Intervener**

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

Heard: February 13, 2003  
Judgment: November 6, 2003 \*  
Docket: 28840

Proceedings: affirming (2001), 45 C.R. (5th) 354, 37 Admin. L.R. (3d) 40 (Ont. C.A.); affirming (2000), 23 Admin. L.R. (3d) 72 (Ont. Div. Ct.)

Counsel: Douglas J. Wray and Harold F. Caley for appellant

Jason Hanson, Mahmud Jamal and Kari M. Abrams for respondent City of Toronto

No one for respondent Douglas C. Stanley

Sean Kearney, Mary Gersht and Meredith Brown for intervener Attorney General of Ontario

Subject: Labour; Criminal; Civil Practice and Procedure; Public; Evidence

APPEAL by union from judgment reported at 2001 CarswellOnt 2760, 45 C.R. (5th) 354, (sub nom. *Toronto (City) v. Canadian Union of Public Employees, Local 79*) 55 O.R. (3d) 541, 149 O.A.C. 213, 205 D.L.R. (4th) 280, (sub nom. *City of Toronto v. Canadian Union of Public Employees, Local 79*) 2002 C.L.L.C. 220-014, 37 Admin. L.R. (3d) 40 (Ont. C.A.), dismissing union's appeal from judgment granting employer's application for judicial review of decision of labour arbitrator, reported at 2000 CarswellOnt 1477, [2000] O.J. No. 1570, 2000 C.L.L.C. 220-038, 187 D.L.R. (4th) 323, 23 Admin. L.R. (3d) 72, 134 O.A.C. 48 (Ont. Div. Ct.).

POURVOI du syndicat à l'encontre de l'arrêt publié à 2001 CarswellOnt 2760, 45 C.R. (5th) 354, (sub nom. *Toronto (City) v. Canadian Union of Public Employees, Local 79*) 55 O.R. (3d) 541, 149 O.A.C. 213, 205 D.L.R. (4th) 280, (sub nom. *City of Toronto v. Canadian Union of Public Employees, Local 79*) 2002 C.L.L.C. 220-014, 37 Admin. L.R. (3d) 40 (Ont. C.A.), qui a rejeté son pourvoi à l'encontre du jugement ayant accueilli la demande de contrôle judiciaire présentée par l'employeur contre la décision rendue par l'arbitre de grief, publié à 2000 CarswellOnt 1477, [2000] O.J. No. 1570, 2000 C.L.L.C. 220-038, 187 D.L.R. (4th) 323, 23 Admin. L.R. (3d) 72, 134 O.A.C. 48 (Ont. Div. Ct.).

**Arbour J. (McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie JJ. concurring):**

**I. Introduction**

1 Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place? This is essentially the issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come to the conclusion that the arbitrator may not revisit the criminal conviction. Although my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

## II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of Toronto. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. He called several defence witnesses, including character witnesses. The trial judge found that the complainant was credible and that Oliver was not. He entered a conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction, and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken to the boy at the time. The City did not call the boy to testify. Oliver again testified on his own behalf and claimed that he had never sexually assaulted the boy.

5 The arbitrator ruled that the criminal conviction was admissible as *prima facie*, but not conclusive, evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration. The arbitrator held that the presumption raised by the criminal conviction had been rebutted and that Oliver had been dismissed without just cause.

## III. Procedural History

### A. Superior Court of Justice (Divisional Court) (2000), 187 D.L.R. (4th) 323

6 At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. The Divisional Court heard this case and *Ontario v. O.P.S.E.U.* at the same time. (*Ontario v. O.P.S.E.U.*, 2003 SCC 64 (S.C.C.), is being released concurrently by this Court.) O'Driscoll J. found that while s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23, applied to all the arbitrations, relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellants' argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral attack upon a final decision of another court where the party had "a full opportunity of contesting the decision," applied (paras. 81 and 90). Finally, O'Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each case, the standard for judicial review had been met (para. 86).

### B. Court of Appeal for Ontario (2001), 55 O.R. (3d) 541

7 Doherty J.A., for the court, held that because the crux of the issue was whether the Canadian Union of Public Employees (CUPE or the union) was permitted to relitigate the issue decided in the criminal trial, and because this analysis "turned on [the arbitrator's] understanding of the common law rules and principles governing relitigation of issues finally decided in a previous judicial proceeding," the appropriate standard of review was correctness (paras. 22 and 38).

8 Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee's privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union's attempt to relitigate the employee's culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase "abuse of process" was perhaps best limited to describe those cases where the plaintiff has instigated litigation for some improper purpose, Doherty J.A. went on to consider what he called "the finality principle" in considerable depth.

9 Doherty J.A. dismissed the appeal on the basis of this principle. He held that the *res judicata* jurisprudence required a court to balance the importance of finality, which reduces uncertainty and inconsistency in results and which serves to conserve the resources of both the parties and the judiciary, with the "search for justice in each individual case" (para. 94). Doherty J.A. held that the following approach should be taken when weighing finality claims against an individual litigant's claim to access to justice:

- Does the *res judicata* doctrine apply?
- If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?
- If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramouncy over the claim that justice requires relitigation?

10 Ultimately, Doherty J.A. dismissed the appeal, concluding that "finality concerns must be given paramouncy over CUPE's claim to an entitlement to relitigate Oliver's culpability" (para. 102). He so concluded because there was no suggestion of fraud at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest and because there was no new evidence presented at arbitration (paras. 103-108).

#### IV. Relevant Statutory Provisions

11 *Evidence Act*, R.S.O. 1990, c. E.23

22.1(1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,

- (a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
- (b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.

(2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.

(3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

*Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A

48.(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

## V. Analysis

### A. Standard of Review

12 My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court's unanimous decisions of *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), and *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.).)

13 The Court of Appeal properly applied the functional and pragmatic approach as delineated in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) (see also *Q.*, *supra*), to determine the extent to which the legislature intended that courts should review the tribunals' decisions.

14 Doherty J.A. was correct to acknowledge patent unreasonableness as the general standard of review of an arbitrator's decision as to whether just cause has been established in the discharge of an employee. However, and as he noted, the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), where he said, at para. 39:

It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. *The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard. . . . An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result.* [Emphasis added.]

15 In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex, it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (S.C.C.), at para. 21.

16 Therefore, I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

### B. Section 22.1 of Ontario's Evidence Act

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary," that the crime was committed by that person.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue

estoppel, collateral attack and abuse of process. Section 22.1 speaks of the admissibility of the fact of the conviction as proof of the truth of its content and speaks of its conclusive effect if unchallenged. As a rule of evidence, the section addresses in part the hearsay rule, by making the conviction - the finding of another court - admissible for the truth of its content, as an exception to the inadmissibility of hearsay (David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 3rd ed. (Toronto: Irwin Law, 2002), at p. 120; M.N. Howard, Peter Crane and Daniel A. Hochberg, *Phipson on Evidence*, 14th ed. (London: Sweet & Maxwell, 1990), at pp. 33-94 to 33-95).

19 Here, however, the admissibility of the conviction is not in issue. Section 22.1 renders the proof of the conviction admissible. The question is whether it can be rebutted by "evidence to the contrary." There are circumstances in which evidence will be admissible to rebut the presumption that the person convicted committed the crime, in particular, where the conviction in issue is that of a non-party. There are also circumstances in which no such evidence may be tendered. If either issue estoppel or abuse of process bars the relitigation of the facts essential to the conviction, then no "evidence to the contrary" may be tendered to displace the effect of the conviction. In such a case, the conviction is conclusive that the person convicted committed the crime.

20 This interpretation is consistent with the rule of interpretation that legislation is presumed not to depart from general principles of law without an express indication to that effect. This presumption was reviewed and applied by Iacobucci J. in *Parry Sound*, *supra*, at para. 39. Section 22.1 reflected the law established in the leading Canadian case of *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (Ont. H.C.), at p. 264, affirmed (1984), 48 O.R. (2d) 266 (Ont. C.A.), wherein after a thorough review of Canadian and English jurisprudence, Osler J. held that a criminal conviction is admissible in subsequent civil litigation as *prima facie* proof that the convicted individual committed the alleged act, "subject to rebuttal by the plaintiff on the merits." However, the common law also recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court (*Demeter* (H.C.), *supra*, at p. 265; *McIlkenny v. Chief Constable of the West Midlands* (1981), [1982] A.C. 529 (U.K. H.L.), at p. 541; see also *Del Core v. College of Pharmacists (Ontario)* (1985), 51 O.R. (2d) 1 (Ont. C.A.), at p. 22, *per Blair J.A.*). Section 22.1 does not change this; the legislature has not explicitly displaced the common law doctrines and the rebuttal is consequently subject to them.

21 The question, therefore, is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

### ***C. The Common Law Doctrines***

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle." I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in many cases more than one doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

#### *(1) Issue Estoppel*

23 Issue estoppel is a branch of *res judicata* (the other branch being *cause of action* estoppel) which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision, (2) the

prior judicial decision must have been final, and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (S.C.C.), at para. 25, *per* Binnie J.). The final requirement, known as "mutuality," has been largely abandoned in the United States and has been the subject of much academic and judicial debate there, as well as in the United Kingdom and, to some extent, in this country (See Garry D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623, at pp. 648-651). In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

24 The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver's employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear that the Crown, acting as prosecutor in the criminal case, is not privy with the City of Toronto, nor would it be with a provincial, rather than a municipal, employer (as in the *Ontario v. O.P.S.E.U.* case, released concurrently).

25 There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. In his article, Prof. Watson, *supra*, argues that explicitly abolishing the mutuality requirement, as has been done in the United States, would both reduce confusion in the law and remove the possibility that a strict application of issue estoppel may work an injustice. The arguments made by him and others (see also Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000)), urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.

26 In his very useful review of the abandonment of the mutuality requirement in the United States, Prof. Watson, at p. 631, points out that mutuality was first relaxed when issue estoppel was used defensively:

The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion. The rationale is that P should not be allowed to relitigate an issue already lost by simply changing defendants . . . .

27 Professor Watson then exposes the additional difficulties that arise if the mutuality requirement is removed when issue estoppel is raised offensively, as was done by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (U.S.S.C. 1979). He describes the offensive use of non-mutual issue estoppel as follows (at p. 631):

The power of this offensive non-mutual issue estoppel doctrine is illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, *etc.*, now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due process and it should not be permitted to re-litigate the negligence issue. However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

28 Properly understood, our case could be viewed as falling under this second category - what would be described in U.S. law as "non-mutual offensive preclusion." Although, technically speaking, the City of Toronto is not the "plaintiff" in the arbitration proceedings, the City wishes to take advantage of the conviction obtained by the Crown against Oliver in a different, prior proceeding to which the City was not a party. It wishes to preclude Oliver from relitigating an issue that he fought and lost in the criminal forum. U.S. law acknowledges the peculiar difficulties with offensive use of non-mutual estoppel. Professor Watson explains, at pp. 632-633:

First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment". Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the *Parklane* court held that preclusion should be denied in action #2 "where a plaintiff could easily have joined in the earlier action".

Second, the court recognized that in some circumstances to permit non-mutual preclusion "would be unfair to the defendant" and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.

In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29 It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

30 For example, there is little relevance to the concern about the "wait and see" plaintiff, the "free rider" who will deliberately avoid the risk of joining the original litigation, but will later come forward to reap the benefits of the victory obtained by the party who should have been his co-plaintiff. No such concern can ever arise when the original action is in a criminal prosecution. Victims cannot, even if they wanted to, "join in" the prosecution so as to have their civil claim against the accused disposed of in a single trial. Nor can employers "join in" the criminal prosecution to have their employee dismissed for cause.

31 On the other hand, even though no one can join the prosecution, the prosecutor as a party represents the public interest. He or she represents a collective interest in the just and correct outcome of the case. The prosecutor is said to be a minister of justice who has nothing to win or lose from the outcome of the case but who must ensure that a just and true verdict is rendered. (See Commentary R. 4.01(3) of the *Rules of Professional Conduct*, Law Society of Upper Canada (Toronto: Law Society of Upper Canada, 2002), at pp. 58 and 61; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12 (S.C.C.); *R. v. Lemay* (1951), [1952] 1 S.C.R. 232 (S.C.C.), at pp. 256-257, *per* Cartwright J.; and *R. v. Banks*, [1916] 2 K.B. 621, at p. 623.) The mutuality requirement of the doctrine of issue estoppel, which insists that only the Crown and its privies be precluded from relitigating the guilt of the accused, is hardly reflective of the true role of the prosecutor.

32 As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple "vexation." For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the arbitrator amounted to a collateral attack on the verdict of the criminal court.

### (2) Collateral Attack

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599, the rule against collateral attack

has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Thus, in *Wilson, supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, [1996] 2 S.C.R. 223 (S.C.C.), at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction." Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.), this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk, supra*, at para. 20, as follows: "that a *judicial order* pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

### (3) Abuse of Process

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.), at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.), at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.), at p. 1007:

. . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway, supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 (S.C.C.), this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.)). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21 (S.C.C.), at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63 (S.C.C.))). Goudge J.A. expanded on that concept in the following terms, at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. *It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.* See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

*One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.* [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *F. (K.) v. White* (2001), 53 O.R. (3d) 391 (Ont. C.A.), *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.), and *Bjarnarson v. Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), affirmed (1987), 21 C.P.C. (2d) 302 at 312 (Man. C.A.)). This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is, in effect, non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (*Watson, supra*, at pp. 624-625).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (*Lange, supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (*Lange, supra*, at pp. 347-348):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *McIlkenny* [H.L.], *supra*, affirming *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (Eng. C.A.). The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had

not used violence. At the Court of Appeal, Lord Denning M.R. endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that, in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court," but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *McIlkenny* [H.L.], *supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (Eng. C.A.), at pp. 304 *et seq.* In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (S.C.C.), at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-518). Although safeguards must be put in place for the protection of the innocent and, more generally, to ensure the trustworthiness of court findings, continuous relitigation is not a guarantee of factual accuracy.

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *McIlkenny* [H.L.], *supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe*, *supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *McIlkenny* [H.L.], *supra*, and *Demeter*, *supra*) the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44 The adjudicative process and the importance of preserving its integrity were well described by Doherty J.A. He said, at para. 74:

The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the OEA, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

46 Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *McIlkenny* [H.L.], *supra*, and on *Demeter* (H.C.), *supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not, in itself, an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms, such as appeals or judicial review. Indeed, reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

47 There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

48 The appellant relies on *Del Core*, *supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues determined in a criminal proceeding. For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted:

The right to challenge a conviction is subject to an important qualification. *A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so.* Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. *The ambit of this qualification remains to be determined . . . .* [Emphasis added.]

(*Del Core*, *supra*, at p. 22, per Blair J.A.)

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely, *Demeter* (H.C.), *supra*, and *McIlkenny* [H.L.], *supra*; see also *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (Ont. H.C.), *F. (K.)*, *supra*, at paras. 29-31), there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. See, for example, *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (Ont. H.C.) at p. 218, affirmed without reference to this point (1978), 18 O.R. (2d) 714n (Ont. H.C.); *Bomac*, *supra*, at pp. 26-27); *Bjarnarson*, *supra*, at p. 39; *Germscheid v. Valois* (1989), 68 O.R. (2d) 670 (Ont. H.C.); *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49 (Man. Q.B.), at p. 61; *Roensch v. Roensch* (1991), 85 D.L.R. (4th) 540 (Alta. Q.B.), at p. 546; *Saskatoon*

*Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C. S.C.), at p. 438; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106 (Ont. Gen. Div.), at p. 115; see also, Paul Perell, "Res Judicata and Abuse of Process" (2001), 24 *Advocates' Q.* 189, at pp. 196-197; and Watson, *supra*, at pp. 648-651.

50 It has been argued that it is difficult to see how mounting a defence can be an abuse of process (see Martin Teplitsky, "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective," in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002*, vol. 1 (Toronto: Lancaster House, 2002), 279. A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (Watson, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that, from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty, (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results, or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk, supra*, at para. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk, supra*, at para. 51; *F. (K.)*, *supra*, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably, in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not, in my view, appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

55 In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent "finality principle" either as a separate doctrine or as an independent test to preclude relitigation.

#### ***D. Application of Abuse of Process to Facts of the Appeal***

56 I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. Yet, as pointed out by Doherty J.A. (at para. 84):

Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

57 As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise.

58 In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court - or the jury -, guided by rules of evidence that are sensitive to a fair search for the truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal.

#### **VI. Disposition**

59 For these reasons, I would dismiss the appeal with costs.

***LeBel J. (concurring) (Deschamps J. concurring):***

#### **I. Introduction**

60 I have had the benefit of reading Arbour J.'s reasons and I concur with her disposition of the case. I agree that this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. I also agree that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law requiring an arbitrator to interpret not only the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, but also the *Evidence Act*, R.S.O. 1990, c. E.23, as well as to rule on the applicability of a number of common law doctrines dealing with relitigation, an issue that is, as Arbour J. notes, at the heart of the administration of justice. Finally, I agree that the arbitrator's determination in this case that Glenn Oliver's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to Oliver's conviction. His failure to do so was sufficient to render his ultimate decision that Oliver had been dismissed without

just cause - a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard - patently unreasonable, according to the jurisprudence of our Court.

61 While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion. In my concurring reasons in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86 (S.C.C.), I raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in *all* administrative law contexts, including those involving non-adjudicative decision makers. In certain circumstances, such as those at issue in *Chamberlain* itself, applying this methodological approach in order to determine the appropriate standard of review may, in fact, obscure the real issue before the reviewing court.

62 In the instant appeal and the appeal in *Ontario v. O.P.S.E.U.*, 2003 SCC 64 (S.C.C.), released concurrently, both of which involve judicial review of adjudicative decision makers, my concern is not with the applicability of the pragmatic and functional approach itself. Having said this, I would note that, in a case such as this one, where the question at issue is so clearly a question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, it is unnecessary for the reviewing court to perform a detailed pragmatic and functional analysis in order to reach a standard of review of correctness. Indeed, in such circumstances reviewing courts should avoid adopting a mechanistic approach to the determination of the appropriate standard of review, which risks reducing the pragmatic and functional analysis from a contextual, flexible framework to little more than a *pro forma* application of a checklist of factors (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), at para. 149; *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), at para. 26; *Chamberlain*, *supra*, at para. 195, *per* LeBel J.).

63 The more particular concern that emerges out of this case and *Ontario v. O.P.S.E.U.* relates to what, in my view, is growing criticism with the ways in which the standards of review currently available within the pragmatic and functional framework are conceived of and applied. Academic commentators and practitioners have raised some serious questions as to whether the conceptual basis for each of the existing standards has been delineated with sufficient clarity by this Court, with much of the criticism directed at what has been described as "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* (see, for example, David J. Mullan, "Recent Developments in Standard of Review," in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (October 20, 2000), at p. 26; Jeff G. Cowan, "The Standard of Review: The Common Sense Evolution?" (2003), paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003, at p. 28; Frank A.V. Falzon, "Standard of Review on Judicial Review or Appeal," in *Administrative Justice Review Background Papers: Background Papers Prepared by Administrative Justice Project for the Attorney General of British Columbia* (June 2002), at pp. 32-33). Reviewing courts too have occasionally expressed frustration over a perceived lack of clarity in this area, as the comments of Barry J. in *Miller v. Newfoundland (Workers' Compensation Commission)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. T.D.), at para. 27, illustrate:

In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.

64 The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law. It is true that the parties to this appeal made no submissions putting into question the standards of review jurisprudence. Nevertheless, at times, an in-depth discussion or review of the state of the law may become necessary despite the absence of particular representations in a specific case. Given its broad application, the law governing the standards of review must be predictable, workable and coherent. Parties to litigation often have no personal stake in assuring the coherence of our standards of review jurisprudence as a whole and the consistency of their application. Their purpose, understandably, is to show how the positions they advance conform with the law as it stands, rather than to suggest improvements of that law for the benefit

of the common good. The task of maintaining a predictable, workable and coherent jurisprudence falls primarily on the judiciary, preferably with, but exceptionally without, the benefit of counsel. I would add that, although the parties made no submissions on the analysis that I propose to undertake in these reasons, they will not be prejudiced by it.

65 In this context, this case provides an opportunity to reevaluate the contours of the various standards of review, a process that in my view is particularly important with respect to patent unreasonableness. To this end, I review below:

- the interplay between correctness and patent unreasonableness both in the instant case and, more broadly, in the context of judicial review of adjudicative decision makers generally, with a view to elucidating the conflicted relationship between these two standards; and
- the distinction between patent unreasonableness and reasonableness *simpliciter*, which, despite a number of attempts at clarification, remains a nebulous one.

66 As the analysis that follows indicates, the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.

## II. Analysis

### A. The Two Standards of Review Applicable in this Case

67 Two standards of review are at issue in this case, and the use of correctness here requires some preliminary discussion. As I noted in brief above, certain fundamental legal questions - for instance, constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation - typically fall to be decided on a correctness standard. Indeed, in my view, it will rarely be necessary for reviewing courts to embark on a comprehensive application of the pragmatic and functional approach in order to reach this conclusion. I would not, however, want either my comments in this regard or the majority reasons in this case to be taken as authority for the proposition that correctness is the appropriate standard whenever arbitrators or other specialized administrative adjudicators are required to interpret and apply general common law or civil law rules. Such an approach would constitute a broad expansion of judicial review under a standard of correctness and would significantly impede the ability of administrative adjudicators, particularly in complex and highly specialized fields such as labour law, to develop original solutions to legal problems, uniquely suited to the context in which they operate. In my opinion, in many instances the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. I now turn to a brief discussion of the rationale behind this view.

#### (1) The Correctness Standard of Review

68 This Court has repeatedly stressed the importance of judicial deference in the context of labour law. Labour relations statutes typically bestow broad powers on arbitrators and labour boards to resolve the wide range of problems that may arise in this field and protect the decisions of these adjudicators by privative clauses. Such legislative choices reflect the fact that, as Cory J. noted in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), at para. 35, the field of labour relations is "sensitive and volatile" and "[i]t is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding" (see also *Canada (Attorney General) v. P.S.A.C.*, [1993] 1 S.C.R. 941 (S.C.C.) ("*P.S.A.C.*"), at pp. 960-961; and *Ivanhoe inc. c. Travailleurs & travailleuses unis de l'alimentation & du commerce, section 500*, [2001] 2 S.C.R. 565, 2001 SCC 47 (S.C.C.), at para. 32). The application of a standard of review of correctness in the context of judicial review of labour adjudication is thus rare.

69 While in this case and in *Ontario v. O.P.S.E.U.* I agree that correctness is the appropriate standard of review for the arbitrator's decision on the relitigation question, I think it necessary to sound a number of notes of caution in this regard. It is important to stress, first, that while the arbitrator was required to be correct on this question of law, this did not open his decision as a whole to review on a correctness standard (see *A.C.T.R.A. v. Canadian Broadcasting Corp.*, [1995] 1 S.C.R. 157 (S.C.C.), at para. 48). The arbitrator was entitled to deference in the determination of whether Oliver was dismissed without just cause. To say that, in the circumstances of this case, the arbitrator's incorrect decision on the question of law affected the overall reasonableness of his decision, is very different from saying that the arbitrator's finding on the ultimate question of just cause had to be correct. To fail to make this distinction would be to risk "substantially expand[ing] the scope of reviewability of administrative decisions, and unjustifiably so" (see *Canadian Broadcasting Corp.*, *supra*, at para. 48).

70 Second, it bears repeating that the application of correctness here is very much a product of the nature of *this particular legal question*: determining whether relitigating an employee's criminal conviction is permissible in an arbitration proceeding is a question of law involving the interpretation of the arbitrator's constitutive statute, an external statute, and a complex body of common law rules and conflicting jurisprudence. More than this, it is a question of fundamental importance and broad applicability, with serious implications for the administration of justice as a whole. It is, in other words, a question that engages the expertise and essential role of the courts. It is not a question on which arbitrators may be said to enjoy any degree of relative institutional competence or expertise. As a result, it is a question on which the arbitrator must be correct.

71 This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness. As a prefatory matter, as the Court has observed, in many cases it will be difficult to draw a clear line between questions of fact, mixed fact and law, and law; in reality, such questions are often inextricably intertwined (see *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), at para. 37; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 37). More to the point, as Bastarache J. stated in *Pushpanathan*, *supra*, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention" (at para. 37). The critical factor in this respect is expertise.

72 As Bastarache J. noted in *Pushpanathan*, *supra*, at para. 34, once a "broad relative expertise has been established," this Court has been prepared to show "considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation": see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.), and *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324 (S.C.C.). This Court has also held that, while administrative adjudicators' interpretations of external statutes "are generally reviewable on a correctness standard," an exception to this general rule may occur, and deference may be appropriate, where "the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result": see *Toronto (City) Board of Education*, *supra*, at para. 39; *Canadian Broadcasting Corp.*, *supra*, at para. 48. And, perhaps most importantly in light of the issues raised by this case, the Court has held that deference may be warranted where an administrative adjudicator has acquired expertise through its experience in the application of a general common or civil law rule in its specialized statutory context: see *Ivanhoe*, *supra*, at para. 26; L'Heureux-Dubé J. (dissenting) in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), at pp. 599-600, endorsed in *Pushpanathan*, *supra*, at para. 37.

73 In the field of labour relations, general common and civil law questions are often closely intertwined with the more specific questions of labour law. Resolving general legal questions may thus be an important component of the work of some administrative adjudicators in this field. To subject all such decisions to correctness review would be to expand the scope of judicial review considerably beyond what the legislature intended, fundamentally undermining the ability of labour adjudicators to develop a body of jurisprudence that is tailored to the specialized context in which they operate.

74 Where an administrative adjudicator must decide a general question of law in the course of exercising its statutory mandate, that determination will typically be entitled to deference (particularly if the adjudicator's decisions are protected by a privative clause), inasmuch as the general question of law is closely connected to the adjudicator's core area of expertise. This was essentially the holding of this Court in *Ivanhoe, supra*. In *Ivanhoe*, after noting the presence of a privative clause, Arbour J. held that, while the question at issue involved both civil and labour law, the labour commissioners and the Labour Court were entitled to deference because "they have developed special expertise in this regard which is adapted to the specific context of labour relations and which is not shared by the courts" (para. 26; see also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 (S.C.C.)). This appeal does not represent a departure from this general principle.

75 The final note of caution that I think must be sounded here relates to the application of two standards of review in this case. This Court has recognized on a number of occasions that it may, in certain circumstances, be appropriate to apply different standards of deference to different decisions taken by an administrative adjudicator in a single case (see *Pushpanathan, supra*, at para. 49; *MacDonell c. Québec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71 (S.C.C.), at para. 58, *per* Bastarache and LeBel JJ., dissenting). This case provides an example of one type of situation where this may be the proper approach. It involves a fundamental legal question falling outside the arbitrator's area of expertise. This legal question, though foundational to the decision as a whole, is easily differentiated from a second question on which the arbitrator was entitled to deference: the determination of whether there was just cause for Oliver's dismissal.

76 However, as I have noted above, the fact that the question adjudicated by the arbitrator in this case can be separated into two distinct issues, one of which is reviewable on a correctness standard, should not be taken to mean that this will often be the case. Such cases are rare; the various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

## (2) The Patent Unreasonableness Standard of Review

77 In these reasons, I explore the way in which patent unreasonableness is currently functioning, having regard to the relationships between this standard and both correctness and reasonableness *simpliciter*. My comments in this respect are intended to have application in the context of judicial review of adjudicative administrative decision making.

### (a) The Definitions of Patent Unreasonableness

78 This Court has set out a number of definitions of "patent unreasonableness," each of which is intended to indicate the high degree of deference inherent in this standard of review. There is some overlap between the definitions and they are often used in combination. I would characterize the two main definitional strands as, first, those that emphasize the magnitude of the defect necessary to render a decision patently unreasonable and, second, those that focus on the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it.

79 In considering the leading definitions, I would place in the first category Dickson J.'s (as he then was) statement in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.) ("*C.U.P.E.*"), that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation" (at p. 237). Cory J.'s characterization in *P.S.A.C., supra*, of patent unreasonableness as a "very strict test," which will only be met where a decision is "clearly irrational, that is to say evidently not in accordance with reason" (pp. 963-964), would also fit into this category (though it could, depending on how it is read, be placed in the second category as well).

80 In the second category, I would place Iacobucci J.'s description in *Southam, supra*, of a patently unreasonable decision as one marred by a defect that is characterized by its "immediacy or obviousness": "If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57).

81 More recently, in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.), Iacobucci J. characterized a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand," drawing on both of the definitional strands that I have identified in formulating this definition. He wrote, at para. 52:

In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84 at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

82 Similarly, in *C.U.P.E. v. Ontario, supra*, Binnie J. yoked together the two definitional strands, describing a patently unreasonable decision as "one whose defect is 'immedia[te] and obviou[s]'" (*Southam, supra*, at para. 57), and so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand (*Ryan, supra*, at para. 52)" (para. 165 (emphasis added)).

83 It has been suggested that the Court's various formulations of the test for patent unreasonableness are "not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?" (*C.U.P.E. v. Ontario, supra*, at para. 20, *per* Bastarache J., dissenting). While this may indeed be the case, I nonetheless think it important to recognize that, because of what are in some ways subtle but nonetheless quite significant differences between the Court's various answers to this question, the parameters of "patent unreasonableness" are not as clear as they could be. This has contributed to the growing difficulties in the application of this standard that I discuss below.

#### **(b) The Interplay between the Patent Unreasonableness and Correctness Standards**

84 As I observed in *Chamberlain, supra*, the difference between review on a standard of correctness and review on a standard of patent unreasonableness is "intuitive and relatively easy to observe" (*Chamberlain, supra*, at para. 204, *per* LeBel J.). These standards fall on opposite sides of the existing spectrum of curial deference, with correctness entailing an exacting review and patent unreasonableness leaving the issue in question to the near exclusive determination of the decision maker (see *Q., supra*, at para. 22). Despite the clear conceptual boundary between these two standards, however, the distinction between them is not always as readily discernable in practice as one would expect.

##### **(i) Patent Unreasonableness and Correctness in Theory**

85 In terms of understanding the interplay between patent unreasonableness and correctness, it is of interest that, from the beginning, there seems to have been at least some conceptual uncertainty as to the proper breadth of patent unreasonableness review. In *C.U.P.E., supra*, Dickson J. offered two characterizations of patent unreasonableness that tend to pull in opposite directions (see David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at p. 69; see also H. Wade MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 281, at pp. 285-286).

86 Professor Mullan explains that, on the one hand, Dickson J. rooted review for patent unreasonableness in the recognition that statutory provisions are often ambiguous and thus may allow for multiple interpretations; the question for the reviewing court is whether the adjudicator's interpretation is one that can be "rationally supported by the relevant legislation" (*C.U.P.E., supra*, at p. 237). On the other hand, Dickson J. also invoked an idea of patent unreasonableness as a threshold defined by certain nullifying errors, such as those he had previously enumerated in *S.E.I.U., Local 333 v.*

*Nipawin District Staff Nurses Assn.* (1973), [1975] 1 S.C.R. 382 (S.C.C.) ("*Nipawin*"), at p. 389, and in *C.U.P.E., supra*, at p. 237:

. . . acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

87 Curiously, as Mullan notes, this list "repeats the list of 'nullifying' errors that Lord Reid laid out in the landmark House of Lords' judgment in *Anisminic Ltd. v. Foreign Compensation Commission* (1968), [1969] 2 A.C. 147 (U.K. H.L.). *Anisminic* "is usually treated as the foundation case in establishing in English law the reviewability of all issues of law on a *correctness* basis" (emphasis added), and, indeed, the Court "had cited with approval this portion of Lord Reid's judgment and deployed it to justify judicial intervention in a case described as the 'high water mark of activist' review in Canada: *Metropolitan Life Insurance Co. v. I.U.O.E., Local 796*," [1970] S.C.R. 425 (S.C.C.) (see Mullan, *Administrative Law, supra*, at pp. 69-70; see also *National Corn Growers Assn., supra*, at p. 1335, *per* Wilson J.).

88 In characterizing patent unreasonableness in *C.U.P.E.*, then, Dickson J. simultaneously invoked a highly deferential standard (choice among a range of reasonable alternatives) and a historically interventionist one (based on the presence of nullifying errors). For this reason, as Mullan acknowledges, "it is easy to see why Dickson J.'s use of [the quotation from *Anisminic*] is problematic" (Mullan, *Administrative Law, supra*, at p. 70).

89 If Dickson J.'s reference to *Anisminic* in *C.U.P.E., supra*, suggests some ambiguity as to the intended scope of "patent unreasonableness" review, later judgments also evidence a somewhat unclear relationship between patent unreasonableness and correctness in terms of establishing and, particularly, applying the methodology for review under the patent unreasonableness standard. The tension in this respect is rooted, in part, in differing views of the premise from which patent unreasonableness review should begin. A useful example is provided by *C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co.*, [1989] 2 S.C.R. 983 (S.C.C.) ("*C.A.I.M.A.W.*").

90 In *C.A.I.M.A.W.*, Sopinka J. (Lamer J. (as he then was) concurring) described the proper approach under the patent unreasonableness standard as one in which the reviewing court first queries whether the administrative adjudicator's decision is correct: "curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness" (p. 1018). As Mullan has observed, this approach to patent unreasonableness raises concerns in that it not only conflicts "with the whole notion espoused by Dickson J. in [*C.U.P.E., supra*] of there often being no single correct answer to statutory interpretation problems but it also assumes the primacy of the reviewing court over the agency or tribunal in the delineation of the meaning of the relevant statute" (Mullan, "Recent Developments in Standard of Review," *supra*, at p. 20).

91 In my view, this approach presents additional problems as well. Reviewing courts may have difficulty ruling that "an error has been committed but . . . then do[ing] nothing to correct that error on the basis that it was not as big an error as it could or might have been" (see Mullan, "Recent Developments in Standard of Review," *supra*, at p. 20; see also David J. Mullan, "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review" (1991), 45 Admin. L.R. 264, at pp. 269-270). Furthermore, starting from a finding that the adjudicator's decision is incorrect may colour the reviewing court's subsequent assessment of the reasonableness of competing interpretations (see Margaret Allars, "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 *Queen's L.J.* 163, at p. 187). The result is that the critical distinction between that which is, in the court's eyes, "incorrect" and that which is "not rationally supportable" is undermined.

92 The alternative approach is to leave the "correctness" of the adjudicator's decision undecided (see Allars, *supra*, at p. 197). This is essentially the approach that La Forest J. (Dickson C.J. concurring) took to patent unreasonableness in *C.A.I.M.A.W., supra*. He wrote, at pp. 1004 and 1005:

The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.

.....

I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is "correct" in the sense that it is the decision I would have reached had the proceedings been before this Court on their merits. It is sufficient to say that the result arrived at by the Board is not patently unreasonable.

93 It is this theoretical view that has, at least for the most part, prevailed. As L'Heureux-Dubé J. observed in *S.C.F.P., Local 301 c. Québec (Conseil des services essentiels)*, [1997] 1 S.C.R. 793 (S.C.C.) ("*C.U.P.E., Local 301*"), "this Court has stated repeatedly, in assessing whether administrative action is patently unreasonable, the goal is not to review the decision or action on its merits but rather to determine whether it is patently unreasonable, given the statutory provisions governing the particular body and the evidence before it" (para. 53). Patent unreasonableness review, in other words, should not "become an avenue for the court's substitution of its own view" (*C.U.P.E., Local 301, supra*, at para. 59; see also *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 (S.C.C.), at pp. 771 and 774-775).

94 This view was recently forcefully rearticulated in *Ryan, supra*. Iacobucci J. wrote, at paras. 50-51:

[W]hen deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been . . . . The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.

. . . Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness . . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

Though Iacobucci J.'s comments here were made in relation to reasonableness *simpliciter*, they are also applicable to the more deferential standard of patent unreasonableness.

95 I think it important to emphasize that neither the case at bar nor the companion case of *O.P.S.E.U.*, should be misinterpreted as a retreat from the position that, in reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the "correct" result. In each of these cases, there were *two* standards of review in play: there was a fundamental legal question on which the adjudicators were subject to a standard of correctness - whether the employees' criminal convictions could be relitigated - and there was a question at the core of the adjudicators' expertise on which they were subject to a standard of patent unreasonableness - whether the employees had been dismissed for just cause. As Arbour J. has outlined, the adjudicators' failure to decide the fundamental relitigation question correctly was sufficient to lead to a patently unreasonable outcome. Indeed, in circumstances such as those at issue in the case at bar, this cannot but be the case: the adjudicators' incorrect decisions on the fundamental legal question provided the entire foundation on which their legal analyses, and their conclusions as to whether the employees were dismissed with just cause, were based. To pass a review for patent unreasonableness, a decision must be one that can be "*rationaly supported*"; this standard cannot be met where, as here, what supports the adjudicator's decision - indeed, what that decision is wholly premised on - is a legal determination that the adjudicator was required, but failed, to decide correctly. To say, however, that in such circumstances a decision will be patently unreasonable - a conclusion that flows from the applicability of *two separate* standards of review - is very different from suggesting that a reviewing court, before applying the standard of patent unreasonableness, must first determine whether the adjudicator's decision is (in)correct or that in applying patent unreasonableness the court should ask itself at any point in the analysis what the correct decision would be. In other words, the application of patent unreasonableness itself is not, and should not be, understood to be predicated on a finding of incorrectness, for the reasons that I discussed above.

#### ***(ii) Patent Unreasonableness and Correctness in Practice***

96 While the Court now tends toward the view that La Forest J. articulated in *C.A.I.M.A.W.*, at p. 1004 - "courts must be careful [under a standard of patent unreasonableness] to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it" - the tension between patent unreasonableness and correctness has not been completely resolved. Slippage between the two standards is still evident at times in the way in which patent unreasonableness is applied.

97 In analyzing a number of recent cases, commentators have pointed to both the intensity and the underlying character of the review in questioning whether the Court is applying patent unreasonableness in a manner that is in fact deferential. In this regard, the comments of Professor Lorne Sossin on the application of patent unreasonableness in *Canada Safeway Ltd. v. R.W.D.S.U., Local 454*, [1998] 1 S.C.R. 1079 (S.C.C.), are illustrative:

Having established that deference was owed to the statutory interpretation of the Board, the Court proceeded to dissect its interpretation. The majority was of the view that the Board had misconstrued the term "constructive lay-off" and had failed to place sufficient emphasis on the terms of the collective agreement. The majority reasons convey clearly why the Court would adopt a different approach to the Board. They are less clear as to why the Board's approach lacked a rational foundation. Indeed, there is very little evidence of the Court according deference to the Board's interpretation of its own statute, or to its choice as to how much weight to place on the terms of the collective agreement. *Canada Safeway* raises the familiar question of how a court should demonstrate its deference, particularly in the labour relations context.

(Lorne Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 *S.C.L.R.* (2d) 37, at p. 49)

98 Professor Ian Holloway makes a similar observation with regard to *W.W. Lester (1978) Ltd. v. U.A., Local 740*, [1990] 3 S.C.R. 644 (S.C.C.):

In her judgment, [McLachlin J. (as she then was)] quoted from the familiar passages of *CUPE*, yet she . . . reached her decision on the basis of a review of the case law. She did not ask whether, despite the fact that it differed from holdings in other jurisdictions, the conclusion of the Newfoundland Labour Relations Board could be "rationally supported" on the basis of the wording of the successorship provisions of the *Labour Relations Act*. Instead, she looked at whether the Board had reached the correct legal interpretation of the Act in the same manner that a court of appeal would determine whether a trial judge had made a correct interpretation of the law. In other words, she effectively *equated patent unreasonableness with correctness at law*.

(Ian Holloway, "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993), 22 *Man. L.J.* 28, at pp. 64-65; see also Allars, *supra*, at p. 178.)

99 At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.

### **(c) The Relationship between the Patent Unreasonableness and Reasonableness Simpliciter Standards**

100 While the conceptual difference between review on a correctness standard and review on a patent unreasonableness standard may be intuitive and relatively easy to observe (though in practice elements of correctness at times encroach uncomfortably into patent unreasonableness review), the boundaries between patent unreasonableness and reasonableness *simpliciter* are far less clear, even at the theoretical level.

**(i) The Theoretical Foundation for Patent Unreasonableness and Reasonableness *Simpliciter***

101 The lack of sufficiently clear boundaries between patent unreasonableness and reasonableness *simpliciter* has its origins in the fact that patent unreasonableness was developed prior to the birth of the pragmatic and functional approach (see *C.U.P.E. v. Ontario*, *supra*, at para. 161) and, more particularly, prior to (rather than in conjunction with) the formulation of reasonableness *simpliciter* in *Southam*, *supra*. Because patent unreasonableness, as a posture of curial deference, was conceived in opposition only to a correctness standard of review, it was sufficient for the Court to emphasize in defining its scope the principle that there will often be no one interpretation that can be said to be correct in interpreting a statute or otherwise resolving a legal dispute and that specialized administrative adjudicators may, in many circumstances, be better equipped than courts to choose between the possible interpretations. Where this is the case, provided that the adjudicator's decision is one that can be "rationally supported on a construction which the relevant legislation may reasonably be considered to bear," the reviewing court should not intervene (*Nipawin*, *supra*, at p. 389).

102 Upon the advent of reasonableness *simpliciter*, however, the validity of multiple interpretations became the underlying premise for this new variant of reasonableness review as well. Consider, for instance, the discussion of reasonableness *simpliciter* in *Ryan*, *supra*, that I cited above:

Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness . . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

(*Ryan*, *supra*, at para. 51; see also para. 55.)

It is difficult to distinguish this language from that used to describe patent unreasonableness not only in the foundational judgments establishing that standard, such as *Nipawin*, *supra*, and *C.U.P.E.*, *supra*, but also in this Court's more contemporary jurisprudence applying it. In *Ivanhoe*, *supra*, for instance, Arbour J. stated that "the recognition by the legislature and the courts that there are many potential solutions to a dispute is the very essence of the patent unreasonableness standard of review, which would be meaningless if it was found that there is only one acceptable solution" (at para. 116).

103 Because patent unreasonableness and reasonableness *simpliciter* are both rooted in this guiding principle, it has been difficult to frame the standards as analytically, rather than merely semantically, distinct. The efforts to sustain a workable distinction between them have taken, in the main, two forms, which mirror the two definitional strands of patent unreasonableness that I identified above. One of these forms distinguishes between patent unreasonableness and reasonableness *simpliciter* on the basis of the relative magnitude of the defect. The other looks to the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it. Both approaches raise their own problems.

**(ii) The Magnitude of the Defect**

104 In *P.S.A.C.*, *supra*, at pp. 963-964, Cory J. described a patently unreasonable decision in these terms:

In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational . . . . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction.

While this definition may not be inherently problematic, it has become so with the emergence of reasonableness *simpliciter*, in part because of what commentators have described as the "tautological difficulty of distinguishing standards of rationality on the basis of the term 'clearly'" (see Cowan, *supra*, at pp. 27-2; see also Gabrielle Perreault, *Le*

*contrôle judiciaire des décisions de l'administration: de l'erreur juridictionnelle à la norme de contrôle* (Montreal: Wilson & Lafleur, 2002), at p. 116; Suzanne Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (Montreal: Yvon Blais, 2003), at pp. 34-35; P. Garant, *Droit administratif*, 4<sup>e</sup> éd., vol. 2 (Montreal: Yvon Blais, 1996), at p. 193).

105 Mullan alludes to both the practical and the theoretical difficulties of maintaining a distinction based on the magnitude of the defect, i.e., the degree of irrationality, that characterizes a decision:

. . . admittedly in his judgment in *PSAC*, Cory J. did attach the epithet "clearly" to the word "irrational" in delineating a particular species of patent unreasonableness. However, I would be most surprised if, in so doing, he was using the term "clearly" for other than rhetorical effect. Indeed, I want to suggest . . . that to maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality. In other words, I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational! In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny.

(Mullan, "Recent Developments in Standard of Review," *supra*, at pp. 24-25)

Also relevant in this respect are the comments of Reed J. in *Hao v. Canada (Minister of Citizenship & Immigration)* (2000), 184 F.T.R. 246 (Fed. T.D.), at para. 9:

I note that I have never been convinced that "patently unreasonable" differs in a significant way from "unreasonable". The word "patently" means clearly or obviously. If the unreasonableness of a decision is not clear or obvious, I do not see how that decision can be said to be unreasonable.

106 Even a brief review of this Court's descriptions of the defining characteristics of patently unreasonable and unreasonable decisions demonstrates that it is difficult to sustain a meaningful distinction between two forms of reasonableness on the basis of the magnitude of the defect and the extent of the decision's resulting deviation from the realm of the reasonable. Under both standards, the reviewing court's inquiry is focused on "the existence of a rational basis for the [adjudicator's] decision" (see, for example, *C.A.I.M.A. W.*, *supra*, at p. 1004, *per* La Forest J.; *Ryan*, *supra*, at paras. 55-56). A patently unreasonable decision has been described as one that "cannot be sustained on any reasonable interpretation of the facts or of the law" (*National Corn Growers*, *supra*, at pp. 1369-1370, *per* Gonthier J., or "rationally supported on a construction which the relevant legislation may reasonably be considered to bear" (*Nipawin*, *supra*, at p. 389). An unreasonable decision has been described as one for which there are "no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did" (*Ryan*, *supra*, at para. 53).

107 Under both patent unreasonableness and reasonableness *simpliciter*, mere disagreement with the adjudicator's decision is insufficient to warrant intervention (see, for example, *C.A.I.M.A. W.*, *supra*, at pp. 1003-1004, *per* La Forest J., and *Chamberlain*, *supra*, at para. 15, *per* McLachlin C.J.). Applying the patent unreasonableness standard, "the court will defer even if the interpretation given by the tribunal . . . is not the 'right' interpretation in the court's view nor even the 'best' of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement" (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at p. 341). In the case of reasonableness *simpliciter*, "a decision may satisfy the . . . standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling" (*Ryan*, *supra*, at para. 55). There seems to me to be no qualitative basis on which to differentiate effectively between these various characterizations of a rationality analysis; how, for instance, would a decision that is not "tenably supported" (and is thus "merely" unreasonable) differ from a decision that is not "rationally supported" (and is thus patently unreasonable)?

108 In the end, the essential question remains the same under both standards: Was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance, because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness (see Deborah K. Lovett, "That Curious Curial Deference Just Gets Curiouser and Curiouser - *Canada (Director of Investigation and Research) v. Southam Inc.*" (1997), 55 *Advocate (B.C.)* 541, at p. 545). Because the two variants of reasonableness are united at their theoretical source, the imperative for the reviewing court to intervene will turn on the conclusion that the adjudicator's decision deviates from what falls within the ambit of the reasonable, not on "fine distinctions" between the test for patent unreasonableness and reasonableness *simpliciter* (see Flazon, *supra*, at p. 33).

109 The existence of these two variants of reasonableness review forces reviewing courts to continue to grapple with the significant practical problems inherent in distinguishing meaningfully between the two standards. To the extent that a distinction is advanced on the basis of the relative severity of the defect, this poses not only practical difficulties but also difficulties in principle, as this approach implies that patent unreasonableness, in requiring "clear" rather than "mere" irrationality, allows for a margin of appreciation for decisions that are not in accordance with reason. In this respect, I would echo Mullan's comments that there would "have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny" (Mullan, "Recent Developments in Standard of Review," *supra*, at p. 25).

### **(iii) The "Immediacy or Obviousness" of the Defect**

110 There is a second approach to distinguishing between patent unreasonableness and reasonableness *simpliciter* that requires discussion. *Southam, supra*, at para. 57, emphasized the "immediacy or obviousness" of the defect:

The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

111 In my view, two lines of difficulty have emerged from emphasizing the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it, as a means of distinguishing between patent unreasonableness and reasonableness *simpliciter*. The first is the difficulty of determining how invasive a review is invasive enough, but not too invasive, in each case. The second is the difficulty that flows from ambiguity as to the intended meaning of "immediacy or obviousness" in this context: is it the obviousness of the defect in the sense of its transparency on the face of the decision that is the defining characteristic of patent unreasonableness review (see James L.H. Sprague, "Another View of *Baker*" (1999), 7 *Reid's Administrative Law* 163, at pp. 163 and 165, note 5), or is it rather the obviousness of the defect in terms of the ease with which, once found, it can be identified as severe? The latter interpretation may bring with it difficulties of the sort I referred to above - *i.e.*, attempting to qualify degrees of irrationality. The former interpretation, it seems to me, presents problems of its own, which I discuss below.

112 Turning first to the difficulty of actually applying a distinction based on the "immediacy or obviousness" of the defect, we are confronted with the criticism that the "somewhat probing examination" criterion (see *Southam, supra*, at para. 56) is not clear enough (see David W. Elliott, "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 *Sask. L. Rev.* 469, at pp. 486-487). As Elliott notes: "[t]he distinction between a 'somewhat probing examination' and those which are simply probing, or are less than probing, is a fine one. It is too fine to permit courts to differentiate clearly among the three standards" (Elliott, *supra*, at pp. 486-487).

113 This Court has itself experienced some difficulty in consistently performing patent unreasonableness review in a way that is less probing than the "somewhat probing" analysis that is the hallmark of reasonableness *simpliciter*. Despite the fact that a less invasive review has been described as a defining characteristic of the standard of patent

unreasonableness, in a number of the Court's recent decisions, including *Toronto (City) Board of Education*, *supra*, and *Ivanhoe*, *supra*, one could fairly characterize the Court's analysis under this standard as at least "somewhat" probing in nature.

114 Even prior to *Southam* and the development of reasonableness *simpliciter*, there was some uncertainty as to how intensely patent unreasonableness review is to be performed. This is particularly evident in *National Corn Growers*, *supra* (see generally Mullan, "Of Chaff Midst the Corn," *supra*; Mullan, *Administrative Law*, *supra*, at pp. 72-73). In that case, while Wilson J. counselled restraint on the basis of her reading of *C.U.P.E.*, *supra*, Gonthier J., for the majority, performed quite a searching review of the decision of the Canadian Import Tribunal. He reasoned, at p. 1370, that "[i]n some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis."

115 *Southam* itself did not definitively resolve the question of how invasively review for patent unreasonableness should be performed. An intense review would seem to be precluded by the statement that, "if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57). The possibility that, in certain circumstances, quite a thorough review for patent unreasonableness will be appropriate, however, is left open: "[i]f the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem" (para. 57).

116 This brings me to the second problem: In what sense is the defect immediate or obvious? *Southam* left some ambiguity on this point. As I have outlined, on the one hand, a patently unreasonable decision is understood as one that is flawed by a defect that is evident on the face of the decision, while an unreasonable decision is one that is marred by a defect that it takes significant searching or testing to find. In other places, however, *Southam* suggests that the "immediacy or obviousness" of a patently unreasonable defect refers not to the ease of its detection, but rather to the ease with which, once detected, it can be identified as severe. Particularly relevant in this respect is the statement that "once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident" (para. 57). It is the (admittedly sometimes only tacit) recognition that what must in fact be evident - *i.e.*, clear, obvious, or immediate - is the defect's magnitude upon detection that allows for the possibility that in certain circumstances "it will simply not be possible to understand and respond to a patent unreasonableness argument without a thorough examination and appreciation of the tribunal's record and reasoning process" (see Mullan, *Administrative Law*, *supra*, at p. 72; see also *Ivanhoe*, *supra*, at para. 34).

117 Our recent decision in *Ryan* has brought more clarity to *Southam*, but still reflects a degree of ambiguity on this issue. In *Ryan*, at para. 52, the Court held:

In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". *Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (Canada (Attorney General) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941, at pp. 963-64, per Cory J.; Centre communautaire juridique de l'Estrie v. Sherbrooke (City), [1996] 3 S.C.R. 84, at paras. 9-12, per Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Emphasis added.]*

This passage moves the focus away from the obviousness of the defect in the sense of its transparency "on the face of the decision" to the obviousness of its magnitude once it has been identified. At other points, however, the relative invasiveness of the review required to identify the defect is emphasized as the means of distinguishing between patent unreasonableness and reasonableness *simpliciter*:

A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the

defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did (*Ryan, supra*, at para. 53).

118 Such ambiguity led commentators such as David Phillip Jones to continue to question in light of *Ryan* whether

. . . whatever it is that makes the decision "patently unreasonable" [must] appear on the face of the record? . . . Or can one go beyond the record to demonstrate - "identify" - why the decision is patently unreasonable? Is it the "immediacy and obviousness of the defect" which makes it patently unreasonable, or does patently unreasonable require outrageousness so that the decision is so flawed that no amount of curial deference can justify letting it stand?

(David Phillip Jones, "Notes on *Dr. Q* and *Ryan*: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law," paper originally presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003, at p. 10)

119 As we have seen, the answers to such questions are far from self-evident, even at the level of theoretical abstraction. How much more difficult must they be for reviewing courts and counsel struggling to apply not only patent unreasonableness, but also reasonableness *simpliciter*? (See in this regard, the comments of Mullan in "Recent Developments in Standard of Review," *supra*, at p. 4.)

120 Absent reform in this area or a further clarification of the standards, the "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* will continue. As a result, both the types of errors that the two variants of reasonableness are likely to catch - *i.e.*, interpretations that fall outside the range of those that can be "reasonably," "rationally" or "tenably" supported by the statutory language - and the way in which the two standards are applied will in practice, if not necessarily in theory, be much the same.

121 There is no easy way out of this conundrum. Whatever attempts are made to clarify the contours of, or the relationship between, the existing definitional strands of patent unreasonableness, this standard and reasonableness *simpliciter* will continue to be rooted in a shared rationale: statutory language is often ambiguous and "admits of more than one possible meaning," provided that the expert administrative adjudicator's interpretation "does not move outside the bounds of reasonably permissible visions of the appropriate interpretation, there is no justification for court intervention" (Mullan, "Recent Developments in Standard of Review," *supra*, at p. 18). It will thus remain difficult to keep these standards conceptually distinct, and I query whether, in the end, the theoretical efforts necessary to do so are productive. Obviously, any decision that fails the test of patent unreasonableness must also fall on a standard of reasonableness *simpliciter*, but it seems hard to imagine situations where the converse is not also true: if a decision is not supported by a tenable explanation (and is thus unreasonable) (*Ryan, supra*, at para. 55), how likely is it that it could be sustained on "any reasonable interpretation of the facts or of the law" (and thus not be patently unreasonable) (*National Corn Growers, supra*, at pp. 1369-1370, *per* Gonthier J.)?

122 Thus, both patent unreasonableness and reasonableness *simpliciter* require that reviewing courts pay "respectful attention" to the reasons of adjudicators in assessing the rationality of administrative decisions (see *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 65, *per* L'Heureux-Dubé J., citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy," in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997), 279, at p. 286, and *Ryan, supra*, at para. 49).

123 Attempting to differentiate between these two variants of curial deference by classifying one as "somewhat more probing" in its attentiveness than the other is unlikely to prove any more successful in practice than it has proven in the past. Basing the distinction on the relative ease with which a defect may be detected also raises a more theoretical quandary: the difficulty of articulating why a defect that is obvious on the face of a decision should present more of an imperative for court intervention than a latent defect. While a defect may be readily apparent because it is severe, a severe defect will not necessarily be readily apparent; by the same token, a flaw in a decision may be immediately evident, or obvious, but relatively inconsequential in nature.

124 On the other hand, the effect of clarifying that the language of "immediacy or obviousness" goes not to ease of detection, but rather to the ease with which, once detected (on either a superficial or a probing review), a defect may be identified as severe might well be to increase the regularity with which reviewing courts subject decisions to as intense a review on a standard of patent unreasonableness as on a standard of reasonableness *simpliciter*, thereby further eliding any difference between the two.

125 An additional effect of clarifying that the "immediacy or obviousness" of the defect refers not to its transparency on the face of the decision but rather to its magnitude upon detection is to suggest that it is feasible and appropriate for reviewing courts to attempt to qualify degrees of irrationality in assessing the decisions of administrative adjudicators: *i.e.*, this decision is irrational enough to be unreasonable, but not so irrational as to be overturned on a standard of patent unreasonableness. Such an outcome raises questions as to whether the legislative intent could ever be to let irrational decisions stand. In any event, such an approach would seem difficult to reconcile with the rule of law.

126 I acknowledge that there are certain advantages to the framework to which this Court has adhered since its adoption in *Southam, supra*, of a third standard of review. The inclusion of an intermediate standard does appear to provide reviewing courts with an enhanced ability to tailor the degree of deference to the particular situation. In my view, however, the lesson to be drawn from our experience since then is that those advantages appear to be outweighed by the current framework's drawbacks, which include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficulty caused at times by the interplay between patent unreasonableness and correctness.

127 In particular, the inability to sustain a viable analytical distinction between the two variants of reasonableness has impeded their application in practice in a way that fulfils the theoretical promise of a more precise reflection of the legislature's intent. In the end, attempting to distinguish between the unreasonable and the patently unreasonable may be as unproductive as attempting to differentiate between the "illegible" and the "patently illegible." While it may be possible to posit, in the abstract, some kind of conceptual distinction, the functional reality is that once a text is illegible - whether its illegibility is evident on a cursory glance or only after a close examination - the result is the same. There is little to be gained from debating as to whether the text is illegible *simpliciter* or patently illegible; in either case, it cannot be read.

128 It is also necessary to keep in mind the theoretical foundations for judicial review and its ultimate purpose. The purpose of judicial review is to uphold the normative legal order by ensuring that the decisions of administrative decision makers are both procedurally sound and substantively defensible. As McLachlin C.J. explained in *Q, supra*, at para. 21, the two touchstones of judicial review are legislative intent and the rule of law:

[In *Pushpanathan*,] Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (*Bibeault, supra*, at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

In short, the role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously.

129 As this Court has observed, the rule of law is a "highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*Reference re Amendment to the Constitution of Canada*,

[1981] 1 S.C.R. 753 (S.C.C.), at pp. 805-806). As the Court elaborated in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), at para. 71:

In the *Manitoba Language Rights Reference*, *supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order" . . . . A third aspect of the rule of law is . . . that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

"At its most basic level," as the Court affirmed, at para. 70, "the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."

130 Because arbitrary state action is not permissible, the exercise of power must be justifiable. As the Chief Justice has noted,

. . . societies governed by the Rule of Law are marked by a certain *ethos of justification*. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals . . . are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness*.

(See the Honourable Madam Justice Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 *C.J.A.L.P.* 171, at p. 174, italics in original; see also MacLauchlan, *supra* at pp. 289-291.)

Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds (*i.e.*, does the decision meet the requirements of procedural fairness?) ensures that they are fair.

131 In recent years, this Court has recognized that both courts and administrative adjudicators have an important role to play in upholding and applying the rule of law. As Wilson J. outlined in *National Corn Growers*, *supra*, courts have come to accept that " 'statutory provisions often do not yield a single, uniquely correct interpretation' " and that an expert administrative adjudicator may be "better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language" in a way that makes sense in the specialized context in which that adjudicator operates (p. 1336, citing J.M. Evans et al., *Administrative Law*, 3rd ed. (Toronto: Emond Montgomery, 1989), at p. 414). The interpretation and application of the law is thus no longer seen as exclusively the province of the courts. Administrative adjudicators play a vital and increasing role. As McLachlin J. helpfully put it in a recent speech on the roles of courts and administrative tribunals in maintaining the rule of law: "A culture of justification shifts the analysis from the institutions themselves to, more subtly, what those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of fairness and rationality" (McLachlin, *supra*, at p. 175).

132 In affirming the place for administrative adjudicators in the interpretation and application of the law, however, there is an important distinction that must be maintained: to say that the administrative state is a legitimate player in resolving legal disputes is properly to say that administrative adjudicators are capable (and perhaps *more* capable) of choosing among reasonable decisions. It is *not* to say that unreasonable decision making is a legitimate presence in the legal system. Is this not the effect of a standard of patent unreasonableness informed by an intermediate standard of reasonableness *simpliciter*?

133 On the assumption that we can distinguish effectively between an unreasonable and a patently unreasonable decision, there are situations where an unreasonable (*i.e.*, irrational) decision must be allowed to stand. This would be the case where the standard of review is patent unreasonableness and the decision under review is unreasonable, but not patently so. As I have noted, I doubt that such an outcome could be reconciled with the intent of the legislature which, in theory, the pragmatic and functional analysis aims to reflect as faithfully as possible. As a matter of statutory interpretation, courts should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such an intent (see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), at pp. 367-368). As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an *irrational* decision, it seems highly likely that the court has misconstrued the intent of the legislature.

134 Administrative law has developed considerably over the last 25 years since *C.U.P.E. v. New Brunswick Liquor Corp.* This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

### III. Disposition

135 Subject to my comments in these reasons, I concur with Arbour J.'s disposition of the appeal.

*Appeal dismissed.*

*Pourvoi rejeté.*

### Footnotes

\* On November 13, 2003, the Supreme Court of Canada issued a corrigendum; the changes have been incorporated herein.

10

**Most Negative Treatment:** Check subsequent history and related treatments.

2002 BCSC 324

British Columbia Supreme Court

Carpenter Fishing Corp. v. Canada

2002 CarswellBC 505, 2002 BCSC 324, [2002] B.C.W.L.D. 251, [2002] B.C.J. No. 442,

[2002] B.C.T.C. 324, 111 A.C.W.S. (3d) 1117, 92 C.R.R. (2d) 357, 99 B.C.L.R. (3d) 69

**Carpenter Fishing Corporation, Kaarina Etheridge, White Hope Holdings Ltd., Simpson Fishing Co. Ltd., Norman Johnson and Titan Fishing Ltd.,  
Petitioners and Her Majesty the Queen in Right of Canada, Respondent**

Stromberg-Stein J.

Heard: February 11-13, 2002

Judgment: March 4, 2002

Docket: Vancouver L011342

Counsel: *M.L. Smith, T. Martin*, for Petitioners

*R.S. Whittaker*, for Respondent

Subject: Constitutional; Civil Practice and Procedure; Human Rights

PETITION for declaration that *Federal Court Act* violates *Canadian Charter of Rights and Freedoms* and that composition of appellate court hearing earlier proceedings initiated by petitioners was unconstitutional.

***Stromberg-Stein J.:***

**Introduction**

1 The petitioners seek the following declarations:

1. Sections 5(6) and 7(1) of the *Federal Court Act*, R.S.C. 1985 c. F-7, violate ss. 6(2)(a), 7 and 15 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982* and s. 2(e) of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, and are null and void.

2. The composition of the Federal Court of Appeal on December 23, 1997, in an appeal involving the petitioners, was unconstitutional.

2 Section 5(6) of the *Federal Court Act* requires that at least 10 of the 31 judicial appointments to the Federal Court be from Quebec. Section 7(1) requires that a Federal Court judge reside within 40 kilometres of the National Capital District. A practice has developed that one third of the remaining judicial appointments to the Federal Court come from Ontario and the balance come from the rest of Canada.

3 The essence of the petitioners' argument is that ss. 5(6) and 7(1) of the *Federal Court Act* are unconstitutional and discriminatory because their effect is a court lacking regional representation. The petitioners maintain that there are very few appointments to the Federal Court from British Columbia because of the residency requirement and this results in a court with a central Canadian bias.

4 The petitioners submit that in order for the Federal Court to function as an effective and impartial adjudicator of inter-governmental disputes, it is important that all regions of Canada have equal access to appointments to the Federal

Court. The petitioners argue that while the social, political, historical and legal fabric of Quebec society is represented, there is no such protection for residents of British Columbia and the other Western provinces, resulting in Western alienation. Further, the petitioners submit that when judges trained in the civil law adjudicate disputes from common law jurisdictions, they tend to vest policymaking in the legislature, resulting in a disadvantage for litigants from common law jurisdictions.

### Issues

5 The petitioners define the issues as follows:

- (a) Do ss. 5(6) and 7 of *Federal Court Act* violate s. 15 of the *Charter*?
- (b) Do ss. 5(6) and 7 of *Federal Court Act* violate s. 7 of the *Charter* and the principles of fundamental justice?
- (c) Does s. 5(6) of the *Federal Court Act* violate s. 2(e) of the *Canadian Bill of Rights*?
- (d) Do ss. 5(6) and 7 of *Federal Court Act* violate s. 6 of the *Charter*?
- (e) If unconstitutional, are these sections saved by s. 1 of the *Charter*?
- (f) What remedies are available?

6 The respondent identifies three preliminary issues that must be addressed:

- (a) Do the petitioners lack standing to seek declaratory relief?
- (b) Is this petition barred by the collateral attack doctrine?
- (c) Is this petition barred by the doctrine of *res judicata*?

The respondent also argues that there is no evidentiary foundation to support the assertions in the petition.

### Background

7 In 1991 the petitioners commenced two actions in Federal Court challenging the lawfulness of the Minister of Fisheries and Oceans 1990 quota allocation formula for halibut licence holders. The trial judge was Mr. Justice Campbell, the only British Columbia appointee on the Federal Court at that time. He determined the issue of liability in favour of the petitioners, found the Minister's actions unlawful, and reserved the issue of damages to a future date. Before damages could be addressed, the Crown appealed the decision. The Pacific Coast Fishing Vessel Owners Guild, a British Columbia society representing various halibut licence holders in British Columbia, intervened in the appeal supporting the Crown.

8 On December 23, 1997 the Federal Court of Appeal, composed of Decary J.A. and Pratt J.A., both members of the Quebec bar prior to their appointments to the Federal Court, and Linden J.A., a former member of the Ontario bar, granted the Crown appeal and dismissed the petitioners' action in its entirety.

9 The petitioners' position in argument was it would be futile to pursue the balance of their claims once the Minister's actions were found to be lawful. The petitioners have never sought to have the Federal Court of Appeal revisit that aspect of the decision.

10 On February 16, 1998 the petitioners sought leave to appeal to the Supreme Court of Canada. They were denied leave on August 20, 1998. On September 18, 1998 the petitioners requested that the Supreme Court of Canada reconsider their leave application. This was refused on November 19, 1998.

11 On December 4, 1998 the petitioners filed a motion in Federal Court to continue the trial. The trial judge issued a Direction on January 27, 1999, notifying counsel that he was *functus officio* since the Federal Court of Appeal had conclusively dismissed the actions. The petitioners appealed to the Federal Court of Appeal. On March 12, 1999 the Federal Court of Appeal issued a Direction that there was no appeal from a Direction of the Trial Division.

12 On May 6, 1999 the petitioners sought leave to appeal to the Supreme Court of Canada. For the first time the petitioners raised constitutional challenges to ss. 5(6) and 7(1) of the *Federal Court Act* and complained that the Federal Court of Appeal had improperly dismissed unlitigated claims in their 1997 decision. On October 14, 1999, the Supreme Court of Canada refused leave to appeal for a third time.

13 The petitioners rely on this history of litigation in Federal Court to establish the factual matrix to support their argument that the composition of the Federal Court of Appeal does not ensure that Western regional considerations are taken into account, particularly when common law judges do not form the majority of an appeal panel in cases originating from a common law jurisdiction. The petitioners complain that in their litigation none of the appeal judges had practiced law in British Columbia; yet they overturned the decision of a trial judge appointed from British Columbia. The point the petitioners raise is that the decision of the Federal Court of Appeal resulted from distinctly different decision making methodology between judges trained in the civil and the common law.

### Analysis

14 I can do little to improve on the reasoning and argument of Mr. Whittaker, counsel for the respondent. I agree with the respondent's assessment that the petitioners are disgruntled litigants who are unhappy with the December 23, 1997 decision of the Federal Court of Appeal as it relates to their halibut quotas for 1990. They lack standing to bring their petition, which is no more than a feebly disguised collateral attack on the correctness or validity of the appeal decision. On any one of the preliminary grounds advanced by the respondent, this petition fails.

### Standing

15 The petitioners assert both a private interest standing and a public interest standing. For the reasons set out below I find that the petitioners lack standing to seek any declaratory relief. Further, the petitioner cannot satisfy the criteria for public interest standing.

### Private Interest Standing

16 There are three branches to the petitioners' claim for private interest standing: (i) as former litigants in Federal Court, they have been affected by that Court and their experience provides a factual backdrop to highlight how the impugned legislation affects litigants from British Columbia; (ii) their livelihood depends on fishing and they may be obliged in the future to challenge the administrative conduct of the Department of Fisheries and Oceans in Federal Court; and (iii) as citizens of Canada they ought to be permitted to challenge the constitutionality of federal legislation affecting all citizens.

17 In *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), Wilson J. stated at pp. 485-486:

... in order to have standing to bring such an action a plaintiff must, as noted from Borchard, *supra*, be able to show that he or she will suffer injury to a right or legally protected interest from the conduct of such officials. The same point is made in de Smith, *Constitutional and Administrative Law* (4<sup>th</sup> Ed.), at p. 604.

... Lord Wilberforce said: '...there is no support for the proposition that declaratory relief can be granted unless the plaintiff, in proper proceedings, in which there is a dispute between the plaintiff and defendant concerning their respective legal rights and liabilities, either asserts a legal right which is denied or threatened, or claims immunity from some claim of the defendant against him, or claims that the defendant is infringing or threatens to infringe some public right so as to inflict the special damage on the plaintiff.'

18 *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), considered the issue of jurisdiction to grant declarations. Dickson J. said at p. 830:

Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.

The principles which guide the court in exercising jurisdiction to grant declarations have been stated time and time again. In the early case of *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438, in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 448):

The question must be a real and not a theoretical question, the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

19 In *Fraser v. Houston*, [1996] B.C.J. No. 2096 (B.C. S.C.) at para. 28, Hood J. noted with approval the comments of Lasar Sarna from *The Law of Declaratory Judgments*, 2d ed. (1988) at p. 20 that purely academic, hypothetical, obscure questions or questions of no real relevance to the parties cannot form a suitable basis for an application for relief.

20 Hood J. held that a declaration would not be granted when the dispute is over and has become academic. This is clearly applicable to the case at bar. The petitioners, former litigants in the Federal Court, are not litigants in Federal Court at this time and no longer have a direct legal interest in the *Federal Court Act*. Because there is no threat of any violation of their rights, the petitioners have no standing to seek declaratory relief.

### Charter Standing

21 The petitioners argue that any citizen of Canada has the right to challenge federal legislation if such legislation does not conform with the constitutional standards enshrined in the *Charter*.

22 "Every individual" has equality rights conferred by s. 15 of the *Charter*. The "personal nature" of s. 15 rights was emphasized by the British Columbia Court of Appeal in *Stinson Estate v. British Columbia* (1999), 70 B.C.L.R. (3d) 233 (B.C. C.A.). In that case, Finch J.A. (as he then was) refused standing to an estate with respect to a s. 15 claim for a deceased individual. While the Court in *Stinson* dealt with the issue of an estate, the reasoning of Finch J.A. is relevant to the matter at bar. Finch J.A. referred, at para. 14, to the Supreme Court of Canada's reasoning in *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), with respect to s. 7 of the *Charter*:

"[E]veryone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.

23 Finch J.A. held that the rights affirmed for "everyone" by s. 7 and "every individual" by s. 15, are personal in nature and those rights belong only to human beings.

24 The corporate petitioners have no rights under s. 7 and s. 15 of the *Charter*: *Stinson Estate v. British Columbia* at para. 15; *Irwin Toy Ltd. c. Québec (Procureur général)* at para. 96. Rights under s. 6(2)(a) of the *Charter* are only available to individuals or natural persons: *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 (S.C.C.).

25 Therefore, unless the corporate petitioners are able to establish public interest standing, they have no standing to invoke the *Charter*.

### Public Interest Standing

26 The petitioners must satisfy the necessary criteria described in *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (S.C.C.) at p. 253-256 to establish public interest standing:

(a) There is a serious issue as to the validity of the *Federal Court Act*.

(b) The petitioners are directly affected by the *Federal Court Act* or that they have a genuine interest in its validity.

(c) There is no other reasonable or effective way in which to place the validity of the *Federal Court Act* before the Court.

27 The petitioners claim they have an interest in **the constitutionality of the Federal Court of Canada** for three reasons. First, they argue that based on their experience as litigants in the Carpenter Fishing action, they have been affected by the Federal Court personally. Second, they argue that they are intimately connected to the fishery on the West coast of British Columbia as they rely on fishing for their livelihood and way of life. Finally, they argue that because they are citizens of Canada that alone ought to permit them to challenge the constitutionality of federal legislation affecting all citizens.

28 Even if the petitioners were able to establish that there is a serious issue, I would decline to exercise my discretion in favour of granting public interest standing here because the petitioners are not directly affected by the *Federal Court Act* and **they do not have any genuine interest in its validity with respect to the appointment of judges to the Federal Court, aside from their unsuccessful litigation in that Court.**

29 The rationale for granting public interest standing is to ensure that legislation is not immunized from challenge. This case is unlike *Thorson v. Canada (Attorney General) (No. 2)* (1974), [1975] 1 S.C.R. 138 (S.C.C.), relied upon by the petitioners, where the impugned statute would have been immunized from challenge if that petitioner was not granted standing. Here, as in *Canadian Council of Churches*, no such immunization exists since those most directly affected—litigants, affected judges or potential judges of the Federal Court—may challenge the impugned legislation. Hence, the rationale for public interest standing disappears as there are other reasonable and effective means by which the validity of the *Federal Court Act* can be challenged: *Hy & Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 (S.C.C.).

30 The absence of a proper factual foundation in which to consider the issues raised in this case, particularly when it is apparent that other litigants could supply such a foundation, is another basis for the finding that no standing should be granted to the petitioners: *Hy & Zel's Inc.; Danson v. Ontario (Attorney General)* (1990), 73 D.L.R. (4th) 686 (S.C.C.).

### Conclusion on Standing

31 **Sections 5(6) and 7(1) of the *Federal Court Act* affect Federal Court judges. Challenges to ss. 5(6) and 7(1) of the *Federal Court Act* should be advanced by those directly affected — prospective judicial candidates or current Judges of the Federal Court. As a general rule, a provision of the *Charter* may only be invoked by those who enjoy its protection: *Canadian Egg Marketing Agency v. Richardson* at para. 36.**

32 It should be emphasized that there is absolutely no evidence before this Court that any current or prospective judge of the Federal Court has had his or her *Charter* rights infringed by ss. 5(6) or 7(1) of the *Federal Court Act*. The petitioners cannot establish any reason why they should be permitted to advance arguments in their petition on behalf of current or prospective judges. They, as former litigants, are neither exceptionally prejudiced nor directly affected by provisions relating to current or prospective judges.

33 The petitioners lack private or public interest standing to bring this claim and for this reason alone this petition must be dismissed. However, I will comment briefly on the other preliminary objections raised by the respondent regarding the jurisdiction to hear this petition.

## Collateral Attack

34 The respondent submits that this petition is nothing more than a collateral attack on the decision of the Federal Court of Appeal. The doctrine of collateral attack arises from judicial policy favouring finality in litigation. The rule provides that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings, except subsequent proceedings provided by law for the express purpose of attacking the order: *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.). In *Wilson*, McIntyre J. defines a collateral attack as "an attack made in proceedings other than those whose specific object is reversal, variation or nullification of the order or judgment."

35 The true purpose of this petition is illustrated in the affidavit of Robert Carpenter, sworn April 27, 2001 in support of the petition, seeking to declare unconstitutional the panel that heard the appeal in 1997. Further evidence is found in the material filed in the Supreme Court of Canada on the third leave application, where it is stated at para. 18:

If the Applicants are found to have been denied their rights under the Charter to equality and fundamental justice by virtue of no judges on the Federal Court of Appeal being from British Columbia then the only effective remedy is for the Supreme Court of Canada to reconsider the appeal from the strong trial judgment in favour of the Applicants. A very strong judgment in favour of the Applicants at trial before a judge from British Columbia was overturned on appeal to a court with no judges from British Columbia. Only the Supreme Court can provide an effective remedy.

I agree with the respondent that this petition is nothing more than the petitioners' attempt to question the correctness of the decision of the Federal Court of Appeal. This is barred as a collateral attack.

36 Breach of individual constitutional rights is no exception to the collateral attack doctrine. The collateral attack doctrine and the importance of finality trumps constitutional rights and/or arguments. Thus, in the case at bar, the collateral attack doctrine would preclude an attack on the appeal decision on the basis of alleged *Charter* violations: *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867* (1985), 19 D.L.R. (4th) 1 (S.C.C.); *R. v. Sarson*, [1996] 2 S.C.R. 223 (S.C.C.). A declaration that a court that heard an appeal was unconstitutional would call into question the original judgment and would constitute a collateral attack on that decision. I agree with the respondent that the appeal decision is immune from collateral attack and for this reason this petition should be dismissed as an abuse of process.

## Res Judicata

37 The respondent submits that despite the petitioners' assertion regarding the impropriety of the Federal Court of Appeal dismissing their claim in its entirety, the petitioners never raised a constitutional challenge to ss. 5(6) and 7(1) of the *Federal Court Act* prior to their third leave application to the Supreme Court of Canada; yet they could have done so. The respondent argues that on these facts, pursuant to the doctrine of *res judicata*, the petitioners cannot raise these *Charter* arguments now in their petition.

38 The respondent's *res judicata* argument is based on the branch of *res judicata* referred to as cause of action estoppel. This principle was articulated by the British Columbia Court of Appeal in *Lim v. Lim* (1999), 180 D.L.R. (4th) 87 (B.C. C.A.), where the Court quoted at para. 8 from *Henderson v. Henderson* (1843), 67 E.R. 313 (Eng. V.-C.), at 319:

... the court requires the parties ... to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in a special case, not only to points upon which the court was actually required by the parties to form an opinion or pronounce a judgment, but to every point which properly belonged to the subject of litigation and which parties, exercising reasonable diligence, might have brought forward at the time.

39 In *Lim*, the Court quoted with approval *Hoque v. Montreal Trust Co. of Canada*, [1997] N.S.J. No. 430 (N.S. C.A.), a decision of the Nova Scotia Court of Appeal, at para. 9:

Res judicata is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the re-litigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991), at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid.* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

40 The parties to this petition are the same as those in the Federal Court of Appeal and on the leave applications to the Supreme Court of Canada. The issue of the constitutionality of ss. 5(6) and 7(1) of the *Federal Court Act* could and should have been raised at the trial level or, at the very least, in the Federal Court of Appeal or in the first two of three leave applications to the Supreme Court of Canada. These issues properly belong to the earlier litigation. There are no special circumstances here that would justify an exception to the *res judicata* doctrine, such as fraud or fresh evidence, that would be conclusive and could not have been discovered with reasonable diligence.

41 Undelivered *Charter* arguments are not a special circumstance justifying an exception to the *res judicata* doctrine. As noted by McKenzie J. (as he then was) in *MacDonald v. Marriott* (1984), 7 D.L.R. (4th) 697 (B.C. S.C.) at p. 8:

There are no special circumstances which would justify a second hearing. If an undelivered *Charter* argument was to be regarded as a special circumstance justifying a second hearing, in theory, there could be successive hearings based on different sections of the *Charter*. I do not believe our court system can tolerate such an elongation of process.

42 Also relevant to this issue is *Chapman v. Canada* (2001), 89 B.C.L.R. (3d) 124 (B.C. S.C.). Based on the principles of *res judicata* and collateral attack, Melnick J. struck certain paragraphs of the Statement of Claim attacking the validity of leases held by the Musqueam Band. Litigation in the Federal Court Trial Division, the Federal Court of Appeal and the Supreme Court of Canada considered the issue of appropriate rents payable under the leases. The leaseholders had never suggested that the leases were invalid or void. Justice Melnick commented at para. 78:

On the other hand, these allegations contained at paras. 27 to 31 and 35 to 39 of the amended statement of claim are, in my view, clearly *res judicata* and thus an abuse of process. The essence of these claims is an attack on the validity of the leases themselves, either because they were assigned without authority or because the Minister has allowed them to be managed by the Band rather than the Crown. These are issues that could have, and should have, been brought forward in the context of the litigation to determine the rents. By these claims, the plaintiffs seek to do an end run around that process which was lengthy, presumably costly, and went all the way to the Supreme Court of Canada on the clear understanding, at each level of court, that there were in place valid leases that were entered into in circumstances in which "both parties were well represented, received good advice [and] neither were disadvantaged".

And at para. 81:

In my view, to allow these claims to stand would be an affront to the Federal Court Trial Division, the Federal Court of Appeal and the Supreme Court of Canada. It would be tantamount to the leaseholders saying, "Well, we put you to a lot of time and effort in settling the rent issues from our leases but, even though we proceeded on the basis of the leases being valid, because no specific declaration was made as to their validity, it is now open for us to argue that all the work you did was for nothing because the leases aren't valid anyway". The issues touching on the

validity of the leases were issues which could have been raised in the context of the rental litigation. They were not and now they cannot be raised. To do so would be an abuse of process.

43 *Chapman* stands for the proposition that a party is barred by the doctrine of *res judicata* from proceeding with litigation on the basis of certain assumptions and, when unsuccessful, commencing fresh litigation attacking the validity of the assumptions in the earlier proceedings. Applied to this case, on appeal and in two leave applications to the Supreme Court of Canada in respect of the appeal, the petitioners made no suggestion that the *Federal Court Act* provisions violated their *Charter* rights. The petitioners proceeded in Federal Court on the basis that the Court was constitutional. Having lost, they cannot now assert that the Court was unconstitutional.

44 In all of the circumstances, the raising of *Charter* arguments is barred by the doctrine of *res judicata*. The *Charter* arguments could and should have been properly raised in the Federal Court proceedings. They were not. Thus, this petition is barred by the doctrine of *res judicata*.

### Unsupported Factual Assertions

45 I also agree with counsel for the respondent that the petition is flawed because there are a number of assertions made by the petitioner for which there is no evidence. For example, there is no evidence that the *effect* of section 7(1) of the *Federal Court Act* is that there is a concentration of judges appointed to the Federal Court from central Canada. There is no evidence to support the assertion that residents of Quebec are given preferential treatment on the basis of *ethnic* origin. There is no support for the statement that there is a preference given to citizens of Quebec resulting in Western alienation. I agree with the respondent that any person not legally trained is likely completely unaware of the provisions of the *Federal Court Act* generally, let alone s. 5(6) in particular. Even counsel for the petitioners concedes that he was unaware of s. 5(6) until after the first two leave applications. Finally, there is no evidence that residents of British Columbia have less opportunity to be appointed to the Federal Court.

### Charter Claims

46 The petitioners argue that ss. 5(6) and 7 of the *Federal Court Act* are unconstitutional because they deny British Columbians equality before the law in the Federal Court. They claim that a litigant from British Columbia has less a chance to be heard by a judge who understands the political, social and historic climate of the province of British Columbia than does a litigant from Quebec. They argue the requirement that one third of the Court be members of the Quebec bar favors litigants from Quebec and discriminates on the basis of residence. They argue this is analogous to discrimination on the basis of national and ethnic origin, as enumerated in s.15 of the *Charter*.

47 The petitioners argue that the denial of an equal opportunity to participate in the institutions of Canadian government constitutes a violation of human dignity and thus, violates both s. 7 of the *Charter* and s. 2(e) of the *Canadian Bill of Rights*. They argue that the central Canada focus of the Federal Court means that a well-informed litigant, viewing the matter reasonably, would have a reasonable apprehension that he may not receive a fair hearing before the Court in matters where British Columbia's regional interests collide with those of central Canada. This, they argue, is unfair.

48 To succeed in their s.15 *Charter* challenge, the petitioner must establish first, that judges from one region of Canada would decide cases differently from judges from other regions; and second, that such difference would be a disadvantage to the petitioners. The petitioner cannot establish either. There is absolutely no evidence to support the assertion that because the judges on the petitioners' appeal were from Quebec and Ontario, this had some impact on the result. This suggestion is pure speculation, is unsupported by any evidence and is an insult to the judges of the appeal court.

49 While this petition fails on each preliminary ground raised by the respondent, even on the merits, I agree with the respondent that the petition is doomed to fail for the following reasons:

(a) Section 15 of *Charter* is not engaged because:

- i) The challenged sections of the *Federal Court Act* do not make any distinction vis-à-vis litigants;
- ii) The challenged sections of the *Federal Court Act* do not impose any burdens or disadvantages on the petitioners;
- iii) In the alternative, any distinction is not discriminatory within the meaning of s. 15; that is, there is no discrimination on the basis of an enumerated or analogous ground.

(b) Section 7 of the *Charter* is not engaged because the petitioners are not deprived of life, liberty or security, and the principles of fundamental justice do not include the proposition that a court must be regionally representative.

(c) Section 6(2)(a) of the *Charter* is not engaged because the petitioners mobility rights are not affected by the impugned legislation, which deals only with judges.

(d) The *Canadian Bill of Rights* is not engaged by ss. 5(6) and 7(1) of the *Federal Court Act* because neither the petitioners nor any litigant is deprived of a fair hearing in violation of the principles of fundamental justice.

(e) The petitioners, particularly the corporate petitioners, have no standing to claim the *Charter* rights.

50 In any event, any *Charter* violations would be justified under s. 1 of the *Charter* as a reasonable legislative response to ensure the bijural nature of Canada's legal system and to ensure coherence and collegiality in the Federal Court.

51 In light of my conclusion that this petition must be dismissed on the basis of the preliminary objections noted above, it is unnecessary to elaborate further. There is ample support in law for my conclusions as advanced in the respondent's argument. In addition, as I have already indicated, claims for *Charter* relief were not advanced at trial or on appeal and there is no evidence to support most, if not all, of the petitioners claims for *Charter* relief.

## Conclusion

52 I would dismiss this petition for the following reasons:

(a) The petitioners lack standing to seek declaratory relief because they are not litigants in the Federal Court and have no direct legal interest in the *Federal Court Act*; they cannot satisfy the criteria for public interest standing because they lack any genuine interest in the matter and there are other reasonable and effective means of getting the issues raised in the petition before a court.

(b) This petition is a collateral attack on the 1997 decision of the Federal Court of Appeal.

(c) The issues raised in the petition are barred by the doctrine of *res judicata* or cause of action estoppel.

53 I adopt the comments of counsel for the Crown, Mr. Whittaker, in argument, to the effect that the concerns raised in the petition are not those the *Charter* was designed to protect and advancing such claims trivializes the *Charter*.

54 The petition is dismissed. The respondent is entitled to costs. If counsel cannot agree on costs, written submissions may be made within 45 days from the date of release of this judgment.

*Petition dismissed.*



2002 BCCA 611  
British Columbia Court of Appeal

Carpenter Fishing Corp. v. Canada

2002 CarswellBC 2718, 2002 BCCA 611, [2002] B.C.J. No. 2536, 117  
A.C.W.S. (3d) 896, 174 B.C.A.C. 38, 286 B.C.A.C. 38, 286 W.A.C. 38

**CARPENTER FISHING CORPORATION, KAARINA ETHERIDGE,  
WHITE HOPE HOLDINGS LTD., SIMPSON FISHING CO. LTD.,  
NORMAN JOHNSON and TITAN FISHING (Appellants / Petitioners)  
and HER MAJESTY THE QUEEN IN RIGHT OF CANADA (Respondent)**

Ryan J.A., Mackenzie J.A. and Thackray J.A.

Heard: October 29, 2002  
Judgment: November 12, 2002  
Docket: Vancouver CA029606

Proceedings: affirming *Carpenter Fishing Corp. v. Canada* (2002), 2002 BCSC 324, 2002 CarswellBC 505, 99 B.C.L.R. (3d) 69, 92 C.R.R. (2d) 357 (B.C. S.C.)

Counsel: *M.L. Smith, T. Martin*, for Appellants  
*R.S. Whittaker*, for Respondent

Subject: Constitutional; Civil Practice and Procedure; Public

APPEAL by petitioners of judgment reported at 2002 CarswellBC 505 (B.C.S.C.) dismissing petition concerning constitutionality of certain federal legislation.

***Mackenzie J.A.:***

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[1] This is an appeal from the order of a Supreme Court judge dismissing the appellants' petition for a declaration that sections 5(6) and 7(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7 violate ss. 6(2)(a), 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* and s. 2(e) of the *Canadian Bill of Rights*, R.S.C. 1985, App. III, and are null and void. The appellants' petition also sought a declaration that the composition of the Federal Court of Appeal on 23 December 1997 in File No. A941-96 [1997 CarswellNat 2509] was unconstitutional.

[2] The learned chambers judge dismissed the petition on the grounds that:

- 1) the appellants lacked standing to seek declaratory relief;
- 2) the petition was a collateral attack on the 1997 decision of the Federal Court of Appeal; and
- 3) the issues raised were barred by the doctrine of *res judicata* or cause of action estoppel.

**Background**

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[3] In 1991 the appellants commenced an action in the Federal Court Trial Division ("FCTD") contesting an order of the Minister of Fisheries and Oceans that implemented individual vessel quotas for the West Coast halibut fishery. The appellants were owners of or otherwise interested in licences to fish for halibut in Canadian waters.

[4] Campbell J. of the FCTD, in reasons dated 14 November 1996 [1996 CarswellNat 2064, 1996 CarswellNat 2677 (Fed. T.D.)], found the quotas to be in excess of the Minister's jurisdiction and therefore a nullity. That decision was overturned on appeal by the Federal Court of Appeal, in reasons dated 23 December 1997 delivered by Décaré J.A. and concurred in by Pratte J.A. and Linden J.A. An application for leave to appeal that decision was dismissed by the Supreme Court of Canada on 20 August 1998 [[1998] 2 S.C.R. vi (S.C.C.)]. A motion for reconsideration of the denial of leave was declined by the Court on 18 September 1998.

[5] The appellants then brought an application before Campbell J. for directions. Campbell J. declined to hear the motion on the ground that the action had been conclusively dismissed and he was *functus officio*. The Federal Court of Appeal ruled that no appeal lay from that direction and an application for leave to appeal that ruling to the Supreme Court of Canada was dismissed on 14 October 1999 [(S.C.C.)]. That leave application raised, for the first time, the constitutional challenges to the provisions of the *Federal Court Act* that are the subject of the present petition. I will refer to the proceedings in the Federal Court comprehensively as the "Federal Court Action".

[6] Section 5(6) of the *Federal Court Act* requires that at least 10 of the 31 judges [now 15 of 46] of the Federal Court of Canada be appointed from the province of Quebec. Section 7(1) requires that the judges of the court shall reside within 40 kilometres of the National Capital Region. The petitioners assert that the preponderance of judges of the court are appointed from Quebec and Ontario and the impugned provisions are unconstitutional and discriminatory because the result is a court that lacks regional representation. They also claim that the residency requirement discourages appointments from British Columbia.

## Analysis

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[7] The learned chambers judge concluded that the petition was a collateral attack upon the decision of the Federal Court of Appeal in the Federal Court Action. The record supports that conclusion. The relief claimed in the petition includes "a declaration that the composition of the Federal Court of Appeal on December 23, 1997 in File No. A941-96 was unconstitutional", thereby linking that relief to the Federal Court Action. The affidavit of Robert James Carpenter, a principal of the appellant Carpenter Fishing Corporation, dated 27 April 2001 and filed in support of the petition, is directed exclusively to complaints related to the Federal Court Action.

[8] It is firmly established that a court order made by a court having jurisdiction to make it is binding and conclusive unless it is set aside on appeal or lawfully quashed. Such an order cannot be attacked collaterally: that is, in proceedings other than those in which the specific object is the reversal, variation, or nullification of the order. *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at 599. This rule extends to collateral attacks on constitutional grounds. In *R. v. Sarson*, [1996] 2 S.C.R. 223 (S.C.C.), the appellant's application to set aside his conviction and sentence for second degree murder failed, even though the constructive murder provision under which he was convicted, s. 213(d) of the *Criminal Code*, was struck down after the expiry of the appeal period following his conviction in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 (S.C.C.). Similarly here, the order of the Federal Court of Appeal could only be attacked directly through an appeal, and those rights of appeal have been exhausted.

[9] The appellants effectively concede that the order of the Federal Court of Appeal is now conclusive, notwithstanding the claim in the petition's prayer for relief. Instead they contend that "their experience [in the Federal Court] provides a factual backdrop that highlights how the impugned legislation affects litigants from British Columbia." They emphasize their reliance on fishing for their livelihoods and their way of life. They also claim discrimination simply as citizens resident in British Columbia. They argue that these factors give them status

to obtain standing on both private interest and public interest grounds. In short, the appellants claim standing to seek a declaration that the impugned provisions are unconstitutional while recognizing that the result in the Federal Court Action rendered by an "unconstitutional" court must stand.

[10] In my view, the history of the Federal Court Action undermines the appellants' claim for standing on both private interest and public interest grounds. As that litigation is *res judicata*, it does not provide a base for private interest standing. The appellants' connections to the fishing industry and British Columbia are interests they share as members of the public and factors that go to public interest standing but not to private interest standing.

[11] Public interest standing requires consideration of three questions identified by the Supreme Court of Canada in *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (S.C.C.). First, is there a serious issue raised as to the invalidity of the legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or, if not, does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the Court?

[12] The appellants submit that they are directly affected by the Federal Court Act as citizens resident in British Columbia with a particular interest in the fishing industry, which is subject to federal jurisdiction. They rely on *Thorson v. Canada (Attorney General) (No. 2)* (1974), [1975] 1 S.C.R. 138 (S.C.C.), *MacNeil v. Nova Scotia (Board of Censors)* (1975), [1976] 2 S.C.R. 265 (S.C.C.), and *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 (S.C.C.) for the proposition that public interest standing may be granted to raise a genuinely justiciable constitutional question. Public interest standing will be granted to raise such a question if there is no other practical way for a citizen to question the validity of the statute. The appellants submit that the **Federal Court Act** is a statute that does not in itself lead to legal proceedings in which its validity would be challenged.

[13] In my view, this submission ignores the history of this litigation. The appellants could have raised the constitutional issues in the Federal Court Action. Counsel candidly admitted that it was not raised because it did not come to mind until the last application for leave to appeal to the Supreme Court of Canada. The constitutional issue could have been raised much earlier in the Federal Court Action. It is a well settled rule, classically stated in *Henderson v. Henderson* (1843), 3 Hare 100, at pp. 114-5, (1843), 67 E.R. 313 (Eng. V.-C.), that the parties to litigation must bring forward their whole case and will not (except under special circumstances) be permitted to bring forward an issue that was omitted but that could have been raised with reasonable diligence.

[14] Mr. Smith submitted that it would have been impractical to raise the issue on the main appeal because of the risk of alienating the court by asking it to rule on its own constitutionality. In my view, that is not a tenable reason for failing to raise the issue in the context of those proceedings. The court is presumed to be objective in addressing constitutional issues, and in any event the foundation would have been laid to advance the issue on a leave application to the Supreme Court of Canada, the ultimate arbiter of important constitutional questions.

[15] The appellants pursued the Federal Court Action with dogged determination. Only at the end, in the final application for leave to appeal to the Supreme Court of Canada did they raise the constitutional issue. The most reasonable and effective time to have raised that issue was in the first appeal to the Federal Court of Appeal. That missed opportunity underlines the fact that **Federal Court Act** provisions can be challenged by litigants in Federal Court proceedings. This distinguishes the present case from *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.), where public interest standing was accorded as a matter of judicial discretion to a welfare recipient seeking to challenge provincial compliance with federal-provincial cost sharing arrangements under the **Canada Assistance Plan** because there was no other way that the issues could be brought before the court. In delivering the judgement of the Supreme Court of Canada in *Canadian Council of Churches*, Cory J. observed (at para. 34):

The standard set by this Court for public interest plaintiffs to receive standing also addresses the concern for the proper allocation of judicial resources. This is achieved by limiting the granting of status to situations in which no directly affected individual might be expected to initiate litigation.

[16] The proper allocation of judicial resources is a factor that weighs heavily here because of the extensive litigation in the Federal Court that has preceded this petition. These appellants have had their opportunity to litigate their dispute and to raise the constitutional issue in a timely manner. They are disappointed litigants with a sense of grievance that fuels this petition, and their claim to public interest standing cannot be separated from that grievance. They are really asking for more judicial time and attention to pursue their grievance and to attempt to undermine the legitimacy of the Federal Court order that is beyond further direct challenge. This private interest taints the public interest professed by the appellants in the constitutional issue, and casts doubt on the genuineness of the public interest required by the second *Canadian Council of Churches* factor. In any event, since the appellants did have open to them another reasonable and effective way to bring the issue before the court in the Federal Court Action, they fail to satisfy the third element of the *Canadian Council of Churches* test.

[17] As I am satisfied that the appellants fail to meet the second and third requirements of the *Canadian Council of Churches* test for public interest standing, it is not necessary to consider the first factor. I do not think that there was any error of law or principle in the exercise of the discretion of the chambers judge to deny standing to the appellants that would allow this Court to interfere with her decision.

[18] As the chambers judge properly exercised her discretion to deny standing to the appellants, I do not find it necessary to address the other issues raised by the appellants. I would dismiss the appeal.

**Ryan J.A.:**

4 I agree.

**Thackray J.A.:**

5 I agree.

*Appeal dismissed.*

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**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** R. v. Coppola | 2007 ONCJ 184, 2007 CarswellOnt 2629, [2007] O.J. No. 1624, 73 W.C.B. (2d) 576 | (Ont. C.J., Apr 12, 2007)

1996 CarswellOnt 4539  
Ontario Court of Appeal

R. v. Domm

1996 CarswellOnt 4539, [1996] O.J. No. 4300, 111 C.C.C. (3d) 449, 31 O.R. (3d) 540, 33 W.C.B. (2d) 108, 40 C.R.R. (2d) 289, 4 C.R. (5th) 61, 95 O.A.C. 262

## Her Majesty the Queen (respondent) and Gordon Domm (appellant)

Osborne, Doherty and Austin J.J.A.

Heard: September 5, 1996  
Judgment: December 6, 1996  
Docket: CA C19293

Counsel: *Frank Addario*, for appellant.  
*W. Graeme Cameron*, for the Crown.

Subject: Criminal

APPEAL from conviction of attempting to breach court order, and of breaching court order.

**The judgment of the court was delivered by *Doherty J.A.*:**

### I.

1 May an accused, in defence to a charge of disobeying a lawful court order, contrary to s. 127 of the *Criminal Code*, challenge the validity of that order on non-jurisdictional grounds?

### II.

2 On July 5, 1993, in the course of presiding over the trial of one Karla Bernardo, Kovacs J. of the Ontario Court (General Division) made an order postponing publication of certain parts of the evidence to be adduced at Ms. Bernardo's trial until separate criminal proceedings against Mr. Bernardo were completed. The order was made at the request of the Crown and over the opposition of counsel for Mr. Bernardo, representatives of the media, and one other individual who was given intervenor status on the motion. Justice Kovacs' order was appealed to this court. The appeal was quashed in December of 1994 on jurisdictional grounds (*R. v. Bernardo* (1994), 95 C.C.C. (3d) 437 (Ont. C.A.)). An application for leave to appeal directly to the Supreme Court of Canada from the order of Kovacs J. was refused on May 4, 1995: [1995] 2 S.C.R. vi. The order eventually expired on September 1, 1995 when Mr. Bernardo's trial was completed.

3 The appellant did not agree with Justice Kovacs' order. He believed that the order infringed his right to freedom of expression and harmed the administration of justice by denying the public timely access to important information concerning the operation of the criminal justice system. He also believed that the order was futile as it could not control the flow of the information into Canada through the foreign media or access to the information on facilities such as the Internet. Despite his opposition, the appellant did not seek to participate in the proceedings before Kovacs J. Nor did

he attempt to challenge the order in any court. Instead, the appellant decided to breach the order in a very public way to force the authorities to charge him, giving him a forum in which to declare his position.

4 Despite attempts by the police and a senior official with the Attorney General's department to dissuade the appellant, he proceeded with his plan to defy Justice Kovacs' order. His first effort on November 19, 1993 proved unsuccessful when the police seized the offending material before he could distribute it. However, on December 1, 1993, the appellant sent copies of certain material by mail to numerous individuals. That material clearly breached the order of Kovacs J. The appellant was charged with one count of attempting to breach that order and one count of breaching that order. At the time of the alleged offences, the appeal from the order of Kovacs J. was pending in this court.

5 The appellant was tried by a judge and jury in May of 1994. The appeal from Justice Kovacs' order was still outstanding in this court. The appellant made no effort to join in that appeal and did not request an adjournment of his trial pending the outcome of the appeal.

6 At the outset of the trial, the appellant argued that he should be allowed to challenge the validity of the order of Kovacs J. The trial judge rejected that submission. He later told the jury:

I tell you as a matter of law that the order of July 5, 1993, made by Mr. Justice Kovacs is a lawful order of a court of justice. It was lawfully made and remains so until withdrawn or otherwise terminated by a higher court. Mr. Justice Kovacs imposed the time limited publication ban as a method of ensuring a fair trial for Paul Teale [Bernardo]. It remains in effect.

### III.

7 Mr. Addario, counsel for the appellant, does not challenge Justice Kovacs' jurisdiction to make the order delaying publication of some of the evidence adduced in the proceedings before him. While Kovacs J. may have erred in relying on s. 486(1) of the *Criminal Code*, *Dagenais v. Canadian Broadcasting Corp.* (1994), 94 C.C.C. (3d) 289 (S.C.C.) establishes a trial judge's common law authority to make an order delaying publication of evidence adduced at a criminal trial. Counsel also accepts that normally orders of a superior court remain in effect until varied or terminated by process of law or by the operation of the terms of the order, and that those orders can usually be challenged only in proceedings, the object of which is the reversal or variation of the order: *R. v. Wilson* (1983), 9 C.C.C. (3d) 97 (S.C.C.) at 117. This last principle is referred to as the rule against collateral attack.

8 Mr. Addario submits that the rule against collateral attack is not absolute: *R. v. Litchfield* (1993), 86 C.C.C. (3d) 97 at 109-111 (S.C.C.). He contends that orders which restrain publication of court proceedings by individuals who are not parties to the proceedings to which the order applies are exempt from the collateral attack rule. Mr. Addario also argues that since the lawfulness of the order of Kovacs J. is an essential element of the *actus reus* of the offence with which the appellant is charged, the appellant must be able to contest the validity of the order in defending against the charge. He refers by analogy to other sections of the *Criminal Code* which make the lawfulness of state action an element of a criminal offence (e.g. s. 129, obstructing a police officer).

9 Mr. Addario's final submission assumes that the appellant was entitled, by way of defence to the charge against him, to challenge the correctness of the order made by Kovacs J. He submits that while the order may have been justified on the jurisprudence as it existed when the order was made and when the appellant's trial took place, the subsequent decision of the Supreme Court of Canada in *Dagenais* renders the order invalid. According to this submission, *Dagenais* set out a new approach which substantially narrowed the circumstances in which a non-publication order should be made. Counsel contends that tested against this new approach, the order of Kovacs J. should not have been made and is, therefore, invalid.<sup>1</sup> Mr. Addario submits that if his arguments are correct, the appellant is entitled to an acquittal or at least a new trial where the lawfulness of the order of Kovacs J. can be tested against the criteria announced in *Dagenais*.

### IV.

10 This appeal is not about the reviewability of a court order postponing publication of criminal proceedings. Where the prosecution relies on an alleged breach of a court order as a basis for imposing criminal liability, that order is subject to *Charter* review: *Re B. C. G. E. U.* (1988), 44 C.C.C. (3d) 289 at 309-310 (S.C.C.). It is also clear after *Dagenais* that court orders banning or delaying publication in criminal proceedings are open to *Charter* challenge by persons affected by the orders. The issue here is whether that challenge can be made by way of a defence to a criminal charge of disobeying that court order.

11 This appeal is about the rule of law, the foundation on which our concept of ordered liberty is built. The preamble to the *Canadian Charter of Rights and Freedoms* provides:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.

12 The rule of law encompasses several interrelated and, in some ways, countervailing principles: E. Colvin, "Criminal Law and the Rule of Law", in P. Fitzgerald ed. *Crime, Justice and Codification: Essays in Commemoration of Jacques Fortin*, (Carswell 1986) at pp. 127-130. It refers to a system of government by laws in which both the governed and the government are subject to and must comply with the law: *Reference re Language Rights Under s. 23 of Manitoba Act, 1870, and s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 at 748-49 S.C.C.). Judicial orders are one manifestation of the law with which the state and the individual must comply. The rule of law, however, does more than demand compliance with the law. To validate this demand, the law must provide individuals with meaningful access to independent courts with the power to enforce the law by granting appropriate and effective remedies to those individuals whose rights have been violated: *Re B. C. G. E. U.*, *supra*, at 298-299; *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 195-96; *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 at 250; *Kourtessis v. Minister of National Revenue* (1993), 81 C.C.C. (3d) 266, per La Forest J. at 309-310; P. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 1263. This court must give effect to both the compliance and the remedial components of the rule of law in determining whether the appellant is entitled to challenge the order of Kovacs J. at his trial.

V.

13 The compliance component of the rule of law is manifested in the rule barring collateral attacks on court orders. A judicial order made by a court having jurisdiction to make that order must be obeyed unless set aside in a proceeding taken for that purpose: *R. v. Wilson*, *supra*, at 117. Referring to the rule in *Litchfield*, *supra*, Iacobucci J. said at p. 110:

... The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal. ...

14 The rule against collateral attack on court orders has been consistently applied in criminal proceedings where the charge involves an alleged breach of a court order. For example, in *R. v. Reed* (1994), 91 C.C.C. (3d) 481 at 499 (B.C.C.A.), the court held that the accused could not defend against a charge of breaching a term of his probation by arguing that the term was invalid. Similarly, in *R. v. Rent*, [1989] N.S.J. No. 177 (N.S. C.A.) [reported at (1989), 91 N.S.R. (2d) 112 (C.A.)], the court invoked the rule against collateral attack in holding that an accused charged under the predecessor section to s. 127 of the *Criminal Code* could not attack the validity of the restraining order which he was alleged to have disobeyed: see also, *R. v. Dawson* (1995), 100 C.C.C. (3d) 123, per Jones J.A. (for the majority on this point), at pp. 130-131 (N.S.C.A.); further appeal to Supreme Court of Canada dismissed November 21, 1996 without reference to this issue: [1996] S.C.J. No. 113.

15 The rule against collateral attack comes to the forefront in criminal contempt cases where the contempt alleged involves a breach of a pre-existing court order. Courts have consistently refused to permit an accused to challenge the validity of the order underlying the contempt charge except on jurisdictional grounds: *Canadian Transport (U.K.) Ltd.*

v. *Alsbury* (1952), 105 C.C.C. 20 at 44-45, 57-58 (B.C.C.A.), affd. without reference to this point *sub nom. Poje v. British Columbia (Attorney General)* (1953), 105 C.C.C. 311 (S.C.C.); *Everywoman's Health Centre Society (1988) v. Bridges* (1990), 62 C.C.C. (3d) 455 at 468-470 (B.C. C.A.); *MacMillan Bloedel Ltd. v. Simpson* (1994), 89 C.C.C. (3d) 217 at 234 (B.C. C.A.); *R. v. Hunchuk* (1956), 25 C.R. 142 at 143-144 (B.C. C.A.).<sup>2</sup>

16 The effect of these and similar cases is summed up by McLachlin J., speaking for the majority, in *U.N.A. v. Alberta (Attorney General)* (1992), 71 C.C.C. (3d) 225 at 255 (S.C.C.):

... The validity of the order is not an issue on the contempt hearing. Unless the order has been set aside for want of jurisdiction, the judge hearing the motion on criminal contempt must accept it as valid. ...

17 Courts in other common law countries take the same position: *Issacs v. Robertson*, [1985] A.C. 97 (P.C.); *Taylor v. Attorney General*, [1975] 2 N.Z.L.R. 675, per Wild C.J. at 680, per Richmond J. at 685-686, per Woodhouse J. (dissenting on other grounds), at p. 689 (C.A.); *Howat v. State of Kansas*, 258 U.S. 181 at 189-90 (1922).

18 The appellant relies on *R. v. Fields* (1986), 28 C.C.C. (3d) 353 (Ont. C.A.) as authority for the proposition that an accused cited for contempt may challenge the validity of the order said to have been violated. Fields was a witness in a criminal prosecution. On cross-examination he refused to answer questions about his political affiliations on the ground that they were irrelevant. The trial judge told Fields that he had to answer the questions or face contempt proceedings. Fields still refused to answer the questions and the trial judge proceeded to convict Fields for contempt committed in the face of the court.

19 Fields appealed his contempt conviction pursuant to s. 10(1) of the *Criminal Code*. The majority (Dubin J.A. and Thorson J.A.) held that the right of appeal in s. 10(1) encompassed the right to challenge the correctness of the trial judge's ruling which Fields had refused to obey. Dubin J.A. said at pp. 358-59:

... Since a judge has the jurisdiction at trial to determine the matter of relevancy, the witness at that stage is bound by the order of the judge, and, if he refuses to answer and the rules of procedural fairness are complied with, the witness exposes himself to a conviction and punishment. *If the witness is convicted for refusing to answer the question, the witness has a right of appeal.*

*On an appeal from such a conviction I think that the relevancy of the question does become an issue with respect to the validity of the conviction for contempt.* [Emphasis added.]

20 Thorson J.A. adopted the same approach. In holding that the scope of the appeal included an inquiry into the relevance of the question which the witness had refused to answer, he said at p. 371:

In my opinion, the view which holds that the irrelevance or impropriety of a question affords no basis for impeaching a contempt conviction for a refusal to answer it goes too far. *Were it to find acceptance, the trial judge's ruling on whether a witness must answer would be absolute and binding, right or wrong, in relation to any conviction of the witness for contempt by reason of his failure to abide by the ruling.* The witness would have no protection afforded to him by the law from being obliged to answer any question put to him which he was directed by the trial judge to answer, no matter how irrelevant, improper or damaging the question put to him by his questioner and no matter how wrong or even capricious or perverse the judge's ruling on the matter. I cannot accept that such an extreme view of the law is compatible with the fairness of our criminal justice system, or with the principles of fundamental justice which are now embodied in our constitution. There must, in my opinion, be room in the system for an objective assessment of the correctness of such a ruling. [Emphasis added.]

21 I do not think that *Fields* departs from the established rule that a court order cannot be collaterally attacked in proceedings alleging a violation of that order. *Fields* involved a direct attack by way of appeal from a finding of contempt and the ruling from which that finding flowed. *Fields* determined that where the order and the finding of contempt for refusal to obey the order were made in the same proceeding by the same judge, the right of appeal granted by s. 10(1)

opened both to appellate review. This interpretation of the scope of the right of appeal under s. 10(1) of the *Criminal Code* appears to have been accepted by the majority' in *Dagenais, supra*, at 305-306.

22 *Fields*, and in particular the reasons of Thorson J.A., can also be seen as an example of how remedial concerns must alleviate against the potential injustice caused by an overly strict adherence to the rule against collateral attack. I will return to that aspect of *Fields* later in these reasons.

23 Nor does giving the challenge to the validity of a court order a constitutional flavour open the door to collateral attack on such orders. Even orders that are constitutionally unsound must be complied with unless set aside in a proceeding taken for that purpose. In *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892. Taylor was ordered by the Commission in 1979 to cease playing recorded messages over the telephone which were regarded as likely to expose a person or group to hatred or contempt. Taylor took none of the steps available to him to challenge the order, but instead defied it. He was eventually convicted of contempt. In 1983, the Tribunal made a second similar cease and desist order. Once again, Taylor ignored it, and once again, he was found in contempt. Taylor challenged the contempt findings on several bases, one of which involved a claim that s. 13(1) of the Canadian Human Rights Act, S.C. 1976-77 c. 33 was unconstitutional. That section empowered the Board to make the cease and desist orders which it had made against Taylor. Dickson C.J.C., for the majority, held that s. 13(1) was constitutional and upheld the validity of the tribunal's orders and the contempt findings. Justice McLachlin, for a three-person minority, would have struck down s. 13(1) as unconstitutional. She was, therefore, required to determine the validity of the contempt convictions based on orders dependent upon a statute which she had held to be unconstitutional. She began her analysis by observing at pp. 972-73:

We were presented with no authority for the proposition that the unconstitutionality of a law upon which a court order is based excuses a refusal to obey the order. Such a proposition appears not to have been advanced in Canada prior to this appeal. In the United States, where it has been advanced, it has been rejected<sup>3</sup>

24 After referring to authorities which clearly established that the validity of the underlying order was not in issue in criminal contempt proceedings based on a violation of that order, she said at pp. 974-75:

In my opinion, the 1979 order of the Tribunal, entered in the judgment and order book of the Federal Court in this case, continues to stand unaffected by the *Charter* violation until set aside. *This result is as it should be. If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.* [Emphasis added.]

25 McLachlin J. would have quashed the Board's orders as unconstitutional, but would have held that the effective date of that quashing was the date on which the judgment of the court was issued. Consequently, the contempt convictions entered prior to the quashing of the orders remained valid. She said at p. 975:

... The commission of the offence of contempt does not depend on the validity of the underlying law but on the existence of a court order made by a court having jurisdiction. I would therefore affirm the appellants' convictions. [Emphasis added.]

26 Justice McLachlin's language was quoted with approval by the majority in *Litchfield, supra*, at p. 110, and by this court in *R. v. Consolidated Maybrun Mines Ltd.* (1996), 105 C.C.C. (3d) 388 at 406, leave to appeal to S.C.C. granted December 5, 1996.

27 Justice McLachlin's refusal to recognize a right to collaterally challenge court orders based on alleged violations of the *Charter* is also consistent with the jurisprudence refusing to equate *Charter* violations with jurisdictional error: *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 at 413 (S.C.C.). In this respect, Canadian case law has taken a very different road than that followed in at least one American jurisdiction where orders made in violation of a constitutional right

are equated with orders made without jurisdiction: In *Re Berry* 436 P. 2d 273 at 282-281 (Cal. S.C. 1968); *Welton v. Los Angeles (City)*, 556 P. 2d 1119 at 1124 (Cal. S.C. 1976).

28 The recent decision in *R. v. Sarson* (1996), 107 C.C.C. (3d) 21 (S.C.C.) is also relevant. Sarson was convicted of second degree murder based on the constructive murder provisions in the *Criminal Code*. Several months after his conviction, those provisions were declared unconstitutional. As the appellant no longer had any right of appeal, he challenged his detention by way of *habeas corpus* relying on the subsequent declaration of unconstitutionality. Sopinka J., at pp. 30-31, for a unanimous court on this issue, held that the *habeas corpus* application amounted to an impermissible collateral attack on the conviction even though the conviction rested on a statutory provision which had been subsequently held to be unconstitutional.

29 In my opinion, an allegation that an individual's constitutional rights have been violated by a court order cannot justify the abandonment of the rule against collateral attack. In such cases (and this is a good example), there are usually fundamental and conflicting values to be balanced. It is very much in the community's best interests that those whose values clash settle their competing claims by resort to established judicial procedures and not by preemptive acts by those convinced of the righteousness of their cause. I would, however, add that where constitutional rights are implicated, the court must be particularly concerned about the availability of an effective remedy apart from collateral attack when considering whether an exception should be made to the rule against collateral attack.

## VI

30 The rule against collateral attack on court orders will bar the appellant's attempt to challenge the validity of Justice Kovacs' order unless he can show either that the interests underlying the rule are not served by adherence to it in these circumstances, or that the remedial component of the rule of law demands an exception to the rule against collateral attack.

31 The rule against collateral attack on court orders serves to reinforce the compliance component of the rule of law and enhance the repute of the administration of justice by providing for the orderly and functional administration of justice: *R. v. Litchfield*, *supra*, at pp. 110-111. If a collateral attack on an order can be taken without harm to those interests, then the rule should be relaxed. Review by a trial judge of orders made on pre-trial motions provides an example of a situation in which those interests are not harmed by collateral attack: *Litchfield*, *supra*, at p. 111; *Dagenais*, *supra*, at pp. 311-312.

32 The collateral attack contemplated by the appellant would do substantial damage to the compliance component of the rule of law and the repute of the administration of justice. Justice Kovacs' order was binding on everyone who had notice of it. It was not an order, like that considered in *Litchfield*, which affected only the interests of those engaged in a specific trial. When the appellant chose to defy the order, those who had opposed the making of the order were continuing to abide by it while challenging its validity on appeal. To suggest that the appellant could disobey the order and then challenge its validity in entirely separate proceedings from those taken specifically for that purpose would, in my view, do a great disservice to the orderly and functional administration of justice. If the appellant's contention is accepted, there would be little incentive in taking the "high road" followed by those who directly challenged the making of the order but complied with it while maintaining their objection to its validity all the way to the Supreme Court of Canada. Indeed, if the appellant's submissions are accepted, he would be in a better position than those who chose to challenge the making of the order and to comply with it while pursuing their appellate remedies. Unlike them, the appellant would have a right of appeal to the Court of Appeal should he be convicted.

33 The "breach first, challenge later" approach taken by the appellant is particularly destructive of the compliance goals of the rule of law where non-publication orders are in issue. Should the order eventually be upheld, the adverse effects of the breach cannot be undone. The genie would indeed be out of the bottle. In some cases, the adverse effects flowing from a breach of a non-publication order may be so severe as to prevent the subsequent trial of a serious criminal allegation. This would do a great disservice to the repute of the administration of justice. The interests underlying the rule against collateral attack are furthered in important ways by adherence to that rule in the present circumstances.

34 The second rationale for exceptions to the rule against collateral attack is concisely put by Iacobucci J. in *Litchfield* at 110 where he observes that the rule against collateral attack was not intended to immunize court orders from review. I take this to be a recognition that as important as the compliance component of the rule of law is, it must accommodate the equally important right of individuals to challenge orders which adversely affect their interests. The availability of an effective remedy to right a constitutional wrong has been a dominant theme of our *Charter* case law. The requirement that there must always exist a court of competent jurisdiction for s. 24(1) purposes and the willingness to modify traditional common law remedies such as *habeas corpus* to ensure relief against constitutional violations sound that theme: *R. v. Kourteissis*, *supra*; *R. v. Rahey* (1987), 33 C.C.C. (3d) 289 (S.C.C.), per Lamer J. at 298-99, per La Forest J. at 319; *R. v. Gamble* (1988), 45 C.C.C. (3d) 204 at 237-41 (S.C.C.).

35 The remedial component of the rule of law demands that the collateral attack bar not stand in the way of an accused who cannot effectively challenge an impugned court order except after violating it. *R. v. Fields* can be seen as an example of a situation in which deviation from the rule was necessary. Fields could not comply with the trial judge's order, answer the question, and then challenge the order. His right to refuse to answer irrelevant questions would have been irretrievably lost when he answered the question. Furthermore, Fields had no effective means to challenge the order of the trial judge prior to his breach.<sup>4</sup> As Thorson J.A. said, at p. 371:

There must, ... be room in the system for an objective assessment of the correctness of such a ruling.

36 Therefore, even if *Fields* is seen as involving a collateral attack on the trial judge's ruling requiring that the question be answered, the result in *Fields* is fully justified on the basis that *Fields* had no other effective means of preserving his right to refuse to answer irrelevant questions and challenge the validity of the trial judge's order.

37 The American jurisprudence considering the validity of contempt convictions based on the breach of allegedly unconstitutional court orders recognizes the significance of the availability of means of testing the impugned order short of non-compliance. In *Walker v. City of Birmingham*, *supra*, the majority upheld the contempt convictions of several civil rights activists who marched in Birmingham in contravention of an injunction issued by the court. The injunction was based on a city ordinance banning parades on public streets without a permit. The constitutional validity of that ordinance was doubtful.<sup>5</sup> Stewart J. for the majority held that the accused could not raise the constitutional validity of the court order as a defence to the contempt charge. In so holding, he said at pp. 318-19:

This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims. But there is no showing that such would have been the fate of a timely motion to modify or dissolve the injunction. There was an interim of two days between the issuance of the injunction and the Good Friday march. The petitioners give absolutely no explanation of why they did not make some application to the state court during that period. The injunction had issued *ex parte*; if the court had been presented with the petitioners' contentions, it might well have dissolved or at least modified its order in some respects. If it had not done so, Alabama procedure would have provided for an expedited process of appellate review. It cannot be presumed that the Alabama courts would have ignored the petitioners' constitutional claims. Indeed, these contentions were accepted in another case by an Alabama appellate court that struck down on direct review the conviction under this very ordinance of one of these same petitioners. [Footnotes omitted]

38 Similarly, in cases involving contempt citations for breach of nonpublication orders. American courts have recognized that those who seek to challenge the constitutionality of the order in defence to the contempt charge must show that they had no other effective means of challenging the non-publication order: e.g. see *Matter of Providence Journal Co.*, *supra*, at pp. 1354-55; *U.S. v. Dickinson*, 465 F.2d 496 at 511 (5th Cir. 1972).

39 In this case, the appellant could have challenged the non-publication order through existing court procedures. The arguments against the validity of the order advanced by the appellant at trial were being made on the appeal challenging

the order of Kovacs J. That appeal was outstanding at the time the appellant chose to defy, the order. The appellant could have awaited the results of the appeal, or even applied for standing on the appeal if he thought it advisable. Had there been no appeal extant, **he could have moved before Kovacs J. for a variation of that order**, and if unsuccessful, pursued his appellate remedies.

40 I acknowledge that resort to either procedure would not provide the appellant with absolute protection against a violation of his s. 2(b) rights. If he was ultimately successful in his challenge, then the full exercise of his rights would have been compromised by the delay in publication while the challenge was being made. Timely publication may be essential to a meaningful exercise of one's right to freedom of expression. Sometimes an order delaying publication will be tantamount to an outright ban on publication. The values promoted by s. 2(b) are not served by publication when the speaker has lost his audience and the message to be conveyed has lost its purpose. In this case, however, the delay needed to accommodate a challenge to the order of Kovacs J. would not have had that effect. The appellant wanted to publish the material because he believed that the public were entitled to know what went on in its criminal courts. That purpose, while ideally served by immediate public access to all proceedings. would still have been served by access after a successful challenge to the order of Kovacs J. This is not a case like *Fields, supra*, where compliance with the court order would result in an irretrievable loss of a right which could not be salvaged by a subsequent setting aside of the order.

41 No doubt, from the appellant's perspective, perfect vindication of his rights required publication without delay. However, where competing interests are at stake, the interests of justice require a broader perspective: *R. v. Sarson, supra*, per L'HeureuxDubé concurring at p. 42. **The delay associated with a challenge to the order of Kovacs J., while potentially compromising the appellant's s. 2(b) rights to some extent, would not render the exercise of those rights ineffective.**

42 The remedial component of the rule of law could have been adequately vindicated without resort to a breach of the non-publication order. **The need to make adequate remedies available to those who claim infringements of their constitutional rights does not warrant an exception to the rule against collateral attack on court orders in these circumstances.** I agree with the trial judge's conclusion that the appellant could not advance a collateral attack on the order of Kovacs J. in defence to the charge.

43 Some would argue that my conclusion creates an untenable distinction between judicial orders and legislative enactments. It is well established that a person accused of breaching a statute may challenge the constitutionality of that statute in defence to the charge: *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385 (S.C.C.). It is said that if the rule of law can countenance a constitutional challenge to a legislative enactment in defence to a charge of breaching that enactment, it can equally tolerate the advancement of a similar challenge when a person is prosecuted for breaching a court order: *Walker v. City of Birmingham, supra*, at 327 per Warren C.J., in dissent.

44 **I think there are valid reasons for treating court orders differently than legislative enactments. In so far as constitutional challenges are concerned, legislative enactments stand on a different footing than court orders. Legislative activity is subject to the direct control and command of the constitution from its inception. The Charter applies directly to government action (s. 32(1)), and any government action is of no force and effect to the extent that it is inconsistent with the constitution (*Constitution Act* 1982, s. 52). A legislative enactment which is unconstitutional is akin to a judicial order made without jurisdiction. Both are made without authority. Just as an accused can challenge the jurisdiction of the court to make the order the accused is alleged to have breached, that accused can also challenge the Legislature's constitutional jurisdiction to enact the law the accused is alleged to have breached.**

45 A court order is not a government action within the meaning of s. 32(1) of the *Charter: Dolphin Delivery Ltd. v. R.W.D.S.U., Loc. 580*, [1986] 2 S.C.R. 573 at 600. **While courts are duty bound to apply the Charter, the Charter is not designed to constrain judicial conduct in the same way it restrains legislative activity. Even though court orders may attract Charter scrutiny depending on their nature and the context in which they are made. (Hogg, *Constitutional Law of Canada, supra*, 843-45), compliance with the Charter cannot be seen as a mandatory condition precedent to the exercise of judicial authority in the same way as it is in respect of legislative activity.**

46 There are also sound policy based reasons for treating court orders differently from statutes. Courts exist to settle disputes and determine rights. They do so by making orders. If those orders can be disobeyed and then challenged when proceedings are taken in respect of the breach, the authority of the court is reduced to little more than a mirage.

For example, if the appellant could disobey the order of Kovacs J. and then challenge its validity when charged with disobeying the order, could he not also refuse to pay the fine imposed by the trial judge and then raise the validity of the order of Kovacs J. when proceedings were taken against him for failure to pay the fine. There would be no end to litigation and no real force to court orders: *Dagenais*, *supra*, per L'Heureux-Dubé at p. 342, in dissent. There is no such equivalent harm to the legislative process when a statute is violated. That violation triggers the judicial process. It is that process which is designed to determine competing rights.

47 The remedies available to challenge court orders are quite different from those available to challenge legislative enactments. When a court order is made, the matter is in the system and before the courts. By and large, effective means of challenging those orders through the courts are well established. For example, one may seek a variation from the court making the order, or in most cases, seek a review of the order by some higher court. In the vast majority of cases, effective means to challenge the order are available without the need to breach the order.

48 When a law is passed which is thought to be unconstitutional, there is no existing cause of action or court proceeding within which the statute can be challenged. Something must be done to bring the matter before the courts. Even with the expanded notion of standing that exists in constitutional cases, public interest litigation is seen as very much the exception to the general rule that the courts exist to resolve actual disputes between parties. Where there is a likelihood that the constitutional issue will arise in the course of a litigated dispute, preemptive applications for declaratory relief by interested persons will be refused: *Canadian Council of Churches v. Canada*, *supra*, at pp. 252-53. Furthermore, in some cases, the constitutional validity of legislation cannot be litigated without a concrete factual background which can be laid only in the context of an alleged specific breach of the statute. Any restriction on a person's right to challenge the validity of a legislative enactment in defence to a charge of breaching that enactment would necessitate greater resort to a less effective means of determining the constitutional validity of those enactments. Remedial considerations support the right to challenge the constitutional validity of an enactment in defence to a charge of breaching that enactment.

49 It must also be recognized that a challenge to the validity of a statute in defence to a charge calls upon the court to perform its customary and crucial function as the final arbitrator of the constitutional legitimacy of legislative or executive pronouncements. Where the challenge is to the validity of a prior court order, the court is asked to consider a prior judicial decision. This function is clearly part of the judicial process, but in a hierarchial court system it can only be effectively performed by resort to the established lines of appeal and review.

## VII

50 As I am satisfied that the validity of Kovacs J.'s order could not be attacked at the appellant's trial. I need not address the validity of that order when tested against the principles enunciated in *Dagenais*. It can, however, be safely said that Kovacs J. faced an extraordinary situation. It was virtually certain that Mr. Bernardo's trial would be preceded by a never-ending avalanche of publicity, much of it potentially detrimental to Mr. Bernardo's ability to receive a fair trial. Publication of the material covered by the order of Kovacs J. prior to Mr. Bernardo's trial had the very real potential to do serious damage to his right to a fair trial. I am inclined to the view that a non-publication order in substance, if not in every detail like that made by Kovacs J., was justified under *Dagenais*.

51 I would dismiss the appeal.

*Appeal dismissed.*

## Footnotes

- 1 The appellant correctly asserts that, as his case was still in the system when *Dagenais* was released, he is entitled to rely on it: *R. v. Wigman* (1987), 33 C.C.C. (3d) 97 at 108-109 (S.C.C.).
- 2 *In R v. Watson* (1996), 106 C.C.C. (3d) 445 at 461 (B.C. C.A.), the court assumed without deciding that the appellant could challenge the validity of the order in answer to a charge of criminal contempt.
- 3 McLachlin J. referred to *Walker v. Birmingham (City)*, 388 U.S. 307 (1967). To the same effect, see: *U.S. v. United Mine Workers of America*, 330 U.S. 258 (1947); *Pasadena (City) Board of Education v. Spangler*, 427 U.S. 424 at 439-440 (1976); *Komyatti v. Bayh*, 1996 W.L. 534180, pp. 31-32 (7th Cir. 1996). The American authorities recognize a very limited exception to this rule. Where the court order is "transparently invalid" or has only a "frivolous pretence to validity" it cannot support a contempt conviction: *Walker v. Birmingham (City)*, *supra*, at p. 315; *U.S. v. Terry*, 802 F. Supp. 1094 at 1101-2 (S.D.N.Y. 1992); In *Matter of Providence Journal Co.*, 820 F. 2d 1342 at 1347 at (1986) aff. En Banc 820 F. 2d 1354 (1st Cir. 1987). McLachlin J. did not have to consider the wisdom of importing this exception into the Canadian case law. Nor do I. Mr. Addario acknowledges that the order may well have been constitutional under the prevailing jurisprudence when the order was made. The order can hardly be said to be "transparently invalid."
- 4 It may be argued that Field could have sought an adjournment of the trial so that he could seek prerogative writ relief in the superior court. Given the realities of an ongoing trial and the very limited review available to Fields, this proposed remedy is little more than theoretical.
- 5 The ordinance was subsequently declared unconstitutional in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

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12

1999 CarswellNat 252  
Federal Court of Canada — Trial Division

Ahani v. R.

1999 CarswellNat 252, 1999 CarswellNat 4596, [1999] F.C.J. No. 212, 163 F.T.R. 296

**Mansour Ahani, Plaintiff and Her Majesty The Queen,  
The Minister of Citizenship & Immigration, Defendants**

Rothstein J.

Heard: February 9, 1999  
Oral reasons: February 11, 1999  
Docket: T-1767-98

Counsel: *Ms Barbara Jackman*, for the Plaintiff.

*Mr. Donald MacIntosh* and *Mr. Sudabeh Mashkuri*, for the Defendant.

Subject: Civil Practice and Procedure; Constitutional; Immigration

MOTION to strike portions of plaintiff's statement of claim.

***Rothstein J.:***

1 The defendants move to strike portions of the plaintiff's statement of claim in which he seeks a declaration that certain provisions of the *Immigration Act*, R.S.C. 1985, c. I-2, are of no force and effect under subsection 52(1) of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. The defendants first move to strike paragraph 2 of the statement of claim which claims that the anti-terrorism provisions of the *Immigration Act*, paragraphs 19(1)(e)(iii), 19(1)(e)(iv)(C), 19(1)(f)(ii), 19(1)(f)(iii)(B) and 19(1)(g) are of no force and effect.

**Facts**

2 The plaintiff entered Canada on October 14, 1991 and claimed Convention refugee status. On December 31, 1991 he was found to have a credible basis for his claim. On April 1, 1992 the Immigration and Refugee Board determined that he was a Convention refugee. On June 9 and June 15, 1993 the Solicitor General of Canada and the Minister of Employment and Immigration, respectively, certified under subsection 40.1(1) of the *Immigration Act*, that they were of the opinion, based on a security intelligence report received and considered by them, that the plaintiff was inadmissible to Canada as being a person described in the anti-terrorism provisions of the *Immigration Act*, namely paragraphs 19(1)(e)(iii), 19(1)(e)(iv)(C), 19(1)(f)(ii), 19(1)(f)(iii)(B) and 19(1)(g). On June 17 and 18, 1993 the certificate was filed with an immigration officer and with this Court. The plaintiff was served with a copy of the certificate and taken into custody and has remained in custody since that date.

3 As a result of the section 40.1 proceedings brought against him, the plaintiff, on December 24, 1993, commenced an action in this Court challenging the constitutional validity of section 40.1 based on section 7 of the Charter. That Charter challenge was decided by McGillis J. in *Ahani v. R.*, [1995] 3 F.C. 669 (Fed. T.D.). McGillis J. found the procedures under section 40.1 to be constitutionally valid. Her decision was upheld by the Federal Court of Appeal (1996), 201 N.R. 233 (Fed. C.A.). Leave to appeal to the Supreme Court of Canada was dismissed (1997), 223 N.R. 72 (note) (S.C.C.).

4 Subsequently, the proceedings under section 40.1 concluded on April 17, 1998 with Denault J., the designated judge, finding that the Minister's certificate was reasonable. The Minister then proceeded under paragraph 53(1)(b) of the *Immigration Act* as the next step in the process of deporting the applicant.

5 Paragraph 53(1)(b) provides:

53. (1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(a), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless

.....

(b) the person is a member of an inadmissible class described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada;

6 The Minister issued her opinion that the plaintiff constituted a danger to the security of Canada on August 12, 1998.

7 This action was commenced on September 9, 1998 challenging the constitutional validity of the anti-terrorism provisions of subsection 19(1) and paragraph 53(1)(d) of the *Immigration Act*.

### Analysis

8 The defendants concede that the plaintiff may bring the present action to challenge the constitutional validity of paragraph 53(1)(d). However, they say, amongst other reasons, that the plaintiff elected to challenge the validity of section 40.1 in his 1993 action, that section 40.1 incorporates by reference the anti-terrorism provisions of subsection 19(1) of the *Immigration Act* and the plaintiff is now estopped from commencing a new action challenging the anti-terrorism provisions. The defendants rely on *Singh v. R.* (1996), 123 F.T.R. 241 (Fed. T.D.). *Singh* is a decision of Muldoon J. of this Court who found that it is an abuse of the process to "litigate by instalments". At paragraph 9 of *Singh*, Muldoon J. cites *Maynard v. Maynard* (1950), [1951] S.C.R. 346 (S.C.C.) in which the Supreme Court of Canada adopted a passage from *Green v. Weatherill*, [1929] 2 Ch. 213 (Eng. Ch. Div.), at pp. 221-222:

...the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

9 Muldoon J. then refers to a passage in the *Maynard* case in which the Supreme Court adopted the following passage from *Hoystead v. Commissioner of Taxation* (1925), [1926] A.C. 155 (Australia P.C.) at p. 170:

Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.

If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

10 I think the dicta cited is applicable to the case at bar. The plaintiff, in 1993, brought a Charter challenge against section 40.1. Section 40.1 incorporates by reference the anti-terrorism provisions of subsection 19(1) which the plaintiff in this action now seeks to challenge. As such, the anti-terrorism provisions of subsection 19(1) are integral and form part of the statutory scheme in section 40.1. There is no reason the plaintiff could not have included the challenge to the subsection 19(1) provisions when he commenced his 1993 action. In fact, in the Notice of Constitutional Question pertaining to the 1993 action, the plaintiff describes his challenge as "a plenary constitutional question directed at section 40.1". The authorities cited with approval in *Singh* by Muldoon J. are dispositive on this issue. The plaintiff could have brought the same issues before the Court in his 1993 action that he seeks to advance in this action. His is estopped from doing so. The matter is *res judicata*.

11 For the Court to acquiesce in the challenge to the anti-terrorism provisions of subsection 19(1) in this action would be to permit an abuse of the process. Indeed, in *Ahani*, McGillis J. makes reference to evidence that was tendered by the Crown and cross-examined by the plaintiff relative to terrorism, the very subject matter of the provisions the plaintiff seeks to challenge in this action. The plaintiff, as the cases cited clearly indicate, cannot litigate by instalments.

12 Plaintiff's counsel says the plaintiff was entitled to await the decision of the designated judge under section 40.1 before bringing his Charter challenge to the anti-terrorism provisions of subsection 19(1). In doing so, the plaintiff is treating the challenge to the anti-terrorism provisions as an appeal of the section 40.1 decision of the designated judge. However, the *Immigration Act* is clear that no appeal lies from a decision of a designated judge under section 40.1. Subsection 40.1(6) provides:

**40.1 (6)** A determination under paragraph (4)(d) is not subject to appeal or review by any court.

13 That is not to say that in appropriate circumstances, an action for a declaration of constitutional invalidity of provisions of the *Immigration Act* is precluded. It is only to say that in this case, when the plaintiff elected to bring an action for a declaration of constitutional invalidity in 1993, he could not hold back some of his arguments on the grounds he was awaiting a decision under section 40.1. Once he elected to challenge section 40.1, which incorporates the anti-terrorism provisions of subsection 19(1), he was obliged to bring forward all relevant arguments. He failed to do so at his own peril.

14 The plaintiff says there is a difference between procedural and substantive Charter challenges. Again, the plaintiff appears to treat the present action as an appeal of the decision of the designated judge under section 40.1. Once the plaintiff commenced his Charter challenge to section 40.1, he was required to raise all arguments, whether as to procedure or as to substance, and whether to an express provision in section 40.1 or to provisions of subsection 19(1) incorporated by reference therein.

15 The plaintiff says that because the *Immigration Act* consists of a number of procedural steps in the process to deport a Convention refugee, that the plaintiff is justified in proceeding by instalments as well. However, the succession of procedural steps provided in the *Immigration Act* are for the benefit of those, like the plaintiff, who the government wishes to deport. It is quite appropriate for an affected person to await the government invoking a particular step in the process before challenging that legislative provision. However, it is not appropriate to attempt to revive old issues pertaining to a previous step by attempting to incorporate them in a challenge of subsequent proceedings. If that were permitted there would be no end to litigation. An affected person could select one provision for challenge and then if unsuccessful, proceed to challenge another in succession. That is clearly an abuse of the process and, if permitted, would bring the administration of justice into disrepute.

16 The defendants' motion to strike paragraph 2 of the plaintiff's statement of claim challenging paragraphs 19(1)(e)(iii), 19(1)(e)(iv)(C), 19(1)(f)(ii), 19(1)(f)(iii)(B) and 19(1)(g) of the *Immigration Act* is granted, and that portion of the statement of claim is struck out.

17 The defendants then move to strike the last sentence of paragraph 9 of the statement of claim. Plaintiff's counsel says the reason for including it goes to whether the Minister exercised her discretion under paragraph 53(1)(b) within constitutional bounds. That is not a subject matter of this action but rather, is to be dealt with in a judicial review which the applicant has brought in respect of the Minister's order under paragraph 53(1)(b) of the *Immigration Act*. Because it is irrelevant to these proceedings, the motion is granted with respect to the last sentence of paragraph 9 and it is struck out.

18 With the consent of the plaintiff, the defendants' motion with respect to paragraph 13(iv) is granted and the words "unduly broad" are struck out.

19 The defendants' motion with respect to the plaintiff's claim for general and particular damages is adjourned to permit the plaintiff to submit to the Court a proposed amended statement of claim with allegations supporting the claim for damages, having regard to *Guimond c. Québec (Procureur général)*, [1996] 3 S.C.R. 347 (S.C.C.). The proposed amended statement of claim shall be submitted to the Court and served on the defendant on or before Monday, February 15, 1999 and the argument shall take place by way of conference call at a time to be fixed by the Court.

*Order accordingly.*

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2016 BCCA 367  
British Columbia Court of Appeal

M. (L.) v. British Columbia (Director of Child, Family and Community Services)

2016 CarswellBC 2514, 2016 BCCA 367, [2016] B.C.W.L.D. 6369, [2016] B.C.W.L.D. 6419, [2016] B.C.W.L.D. 6428, [2016] B.C.W.L.D. 6437, [2016] B.C.W.L.D. 6534, [2016] B.C.W.L.D. 6586, [2016] B.C.W.L.D. 6587, [2016] B.C.W.L.D. 6588, [2016] B.C.W.L.D. 6589, [2016] W.D.F.L. 5284, [2016] W.D.F.L. 5298, [2016] W.D.F.L. 5350, [2016] W.D.F.L. 5390, [2016] W.D.F.L. 5391, [2016] W.D.F.L. 5397, [2016] W.D.F.L. 5399, 269 A.C.W.S. (3d) 716, 402 D.L.R. (4th) 706, 6 Admin. L.R. (6th) 51, 79 R.F.L. (7th) 257, 89 B.C.L.R. (5th) 362

**L.M. and R.B. (Appellants/Petitioners) and The Director of Child,  
Family and Community Services (Respondent/Respondent)**

L.M. and R.B. (Appellants/Petitioners) and The Director of Child, Family and Community Services and Director of Adoptions and the Public Guardian and Trustee as Litigation Guardian of S.S. (Respondents/Respondents)

Saunders, Kirkpatrick, Bennett, Goepel, Savage JJ.A.

Heard: June 8, 2016

Judgment: September 13, 2016

Docket: Vancouver CA43296, CA43470

Proceedings: affirming *M. (L.) v. British Columbia (Director of Child, Family and Community Services)* (2015), 2015 BCSC 2261, 2015 CarswellBC 4006, 74 R.F.L. (7th) 80, Macintosh J. (B.C. S.C.); and affirming *S. (S.) (Litigation guardian of) v. British Columbia (Director of Child, Family and Community Services)* (2016), 2016 BCSC 275, 78 R.F.L. (7th) 226, 2016 CarswellBC 558, 2 Admin. L.R. (6th) 333, Choi J. (B.C. S.C.)

Counsel: J. Hittrich, B. McIvor, M. Dunnaway, for Appellants

L. Greathead, K. Webber, for Respondents, Director of Child, Family and Community Services and Director of Adoptions

T. Dickson, J. Arvay, Q.C., for Respondent, Public Guardian and Trustee as Litigation Guardian of S.S.

Subject: Civil Practice and Procedure; Constitutional; Contracts; Family; Public

APPEALS by foster parents from judgments reported at *M. (L.) v. British Columbia (Director of Child, Family and Community Services)* (2015), 2015 BCSC 2261, 2015 CarswellBC 4006, 74 R.F.L. (7th) 80 (B.C. S.C.) and *S. (S.) (Litigation guardian of) v. British Columbia (Director of Child, Family and Community Services)* (2016), 2016 BCSC 275, 2016 CarswellBC 558, 2 Admin. L.R. (6th) 333, 78 R.F.L. (7th) 226 (B.C. S.C.), dismissing their petitions for relief with respect to decision by Director of Child, Family and Community Services not to consent to their adoption of child and to place child with another family.

**Saunders J.A.:**

1 These appeals concern the plans made for the upbringing of S.S., a young Métis girl not yet three years old.

2 S.S. has been in the care of foster parents, the appellants L.M. and R.B. from two days after her birth in British Columbia. L.M. is of Métis heritage. There is no indication that the placement of S.S. with L.M. and R.B. has been anything but successful. Now L.M. and R.B. wish to adopt S.S.

3 S.S. has two older siblings who have been adopted by a couple in Ontario. The Director of Child, Family and Community Services hopes to place S.S. with that couple, with the intention she will be adopted by them in Ontario. The Ontario couple is not of Métis heritage but they are willing to expose S.S. to Métis culture.

4 Contrary to the Director's intention, the birth parents of S.S. support an adoption by L.M. and R.B. in British Columbia. On July 6, 2015, they signed a continuing custody order placing S.S. permanently under the responsibility of the Director (unless adopted), but say they signed the continuing custody order on the premise of L.M. and R.B. adopting S.S. L.M. and R.B. are amenable to facilitating healthy contact between S.S. and her birth parents. The Director opposes such contact and has instructed L.M. and R.B. to refrain from allowing it.

5 When L.M. and R.B. became foster parents they signed an agreement with the Director for provision of caregiver services consistent with the child's Plan of Care. The agreement provided in the Schedule attached:

3. A Director may at any time, in his or her sole discretion, retake physical care and control of a child who is receiving services from the Caregiver and revoke any guardianship authority specified or implied which has been delegated by a Director to the Caregiver.

6 At the time the agreement was made, the Director had legal custody of S.S. under ss. 44(3)(b) and 61 of the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46.

7 In September 2015, L.M. and R.B. petitioned the Supreme Court of British Columbia for orders that would prevent S.S. from being removed from their care, would appoint them interim and permanent Guardians of S.S., and would effect their adoption of S.S. This latter request contemplated orders that would effectively step over the procedural requirements of the *Adoption Act*, R.S.B.C. 1996, c. 5, and relieve them from the requirement of obtaining the Director's consent to the adoption. In the alternative, they sought an order allowing contact with S.S., and in the further alternative, they sought a judicial review "of the decision of the Respondent Director to have [S.S.] adopted by non-native individuals in Ontario".

8 L.M. and R.B. invoked the best interests of the child as the predominant principle against which their application for relief should be assessed, and asked the Supreme Court of British Columbia to invoke its *parens patriae* jurisdiction to dispense with the statutory requirements of the *Adoption Act*, and to make an order of adoption.

9 On December 3, 2015, Mr. Justice Macintosh dismissed the petition in its entirety. In doing so, he addressed only the adoption issues, and found that L.M. and R.B. had not identified an applicable gap in the relevant legislation or any bad faith on the part of the Director to enable the court to invoke its *parens patriae* jurisdiction so as to order the adoption they sought. In January 2016, L.M. and R.B. filed a second petition much in the vein as their first petition, but adding an application for a declaration that the *Adoption Act* is contrary to ss. 7 and 15(1) of the *Charter of Rights and Freedoms* and seeking relief under s. 24 of the *Charter*. They contended that many of the prayers for relief in their first petition were not considered by Mr. Justice Macintosh, in particular issues concerning the best interests of the child which they say he left unresolved.

10 On February 22, 2016, Madam Justice Choi dismissed the second petition on the basis of *res judicata*. She held that the issues in relation to adoption said not to have been decided by Mr. Justice Macintosh and all other matters raised in the first petition which then stood dismissed, were matters for appeal. As to the newly raised *Charter* issues, Madam Justice Choi said they, too, were *res judicata* as they should have been included in the first petition.

11 L.M. and R.B. appeal from the two orders dismissing their two petitions. Appeal CA43296 is from the order of Mr. Justice Macintosh. Appeal CA43470 is from the order of Madam Justice Choi.

12 On March 16, 2016, Madam Justice Newbury made an order under s. 10 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, that until the appeals are determined, S.S. shall continue in the care of L.M. and R.B. She also ordered that the appeals be heard together. That order, of course, upon release of these reasons for judgment, will be spent.

13 In these appeals, L.M. and R.B. seek an order that S.S. be adopted by them, and in the alternative, an order remitting the issues not addressed by Mr. Justice Macintosh to the trial court, with S.S. remaining in their care for the interim.

14 In aid of their appeals, L.M. and R.B. apply to adduce fresh evidence in the form of three affidavits. The main affidavit (of Dawn Thibeault) appends documents filed in the Provincial Court of British Columbia by which the birth parents applied to cancel the continuing custody order, and a further third petition filed in the Supreme Court of British Columbia on May 30, 2016. In this third petition, which is not before us for consideration, the birth parents invoke the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, in respect to decisions of the Director engaging provisions of the *Child, Family and Community Service Act*, wrapping into it a plea for relief under ss. 7, 8, 15 and 24 of the *Charter* and tangentially touching upon the Director's plans and their accordance with the *Adoption Act*.

15 This affidavit describes the status of court proceedings in respect to S.S. In my view, it contains materials that should be admitted to apprise us of the status of the continuing custody order which underpins the Director's decision. I would admit the affidavit of Dawn Thibeault sworn May 30, 2016.

16 I would not admit two other affidavits tendered by the appellants as fresh evidence — one from the birth mother and one from Keith Henry, president of the B.C. Métis Foundation — as evidence in these appeals for the reason they are affidavits prepared for the Provincial Court proceedings. They are, however, also attached as exhibits to the affidavit of Dawn Thibeault as documents filed in the Provincial Court. The fact such affidavits have been sworn is accordingly before us, but I have not considered their content in preparing these reasons for judgment.

17 The Director also applies to adduce new evidence, being the affidavit of Lise Erikson, the Executive Director of Service for South Island, Vancouver Island Region, for the British Columbia Ministry of Children and Family Development. Ms. Erikson has been designated a Director under s. 91 of the *Child, Family and Community Service Act*. She deposes that she may delegate, and has delegated, powers, duties and functions of the Director to social workers under s. 92 of that *Act*. The substance of her affidavit addresses the plans made for S.S., incorporates a report examining and commenting on the plans for S.S., and expresses her views on the best interests of S.S.

18 On the view I take, explained below, that the orders dismissing the first two petitions of September 2015 and January 2016 do not address the decisions taken by the Director under the *Child, Family and Community Service Act*, I consider this affidavit is not material to these appeals. It is relevant to the third petition filed by the birth parents addressing the processes under the *Child, Family and Community Service Act*. Accordingly, I would not admit the affidavit of Lise Erikson on these appeals.

19 Since the hearing of these appeals and pursuant to our request to be informed of the proceedings relating to the continuing custody order, we have been advised by way of affidavit that the Provincial Court has declined to cancel the continuing custody order.

20 L.M. and R.B. now ask us to delay this decision to allow for a decision in the Supreme Court of British Columbia in respect to yet further court proceedings. While it is of general interest to this court to be aware of further legal proceedings, there is no need, in my view, to delay these appeals which address two discrete orders and which stand on their own.

## Discussion

*Appeal CA43296*

21 By the petition giving rise to this appeal L.M. and R.B. addressed the issue as one of adoption, here and in Ontario. They invoke both the *parens patriae* jurisdiction of courts and the principle of the best interests of the child, in saying the judge erred in failing to make the orders they sought concerning adoption.

22 The good intentions of L.M. and R.B. to S.S. are not disputed by the Director, but she denies the availability of the relief sought, rightly so in my view. L.M. and R.B. face an insurmountable hurdle to achieving the relief sought in the first petition — the adoption scheme in British Columbia does not provide for adoption of a child by foster parents at the behest of a court, outside of the statutorily mandated process for adoption.

23 The *Adoption Act* provides for placement for adoption with a resident of British Columbia:

4 (1) The following may place a child for adoption:

(a) a director who

(i) has care and custody of the child under section 23, or

(ii) is the guardian of the child under section 24;

(b) an adoption agency;

(c) a parent or other guardian of the child, by direct placement in accordance with this Part;

(d) a parent or other guardian related to the child, if the child is placed with a relative of the child.

(2) In addition to the authority under subsection (1) (a), a director may, at the request of a director of child protection, place a child for adoption with the person or persons selected by the director of child protection, if

(a) the child is in the continuing custody of the director of child protection, or

(b) the director of child protection is the child's personal guardian under section 51 of the *Infants Act*.

...

5 (1) A child may be placed for adoption with one adult or 2 adults jointly.

(2) Each prospective adoptive parent must be a resident of British Columbia.

24 The *Act*, in Part 2, provides for consent:

13 (1) The consent of each of the following is required for a child's adoption:

(a) the child, if 12 years of age or over;

(b) the child's parents;

(c) the child's guardians.

(d) [Repealed 2011-25-268(a).]

...

(3) If the child is in the continuing custody of a director of child protection, or a director of child protection is the child's personal guardian under section 51 of the *Infants Act*, the only consents required are

- (a) the director of child protection's consent, and
- (b) the child's consent, if the child is 12 years of age or over.

...

17 (1) On application, the court may dispense with a consent required under this Part if the court is satisfied that it is in the child's best interests to do so or that

- (a) the person whose consent is to be dispensed with is not capable of giving an informed consent,
- (b) reasonable but unsuccessful efforts have been made to locate the person whose consent is to be dispensed with,
- (c) the person whose consent is to be dispensed with
  - (i) has abandoned or deserted the child,
  - (ii) has not made reasonable efforts to meet their parental obligations to the child, or
  - (iii) is not capable of caring for the child, or
- (d) other circumstances justify dispensing with the consent.

(2) Despite subsection (1), the court may dispense with the consent of a child only if the child is not capable of giving an informed consent.

(3) Before making an order under this section, the court may consider any recommendation in a report filed by a director or by an adoption agency.

(4) An application under this section may be made without notice to any other person and may be joined with any other application that may be made under this Act.

25 Section 29 gives the court authority in these terms:

29 (1) One adult alone or 2 adults jointly may apply to the court to adopt a child in accordance with this Act.

(2) One adult may apply to the court to become a parent of a child jointly with another parent.

(3) Each applicant must be a resident of British Columbia.

26 And, in s. 82 the Court forbids placement of children for adoption in the absence of compliance with s. 4:

82 (1) A person must not place or arrange the placement of a child for the purposes of adoption unless the person is authorized by section 4 to do so.

(2) A person must not receive a child in their home for the purposes of adoption unless the child has been placed by a person authorized by section 4 to do so.

(3) A person must not receive a child placed in their home by direct placement unless the person has complied with section 8 (1) and is authorized under section 9 to receive the child.

(4) A person who contravenes this section commits an offence and is liable to a fine of up to \$5 000.

27 Continuing custody of a director, referred to in s. 13, is obtained under s. 50(1) of the *Child, Family and Community Service Act* and has the effect of making the director appointed under that Act the sole guardian of the child:

50 (1) When an order is made placing a child in the continuing custody of a director,

(a) the director becomes the sole personal guardian of the child and may consent to the child's adoption,

(b) the Public Guardian and Trustee becomes the sole property guardian of the child, and

(c) the order does not affect the child's rights respecting inheritance or succession to property.

28 Foster parents are, formally, care givers within the meaning of s. 94 of the *Child, Family and Community Service Act*:

94 A director may, by agreement, authorize a caregiver to carry out any of the director's rights and responsibilities with respect to the care, custody or guardianship of a child placed with the caregiver.

29 Adoption is a specific legal device created by legislation to reassign legal relationships in respect to a person, usually a child. In historical terms, adoption is relatively new. In "Interrupted Relations: The Adoption of Children in Twentieth-Century British Columbia", (Winter 2004/2005) No. 144 B.C. Studies 5, Veronica Strong-Boag recounts the legal history of adoption in British Columbia, starting with the first *Adoption Act* passed in 1920. Before that *Act* there was no legal process of adoption in this province. Since the *Act*, adoption has been effected by an entirely statutory process.

30 In my view, it has not been open, and is not open, to a court to make an adoption order, fundamentally altering the identity of a person's parents, where such a process is not provided by legislation. The few cases in which courts have asserted *parens patriae* jurisdiction and waived procedural requirements are more properly seen as applications of the clearly discernible intention of the legislature, and not as examples of the court circumventing legislative intent to effect an adoption. In other words, a positive order for adoption must come within the scheme intended by the legislature; there is no free roving commission residing in the courts to alter the otherwise fundamental precepts of legal familial bonds.

31 This proposition as to the lack of jurisdiction in a court to order adoption outside the scheme of the *Act* is entirely consistent with the law as it relates to *parens patriae* jurisdiction.

32 The *parens patriae* jurisdiction of a court is founded on an obligation of the Crown to protect those who owe the Crown allegiance: Christine Davies, *Family Law in Canada*, (Toronto: Carswell, 1984) at 291-292.

33 Where there is a legislative scheme, this protective jurisdiction of the court applies only when there is a gap in that legislation: *Beson v. Newfoundland (Director of Child Welfare)*, [1982] 2 S.C.R. 716, 142 D.L.R. (3d) 20 (S.C.C.). It is sometimes said that the *parens patriae* jurisdiction can be used to clothe the court with the ability to interfere where malice or bad faith is established. Those concepts, however, are not unique to *parens patriae* issues, and I consider they properly belong to the general framework of judicial review. Use of *parens patriae* jurisdiction is, accordingly, not meant to be an avenue for statutory amendment or broad interference with existing laws, and does not create substantive rights: *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 112 O.A.C. 78, 41 O.R. (3d) 257 (Ont. C.A.); *P. (E.) v. British Columbia (Superintendent of Family & Child Service)* (1988), 23 B.C.L.R. (2d) 329, 48 D.L.R. (4th) 469 (B.C. S.C.). In *P. (E.)*, one of a series of cases dealing with the rights of foster parents, Mr. Justice Anderson for the court addressed an application by foster parents for custody and access under the *Family and Child Service Act*, S.B.C. 1980, c. 11. He explained *parens patriae* jurisdiction and referred compendiously to the opinion of Lord Evershed in *M., Re*, [1961] 1 All E.R. 788 (Eng. C.A.) at 790-93, including:

The main part of counsel for the appellant's argument was simple. It was that the ancient prerogative [*parens patriae*] will not be held by the courts to be ousted or restricted by any statute unless the statute in question does so expressly or by clear implication of its terms. That general proposition I accept, for it is well established (see, e.g., the language of Lindley, L.J., in *Wheaton v. Maple & Co.*, [1802] 3 Ch. at p. 64). On the other hand, the necessary clear inference

may be drawn when a statute deals with a matter subject to the exercise of the royal prerogative and provides in precise terms a new means of securing the same result ...

34 Mr. Justice Anderson referred also to *Galbraith v. British Columbia (Superintendent of Family & Child Services)* (1981), 25 R.F.L. (2d) 244 (B.C. S.C.) at 251, (1981), 51 B.C.L.R. 314 (B.C. S.C.), in turn referring to his earlier decision *C., Re* (1977), 4 R.F.L. (2d) 3 (B.C. S.C.) at 20, (1977), 4 B.C.L.R. 374 (B.C. S.C.), in holding that the adoption scheme then in force, which did not overtly permit foster parents to apply under the *Family and Child Service Act* (as it was then called) for custody, access or adoption, could not be stretched to incorporate that right using the doctrine of *parens patriae* jurisdiction.

35 This proceeding has been described as one in which L.M. and R.B. have been denied relief on the basis they lack standing. I would not characterize Mr. Justice Macintosh's decision in that fashion. A case invoking *parens patriae* jurisdiction may always be advanced by a person seeking the court's interference on behalf of a child: *S. (L.) v. British Columbia (Ministry of Children & Family Development)*, 2004 BCCA 244 (B.C. C.A.) at paras. 50-51. It seems to me, rather, that the two essential legal flaws in the petition as it relates to adoption are that it ascribes a legal status to the foster parents in respect of S.S. that they do not have, and it fails to identify an applicable gap in legislation. It appears that L.M. and R.B. identified legislative choices to allow rights of appeal to some persons and not to others, to mandate certain steps in adoption proceedings, and to assign decision-making responsibility to the Director of Adoption, and they say those legislative choices should have been different and should accord them rights in respect to adoption because they have cared for S.S. This, with respect, is not a basis upon which they can achieve the objective of adoption, pursued in the first petition.

36 In *M. (W.A.) v. British Columbia (Superintendent of Family & Child Services)* (1985), 65 B.C.L.R. 229, 47 R.F.L. (2d) 173 (B.C. C.A.), this court discussed its capacity to review a decision of the Superintendent in respect to removing a ward from a home after allegations of abuse:

[6] Is there a gap in the legislation here? One was found in the *Beson* case. The legislature clearly intended in the *Adoption of Children Act*, 1972 [1972 (Nfld.), c. 36] to give a right of appeal to the appeal board to persons aggrieved by the decision of the director refusing a certificate under s. 11. But, in fact, no appeal lay from a decision of the director made prior to expiration of the six-month period in which the child had to reside with the applicants for adoption. I cannot find a legislative gap in our *Adoption Act*. The legislature clearly intended to withhold from the court power to dispense with consent where the child is a permanent ward of the superintendent. The court may be of the opinion that it should have that power. But that does not create a legislative gap.

[7] In this case the petitioners are limited to judicial review. They can succeed if they show that the superintendent's representatives failed to treat them fairly: see *Nicholson v. Haldimand-Norfolk Police Commr. Bd.*, [1979] 1 S.C.R. 311, 78 C.L.L.C. 14,181, 88 D.L.R. (3d) 671, 23 N.R. 410, and the *Beson* case. Fair treatment excludes arbitrariness, capriciousness and bad faith.

[8] What is the duty of this court? We should interfere with the judgment if we are satisfied that the judge was plainly wrong in failing to find bad faith and capriciousness. If we are not satisfied in that respect, we should go on to consider whether, nevertheless, the M.s were treated unfairly. So the circumstances have to be examined.

37 It is clear here that the Director is the sole personal guardian of S.S. under the continuing custody provisions of the *Child, Family and Community Service Act*. The Director has the power to select the persons with whom S.S. is placed for adoption: *Adoption Act*, s. 4(2), and s. 82 forbids the placement of a child for adoption unless the person is authorized by s. 4 to do so. It is the Director's decision as to where to place children in her care. This decision-making power is reflected in the contract she enters into with foster parents pursuant to her statutory authority. The contract in this case gives her full discretion to remove S.S. from the care of L.M. and R.B.

38 Further, s. 13 provides that any adoption must have the Director's consent. Here the appellants point to s. 17 and say by allowing the court to dispense with the consents required, including by s. 13, s. 17 allows the court to give the relief they seek. I do not agree. While it is clear that s. 17 necessarily allows for dispensation of a consent required by s. 13, it does not assist the appellants because it does not provide an avenue for dispensation of other critical steps of the adoption process, most centrally the mandatory framework surrounding the placement of a child for adoption. Nor am I of the view that this understanding of s. 17 renders the language of s. 17 mere surplusage. The introductory words of s. 17(1) and s. 17(1)(d) have utility by opening the possibility of court assistance in the matter of consent in circumstances not directly, or not clearly, addressed in s. 17(1)(a)-(c): e.g., *British Columbia Birth Registration No. XX-XX297, Re*, 2015 BCSC 1577 (B.C. S.C.).

39 In my view, the combination of the power given to the Director by the *Child, Family and Community Service Act*, and by specific reference to her in s. 4(2) of the *Adoption Act*, demonstrates that the legislature intended the Director to have full control over these matters such that there is no role for the exercise of *parens patriae* jurisdiction to effect the adoption of S.S. by the appellants.

40 On this view of the legislation, it is plain that the petition in front of Mr. Justice Macintosh for orders in respect to adoption in British Columbia sought relief beyond the powers of the court and he was correct to dismiss those aspects of the petition.

41 The appellants also challenge the dismissal by Mr. Justice Macintosh of their claim for other relief, including judicial review of the decision of the Director to have S.S. adopted by non-aboriginal individuals in Ontario. I consider this claim mischaracterized the decision of the Director; with respect, the decision is not approving an adoption in Ontario but rather is a decision made under the *Child, Family and Community Service Act* allowing a child to be put in care in another province.

42 The provisions of the *Adoption Act* are not engaged by the decision of the Director at this stage.

43 L.M. and R.B. relied upon *M. (A.A.A.) v. British Columbia (Director of Adoption)*, 2016 BCSC 842 (B.C. S.C.), in which Madam Justice Young held that the Director's interprovincial adoption placement of a child in Alberta was *ultra vires* the geographic limits of her authority under the *Adoption Act*, and extended the reach of the *Act* beyond geographic limits of the province's legislative competence. *M. (A.A.A.)*, in my view, is not applicable to the circumstance before us because this case concerns a placement outside of British Columbia under the *Child, Family and Community Service Act*, not a placement under the *Adoption Act*. Accordingly, I do not address the respondents' submissions that *M. (A.A.A.)* was wrongly decided.

44 Last, L.M. and R.B. challenge the Director's consideration of S.S.'s Métis heritage and say that inadequate attention was given to this circumstance by Mr. Justice Macintosh. It is true he did not explore this aspect at length. However, this complaint could apply only to the Director's decision under the *Child, Family and Community Service Act* to place the child in Ontario, and that decision was not the subject of the petition.

45 As can be seen by these reasons, there has been considerable criticism by L.M. and R.B. of the Director's decision to place S.S. with the Ontario couple concerning the best interests of S.S. Those are matters that are properly for judicial review, in my view, in the context of the applicable statutory framework, and are not part of the first petition described in para. 7 above. Accordingly, I decline to comment on those matters.

46 For these reasons, I would dismiss the appeal in respect to the order of Mr. Justice Macintosh.

***Appeal CA43470***

47 L.M. and R.B. also appeal from the order of Madam Justice Choi dismissing the second petition on the grounds of *res judicata*. The appellants contend that Madam Justice Choi erred in failing to recognize that the second petition claimed relief under the *Charter* that was only made necessary by the decision of Mr. Justice Macintosh.

48 I would not accede to this submission.

49 Constitutional arguments do not attract an exception to the general approach brought to *res judicata*: *Tsawwassen Indian Band v. Delta* (1997), 37 B.C.L.R. (3d) 276 (B.C. C.A.) at paras. 66-71, (1997), 149 D.L.R. (4th) 672 (B.C. C.A.), and on that general approach Madam Justice Choi was correct, in my view, for two reasons. First, the second petition is based on substantially the same facts as the first petition. Second, the *Charter* argument could have been raised in the proceedings before Mr. Justice Macintosh, as it should have been within the appellants' contemplation that he may dismiss the petition, thus raising these potential *Charter* issues.

50 I would say further that this court is not in a position to decide the *Charter* arguments raised given the absence of an evidentiary record sufficient for determination of those issues.

51 In my view, this appeal must be dismissed.

52 I am mindful, in preparing these reasons for judgment, that L.M. and R.B. are pursuing the best interests of S.S. as they see them. The comments of Mr. Justice Maczko in *K. (C.) v. British Columbia (Ministry of Children & Family Development)*, 2003 BCSC 785 (B.C. S.C. [In Chambers]) (in Chambers), described the uncertain status of foster parents in relation to the children in their care:

[45] It is highly probable that foster parents will become attached to the children they care for, particularly when they receive the children immediately after birth. I cannot help but express my admiration for the people who take in needy, handicapped children and care for them as though they were their own.

[46] Unfortunately, the lot of a foster parent is inherently insecure. There are competing interests, such as the interests of biological parents and biological siblings. The legislature anticipated such problems and carefully crafted a statute to ensure that the Director has the necessary discretion to act freely in the best interests of the child in care. ...

53 In his comprehensive reasons in *K. (T.O.) v. British Columbia*, 2003 BCSC 1248 (B.C. S.C.), Mr. Justice Parrett commented on the role of foster parents:

[118] I am troubled by the underlying circumstances of the present case, for it seems clear that the role of foster parents in our society is in transition. These caregivers play an important role yet lack many of the rights which generally attach to those who serve in the capacity of parents. At the same time, there are good reasons for maintaining a separate and distinct role for foster parents compared to that of the parental authority. Foster parents are essentially contract parents. They provide a safe environment for a child in a time of transition or need. While there are certainly exceptions, generally these placements are intended to be temporary, and the contracts made create a clearly defined set of obligations and rights for all parties involved. There are a great many implications which would flow from the alteration of those relationships, not least of which would be increased levels of litigation and uncertainty.

54 I agree with the observations of both Mr. Justice Maczko and Mr. Justice Parrett, and conclude the relief sought by L.M. and R.B. in both petitions before us is simply not available.

## Conclusion

55 I would allow the application to adduce the evidence of Dawn Thibeault, but dismiss the other applications to admit fresh evidence. I would dismiss both appeals.

***Kirkpatrick J.A.:***

I AGREE:

***Bennett J.A.:***

I AGREE:

***Goepel J.A.:***

I AGREE:

***Savage J.A.:***

I AGREE:

*Appeals dismissed.*

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# CONSTITUTIONAL LAW OF CANADA

Fifth Edition Supplemented

Volume 2

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# 58

## EFFECT OF UNCONSTITUTIONAL LAW

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### 58.1 Invalidity of unconstitutional law

What is the effect of a judicial decision that a law is unconstitutional? Section 52(1) of the Constitution Act, 1982 (the supremacy clause) provides that the Constitution of Canada is “the supreme law of Canada”, and that “any law that is inconsistent with the provisions of the Constitution” is “of no force or effect”. This supremacy clause dates only from 1982, but it states a principle that has always been part of Canadian constitutional law. A law enacted outside the authority granted by the Constitution is ultra vires, invalid, void, a nullity. As Field J. said in the Supreme Court of the United States in 1886: “An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed”.<sup>1</sup>

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<sup>1</sup> *Norton v. Shelby County* (1886) 118 U.S. 425, 442.

## 58.5 Res judicata

The doctrine of res judicata stipulates that a judicial decision is binding on the parties to the litigation, so that the same issue may not be re-litigated by the losing party. Once decided by a court of competent jurisdiction, an issue is said to be res judicata. The doctrine of res judicata is needed in order to bring disputes to an end. The doctrine precludes the re-opening of a decided case, even if it later becomes clear that the case was wrongly decided. The doctrine can have the effect of preserving the consequences of an unconstitutional law. After a law has been held to be unconstitutional, prior judicial decisions in which the law was applied remain binding and unreviewable (unless there is still time to appeal).<sup>40</sup>

In *R. v. Vaillancourt* (1987),<sup>41</sup> the Supreme Court of Canada held that the Criminal Code offence of felony-murder was unconstitutional, because it violated the accused's right to fundamental justice under s. 7 of the Charter of Rights. The accused in that case, who had been convicted of the offence at trial, was therefore entitled to be acquitted. But what was to become of all the other persons already serving prison sentences for the non-existent offence of felony-murder?

In *R. v. Thomas* (1990),<sup>42</sup> this question was raised by an accused who had been convicted of felony-murder in 1984 — three years before the Court's ruling in *Vaillancourt* — and who had unsuccessfully appealed to the British Columbia Court of Appeal (where he had not raised any constitutional issue). After the Supreme Court of Canada's ruling in *Vaillancourt*, Mr. Thomas applied to the Supreme Court of Canada for leave to appeal from the affirmation of his conviction by the British Columbia Court of Appeal. The time limit for such an application was 21 days, and Mr. Thomas was three years out of time. However, the Supreme Court of Canada had power to extend the time where there were "special reasons" to do so. A three-judge bench of the Supreme Court of Canada refused to extend the time and grant leave to appeal. Sopinka J. held that relief was precluded, because the accused was no longer "in the judicial system". An accused would be in the judicial system if there was still time to appeal, but an application for an extension of time should be granted only on "the criteria that normally apply in such cases". These criteria required that an intention to appeal be formed within the stipulated time, and that there be an adequate explanation for the delay. The fact that the accused had been convicted under a law subsequently held to be unconstitutional was not a sufficient reason to bring him "artificially" into the system.

In *R. v. Thomas*, the accused, although he was unsuccessful because he was out of time to appeal, had chosen the most promising route to review his convic-

40 *Re Man. Language Rights* [1985] 1 S.C.R. 721, 757 ("res judicata would preclude the re-opening of cases decided by the courts on the basis of invalid laws"); Gibson, *The Law of the Charter: General Principles* (1986), 179.

41 [1987] 2 S.C.R. 636.

42 [1990] 1 S.C.R. 713.

tion, that is, a *direct* attack in the form of an appeal. An appeal is not precluded by the doctrine of *res judicata*. The doctrine of *res judicata* would be a conclusive answer to a *collateral* attack on the accused's conviction, for example, an application for habeas corpus, an action for a declaration that the accused was illegally in custody, an action for damages for false imprisonment or a defence to a charge of escaping from lawful custody. All such collateral attacks would fail on the ground that the accused was in custody pursuant to the judgment of a court of competent jurisdiction.<sup>43</sup> The fact that the convicting court had made an error of law in applying an unconstitutional statute would not deprive the court of jurisdiction.<sup>44</sup> Only an absence of jurisdiction, rendering a decision a nullity, would expose a judicial decision to collateral attack.<sup>45</sup>

### 58.6 De facto officers

The de facto officer doctrine protects from collateral attack the act of an officer who has apparent (de facto) authority to act, but who lacks the legal (de jure) authority.<sup>46</sup> The doctrine does not prevent a direct attack on the legality of the officer's title to the position: a direct attack would be a proceeding to remove the officer. Nor does the doctrine protect the officer himself from liability: we have already noticed that the personal liability of an officer who acts without legal authority is a basic tenet of the rule of law.<sup>47</sup> What the doctrine does is to protect third parties, who are not normally in a position to verify the lawfulness of an officer's appointment, and who are therefore entitled to rely on the ostensibly official acts of a person acting as an officer, even though he holds an invalid or non-existent appointment. For example, a seizure of property under a search warrant issued to a person who had not been properly appointed a police constable has been upheld on the ground that the holder of the warrant had performed the functions of a police constable for several years, and held the office de facto.<sup>48</sup> The Court said<sup>49</sup> that "the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons . . . legal and binding".

43 *Turigan v. Alta.* (1988) 53 D.L.R. (4th) 321 (Alta. C.A.) (person convicted under unconstitutional law cannot recover fine, because fine is *res judicata*).

44 *Ibid.*

45 See generally A. Rubinstein, *Jurisdiction and Illegality* (Clarendon Press, Oxford, 1965), esp. ch. 1.

46 Constantineau, *A Treatise on the De Facto Doctrine* (1910); Rubinstein, note 45, above, 205-208; C.L. Pannam, "Unconstitutional Statutes and De Facto Officers" (1966) 2 Fed. L. Rev. 37; Gibson, note 40, above, 176-178.

47 Note 27, above. *Crown Trust Co. v. The Queen* (1986) 54 O.R. (2d) 79 (Div. Ct.) applies the de facto doctrine to immunize the officer from personal liability. That is wrong.

48 *O'Neil v. A.G. Can.* (1896) 26 S.C.R. 122.

49 *Id.*, 130.

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1996 CarswellOnt 5035  
Supreme Court of Canada

Eaton v. Brant (County) Board of Education

1996 CarswellOnt 5035, 1996 CarswellOnt 5036, [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241, 142 D.L.R. (4th) 385, 207 N.R. 171, 31 O.R. (3d) 574 (note), 41 C.R.R. (2d) 240, 68 A.C.W.S. (3d) 863, 97 O.A.C. 161, J.E. 97-344

**The Brant County Board of Education and the Attorney General for Ontario (Appellants) v. Carol Eaton and Clayton Eaton (Respondents) and The Attorney General of Quebec, The Attorney General of British Columbia, The Canadian Foundation for Children, Youth and the Law, The Learning Disabilities Association of Ontario, The Ontario Public School Boards' Association, The Down Syndrome Association of Ontario, The Council of Canadians with Disabilities, La Confédération des organismes de personnes handicapées du Québec, The Canadian Association for Community Living, People First of Canada, The Easter Seal Society, La Commission des droits de la personne et des droits de la jeunesse (Interveners)**

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

Heard: October 8, 1996

Judgment: October 9, 1996

Written reasons: February 6, 1997

Docket: 24668

Proceedings: reversed (1995), 22 O.R. (3d) 1 (C.A.)

Counsel: *Christopher G. Riggs, Q.C., Andrea F. Raso and Brenda J. Bowlby*, for Appellant Brant County Board of Education.

*Dennis W. Brown, Robert E. Charney and John Zarudny*, for Appellant Attorney General for Ontario.

*Stephen Goudge, Q.C., and Janet L. Budgell*, for Respondents.

*Isabelle Harnois*, for Intervenor Attorney General of Quebec.

Written submissions only by *Lisa Mrozinski*, for Attorney General of British Columbia.

Written submissions only by *Cheryl Milne* for Canadian Foundation for Children, Youth and the Law, and Learning Disabilities Association of Ontario.

*Brenda J. Bowlby*, for Intervenor Ontario Public School Boards' Association.

*W.I.C. Binnie, Q.C., and Robert Fenton*, for Intervenor Down Syndrome Association of Ontario.

*David W. Kent, Melanie A. Yach and Geri Sanson*, for Interveners Council of Canadians with Disabilities, la Confédération des organismes de personnes handicapées du Québec, Canadian Association for Community Living, and People First of Canada.

*Mary Eberts and Lucy K. McSweeney*, for Intervener Easter Seal Society.

*Philippe Robert de Massy*, for Intervenor Commission des droits de la personne et des droits de la jeunesse.

Subject: Constitutional; Public

APPEAL by Board of Education and Attorney General for Ontario from decision reported at (1995), 22 O.R. (3d) 1, 27 C.R.R. (2d) 53, 123 D.L.R. (4th) 43, (sub nom. *Eaton v. Board of Education of Brant County*) 77 O.A.C. 368 (C.A.), reversing decision reported at (1994), 71 O.A.C. 69 (Div. Ct.), dismissing respondent parents' application for judicial review of decision of Ontario Special Education Tribunal, confirming placement of disabled child in special education class contrary to wishes of parents.

**Lamer C.J.C. (Gonthier J. concurring):**

1 I concur with Justice Sopinka's analysis of the arguments made under s. 15(1) of the *Canadian Charter of Rights and Freedoms* and his conclusion that there was no violation of Emily Eaton's equality rights. However, I wish to address briefly an issue which he has chosen not to explore in light of his conclusion on s. 15(1) — the incorrect manner in which the court below applied my judgment in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, to find that the source of the alleged discrimination against Emily Eaton was the *Education Act*, R.S.O. 1990, c. E.2. Although it is, strictly speaking, unnecessary to address this question, because the *Charter* was not violated, I think it important that I address it because I do not want to leave the impression that I believe this portion of the Court of Appeal's judgment was correct.

2 To understand how the Court of Appeal erred in its application of *Slaight Communications*, it is necessary to recapitulate briefly an aspect of the proceedings in that court. After having found that the separate placement of Emily Eaton violated s. 15(1) of the *Charter*, Arbour J.A. went on to consider the source of the discrimination. This issue arose because the order to place Emily Eaton in a special classroom was taken pursuant to the regime for special education which is centred on the *Education Act*, but was made by an administrative tribunal, the Ontario Special Education Tribunal. However, Arbour J.A. characterized the respondents' argument as an attack neither on the Act, nor on the order of the Tribunal, but on the *reasoning* of the Tribunal. Then, citing *Slaight Communications*, she went on to hold at p. 19 that the "legislative scheme provides no impediment to the method and reasoning employed by the IPRC, Appeal Board and Tribunal", and for that reason was unconstitutional.

3 Arbour J.A.'s judgment can be summarized as follows — the constitutional imperfection of the *Education Act* resides in *what it does not say*; what it does not prohibit explicitly, the statute must authorize, including unconstitutional conduct. However, in *Slaight Communications*, where I dissented in the result but spoke for the majority on this very issue, I held exactly the opposite — that statutory silences should be read down to not authorize breaches of the *Charter*, unless this cannot be done because such an authorization arises by necessary implication. I developed this principle in the context of administrative tribunals which operate pursuant to broad grants of statutory powers, and which can potentially violate *Charter* rights. Whatever section of the Act or of Regulation 305, R.R.O. 1990, grants the authority to the Tribunal to place students like Emily Eaton — a question which I need not address — *Slaight Communications* would require that any open-ended language in that provision (if there were any) be interpreted so as to not authorize breaches of the *Charter*.

4 For the reasons stated above, I agree with Sopinka J. in his disposition of this appeal.

**Sopinka J. (La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. concurring):**

5 The issue in this case is whether a decision of the Ontario Special Education Tribunal (the "Tribunal") confirming the placement of a disabled child in a special education class contrary to the wishes of her parents contravenes the equality provisions of s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal held that it did. I have concluded that the decision of the Tribunal was based on what was in the best interests of the child and that in the circumstances no violation of s. 15(1) of the *Charter* occurred. The Court of Appeal went on to consider the validity of s. 8 of the *Education Act*, R.S.O. 1990, c. E.2 (the Act) and found it to be constitutionally deficient in authorizing the Tribunal to proceed as it did. No notice of a constitutional question had been given in accordance with s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I conclude that the constitutional issue was not open to the Court of Appeal

but, in any event, in view of the fact that the decision of the Tribunal complied with s. 15(1) of the *Charter*, it was not necessary to consider whether s. 8 was constitutionally valid.

## Facts

6 The respondents, Carol and Clayton Eaton, are the parents of Emily Eaton, a 12-year-old girl with cerebral palsy. Emily is unable to speak, or to use sign language meaningfully. She has no established alternative communication system. She has some visual impairment. Although she can bear her own weight and can walk a short distance with the aid of a walker, she mostly uses a wheelchair.

7 When she began kindergarten, Emily attended Maple Avenue School, which is her local public school. The Identification, Placement, and Review Committee ("IPRC") of the Brant County Board of Education (the "appellant") identified Emily as an "exceptional pupil" and, at the request of her parents, determined that she should be placed on a trial basis in her neighbourhood school. A full-time educational assistant, whose principal function was to attend to Emily's special needs, was assigned to her classroom. At the end of the school year, the IPRC determined that Emily would continue in kindergarten for the following year. This arrangement was continued into Grade 1. A number of concerns arose as to the appropriateness of her continued placement in a regular classroom. The teachers and assistants concluded, after three years of experience, that the placement was not in Emily's best interests and might well harm her.

8 The IPRC determined that Emily should be placed in a special education class. Emily's parents appealed this decision to a Special Education Appeal Board, which unanimously confirmed the IPRC decision. The parents appealed again to the Tribunal, which also unanimously confirmed the decision. The Tribunal heard from a large group of witnesses and made numerous findings of fact which are described below. The parents then applied for judicial review to the Divisional Court, Ontario Court of Justice (General Division), which dismissed the application. However, the Court of Appeal allowed the subsequent appeal and set aside the Tribunal's order. The court held that s. 8 of the Act should be read to include a direction that, unless the parents of a disabled child consent to the placement of that child in a segregated environment, the appellant must provide a placement that is the least exclusionary from the mainstream and still reasonably capable of meeting the child's special needs. The court also ordered that the matter be remitted to a differently constituted Tribunal for rehearing. With leave of this Court, the appellant appealed from that decision. Shortly after the conclusion of argument, the Court gave judgment allowing the appeal with costs and with reasons to follow.

## II. Relevant Statutory Provisions

9 In the *Education Act*, exceptional pupils are defined as follows:

1. — (1) ...

"exceptional pupil" means a pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program by a committee ... of the board.

10 Section 8(3) sets out the Minister of Education's responsibility for the provision of special education in Ontario:

8. ...

(3) The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement, and for these purposes the Minister shall,

(a) require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and

(b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.

11 Regulation 305 (Special Education Identification Placement and Review Committees and Appeals), R.R.O. 1990, under the *Education Act*, requires that every board of education set up an IPRC and establishes the process by which exceptional students are identified and placed, and the process by which parents may appeal the IPRC's decision.

6. — (1) An exceptional pupil shall not be placed in a special education program without the written consent of a parent of the pupil.

(2) Where a parent of an exceptional pupil,

(a) refuses or fails to consent to the placement recommended by a committee and to give notice of appeal under section 4; and

(b) has not instituted proceedings in respect of the determinations of the committee within thirty days of the date of the written statement prepared by the committee,

the board may direct the appropriate principal to place the exceptional pupil as recommended by the committee and to notify a parent of the pupil of the action that has been taken.

12 The *Courts of Justice Act*, s.109(1), states that:

109. — (1) Where the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature or of a regulation or by-law made thereunder is in question, the Act, regulation or by-law shall not be adjudged to be invalid or inapplicable unless notice has been served on the Attorney General of Canada and the Attorney General of Ontario in accordance with subsection (2).

13 The *Canadian Charter of Rights and Freedoms* states that;

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

### III. Judgments in Appeal

#### *Tribunal*

14 The respondents requested that the Tribunal set aside the placement decision of the IPRC, and asked that the Tribunal direct that Emily be placed full time, in a regular, age-appropriate class, with full accommodation of her special needs. The Tribunal heard from the respondents, speech, occupational and physical therapists familiar with Emily, parents of some of Emily's classmates, a witness who, himself, had received a segregated education before high school, Emily's teachers, special assistants and principal at Maple Avenue School, the Board Superintendent, and a special education teacher with the Board.

15 The Tribunal stated the principal question as "whether Emily Eaton's special needs can be met best in a regular class or in a special class." The Tribunal considered the wishes of Emily's parents; the empirical evidence available from Emily's three school years in a regular classroom setting; the evidence from the literature on placement; the testimony of experts in the matter of classroom placement; the Ontario Ministry of Education and Training's proposed directions regarding the integration of exceptional pupils; and the *Charter* and Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, in reaching its conclusion that the IPRC placement decision was the best placement for Emily.

16 The Tribunal observed at the outset that it is the extent of Emily's special needs which provokes consideration of a special placement, and not the fact that her needs are different from the mainstream. The Tribunal then reviewed Emily's needs under a number of headings and made numerous findings of fact upon which it based its decision.

17 *Intellectual and Academic Needs:* Despite the difficulty in assessing Emily's intellectual abilities owing to her inability to communicate, the Tribunal nevertheless found that there was considerable evidence that Emily had a profound learning deficit, and that there was a wide and significant intellectual and academic gap between her and her peers. The Tribunal considered the testimony presented on the subject of the "parallel curriculum" approach in which an adapted curriculum is delivered in the regular classroom setting. However, the Tribunal concluded that "[e]xperience demonstrates that in practice, "parallel curriculum" benefits the receiver when it is realistically parallel. But when a curriculum is so adapted and modified for an individual that the similarity - the parallelism - is objectively unidentifiable, the adaptation becomes mere artifice and serves only to isolate the student." The Tribunal concluded that it was clear from the evidence that "a 'parallel' learning program specifically designed to meet [Emily's] intellectual needs, isolates her in a disserving and potentially insidious way."

18 *Communication Needs:* Emily has very limited abilities to communicate. Carol Eaton and Emily's educational assistants testified "that to learn sign, Emily needs repetitive, hand-over-hand instruction". The evidence suggested that despite this approach, Emily cannot yet communicate using sign. The importance of communication was emphasized by the Eatons' witness, Robert Williams, an adult with cerebral palsy who communicates by means of assistive technology. The Tribunal concluded that "Emily's need to communicate is going to be met only with very individualized, highly specialized, extremely intense, one-on-one instruction. Because this need is of such over-riding importance for Emily, it makes sense to address it, at least initially, and until she demonstrates some minimal competence, in a setting where there will be maximum opportunity for such instruction."

19 *Emotional and Social Needs:* The Tribunal relied on the testimony of Emily's parents, teachers and educational assistants in assessing these needs. The teachers and educational assistants testified that Emily's classmates tend not to involve themselves with Emily in class or at play. The Tribunal concluded that "... although the empirical evidence is that there is limited, if any, interaction between Emily and her classmates, it may be possible that some of her social and emotional needs are nevertheless being met. Because she does not communicate effectively, it is conceivable that she is enjoying the experience and cannot tell us. However, her classroom behaviours — the increasing incidents of crying, sleeping and vocalization — suggest that this is not the case. There appears to be little if any, social interaction between Emily and her peers in the regular class."

20 *Physical and Personal Safety Needs:* The Tribunal found that Emily's physical disabilities by themselves ought not to be a deciding factor in evaluating whether her needs can be met best in a regular or special class since it is reasonable to expect that the adaptations necessary would be made in order to accommodate Emily in the regular classroom even if a special classroom may be better designed to address her special physical needs. However, the Tribunal was concerned with Emily's tendency to place objects in her mouth. Emily's parents asserted that they were not concerned, and were confident that Emily would not swallow harmful objects. The Tribunal found that "a home setting that is adjusted to a child with pervasive muscular dysfunction, and idiosyncratic communication abilities, and who regularly mouths objects, is significantly different from a regular classroom setting." The Tribunal found that it was not reasonably possible to cleanse the classroom of mouthable materials or to establish the level of adult supervision necessary in the regular, integrated classroom.

21 The Tribunal then considered Emily's three years of experience in the integrated classroom. The Tribunal found "that the desired outcome of integration for an exceptional child, namely, fulfilment of intellectual and especially social and emotional needs through regular and natural interaction, has not been realized in Emily's case." It observed that the frequency and intensity of Emily's expressions of discontent — crying, sleeping, vocalizing — had been increasing over the three-year period.

22 The Tribunal agreed that integration confers great psychological benefit on disabled children, but that in Emily's case, the three years of experience in the regular classroom with the adult intervention necessary to meet her profound needs even minimally "has the counter-productive effect of isolating her, of segregating her in the theoretically integrated setting." The Tribunal found that "this is a far more insidious outcome than would obtain in a special class".

23 Accordingly, the Tribunal concluded that "[i]t is our opinion that where a school board recommends placement of a child with special needs in a special class, contrary to the wishes of the parents, and where the school board has already made extensive and significant effort to accommodate the parents' wishes by attempting to meet that child's needs in a regular class with appropriate modifications and supports, and where empirical, objective evidence demonstrates that the child's needs are not being met in the regular class, that school board is not in violation of the *Charter* or the OHRC [Ontario *Human Rights Code*]."

***Ontario Divisional Court (Adams J. for the Court) (1994), 71 O.A.C. 69***

24 The respondents applied for judicial review of the Tribunal's decision and sought to quash it on several grounds. First, they argued that the Tribunal was not expert since it was protected by a privative clause of the "final and binding" style only. Second, the Tribunal committed the following errors: it conducted its own literature search after the hearing, and it failed to place a legal burden (arising from the *Charter* and Ontario *Human Rights Code*) on the Board to establish that a special education class was clearly better than a regular class for Emily.

25 The court found that the specialized Tribunal had dealt comprehensively and thoughtfully with all the issues raised before it and with the central focus being what was best for Emily. Adams J. stated that the Tribunal had accepted that a regular class was to be preferred where consistent with the child's best interests and had been conscious of the *Charter* and Ontario *Human Rights Code*.

26 The court held that the Tribunal was worthy of curial deference given the structure of the legislation, the subject matter, and the composition of the Tribunal, but in any event there was no error of law. The court held that the Tribunal's post-hearing review of "the literature" to which the experts generally referred did nothing more than confirm its assessment of the evidence before it and the various admissions of the applicants' experts with regard to that research. Accordingly there was no denial of natural justice.

27 The court rejected the idea that the *Charter* creates a presumption in favour of one pedagogical theory over another. The issue of burden was academic in this case because the Tribunal found that the evidence clearly established that Emily's best interests would be better served in the special class.

28 The court echoed the Tribunal's reminder to the School Board that this placement did not relieve the Board and the parents of the obligation to collaborate creatively in a continuing effort to meet Emily's present and future needs.

***Court of Appeal (Arbour J.A. for the Court) (1995), 22 O.R. (3d) 1***

29 The respondents raised several issues on appeal before the Ontario Court of Appeal. First, they contended that the Divisional Court erred in its application of the *Charter* to the process of placing disabled students in appropriate educational settings. Second, they raised a number of legal errors committed by the Tribunal which, they submitted, ought to have been reviewed by the Divisional Court.

30 Arbour J.A. discussed the scope of judicial review appropriate in this case. Owing to the privative clause, the subject matter of the legislation, and the composition of the Tribunal, she held that the Tribunal was worthy of curial deference. However, in constitutional matters, she held that the standard of review was one of correctness.

31 Arbour J.A. dealt with the alleged errors of law first and concluded at p. 8 that although the Tribunal erred in conducting its own review of the literature after the hearing, this error of law "does not come within the ambit of reviewable error within the standard set out above since the analysis conducted by the Tribunal does little more than confirm that there is an ongoing pedagogical debate about the various models for the placement of disabled students, and that, solely from the pedagogical point of view, integration has not yet been proven superior." Consequently, even if the error was reviewable it would not result in the invalidation of the decision.

32 Arbour J.A. then turned to the constitutional issue. She noted that the respondents submitted that the *Charter* and the Ontario *Human Rights Code* both require a presumption in favour of the integration of disabled students, and that, therefore, the Board had to establish why Emily's needs would be better met in a segregated classroom. Arbour J.A. found at p. 9 that the Tribunal asked itself "whether Emily Eaton's special needs can be met best in a regular class or in a special class".

33 Arbour J.A. held that the Tribunal clearly rejected any notion of a presumption in favour of inclusion, and that the Tribunal simply found that the integrated classroom had not been successful. The Tribunal never answered the question as it framed it, namely, whether Emily's needs could be met best in a regular class or a special class.

34 The respondents contended that the "best interests of the child" test is not satisfactory in determining the appropriate placement for a disabled child because this test could prove insensitive to the equality rights of the child. They stated that there ought to be a presumption in favour of integration. Accordingly, Arbour J.A. looked at whether Emily's placement in a special classroom amounted to discrimination within the meaning of s. 15 of the *Charter*. She found that Emily was prevented from attending the regular class because of her disability. Thus, a distinction had clearly been made on a prohibited ground. Arbour J.A. then turned to the question of whether the distinction resulted in the imposition of a burden or disadvantage. She held at p. 13 that "[a]lthough one should not ignore the intended recipient's perception of whether the measure designed to enhance her equality is in fact a burden rather than a benefit, that subjective perception is not in itself determinative of the issue." Arbour J.A. applied *R. v. Turpin*, [1989] 1 S.C.R. 1296, in which scrutiny of the larger social, historical and political context was mandated, and found that the history of disabled persons, which the *Charter* seeks to redress and prevent, is a history of exclusion from the mainstream of society. In fact, "[i]n all areas of communal life, the goal pursued by and on behalf of disabled persons in the last few decades has been integration and inclusion" (at p. 15). Arbour J.A. concluded that, when analysed in its larger context, a segregated educational placement is a burden or disadvantage, and is therefore discriminatory within the meaning of s. 15.

35 Arbour J.A. stated at pp. 15-16:

Inclusion into the main school population is a benefit to Emily because without it, she would have fewer opportunities to learn how other children work and how they live.

.....

When a measure is offered to a disabled person, allegedly in order to provide that person with her true equality entitlement, and that measure is one of exclusion, segregation, and isolation from the mainstream, that measure, in its broad social and historical context, is properly labelled a burden or a disadvantage.

36 The School Board suggested that distinctions based on disability are not like those based on race or sex in the context of access to education because equality in education requires that the students be treated according to their actual abilities or disabilities. Arbour J.A. criticized this argument saying that although it may be easier to justify differences in access to educational facilities on the basis of disability than it would be if differences were based on race, this analysis must belong to s. 1. There is no reason to create a hierarchy of prohibited grounds within s. 15 which would elevate

distinctions based on some to a more suspect category than others. Arbour J.A. stated at p. 17 that "[i]f anything, one should be wary of accepting as inevitable and innocuous classification on the basis of ... disability, without the rigorous analysis required by s. 15.

37 The Eatons stated that they were not attacking the *Education Act*, because, in the appropriate case and using the appropriate test, a Tribunal could order that a child like Emily be put in a special segregated class. They were attacking only the reasoning of the Tribunal. Not only did the respondents not attack the *Education Act*, but they also expressly disavowed any intention of doing so. No motion pursuant to s. 109 of the *Courts of Justice Act* had been given.

38 Arbour J.A. expressed considerable difficulty with this argument. She held that if it is true that the *Charter* mandates a presumption in favour of integration, then the deficiency must be in the failure of the *Education Act* to so provide. She stated at p. 19 that the Act infringed s. 15(1) because it "provides no impediment to the method and reasoning employed by the ... Tribunal in the present case. ..."

39 Arbour J.A. went on to consider s. 1 of the *Charter* and concluded that, "since it [the *Education Act*] permits a *Charter* infringement, without further guidance, I cannot say that the Act infringes the equality rights of disabled students as little as possible".

40 Arbour J.A. found that the appropriate remedy was to declare that s. 8 of the Act should be read to include a direction that, unless the parents of a disabled child consent to the placement of that child in a segregated environment, the school board must provide a placement that is the least exclusionary from the mainstream and still reasonably capable of meeting the child's special needs.

41 Arbour J.A. held that the Tribunal would not have inevitably arrived at the same conclusion had it appreciated that the *Charter* required that segregated placement be used only as a last resort. Therefore Arbour J.A. directed that the matter be remitted to a differently constituted Tribunal for re-hearing in accordance with the constitutional principles set out in her reasons.

#### IV. Issues

42 This appeal raises the following issues:

1. Did the Court of Appeal err in proceeding, *proprio motu* and in the absence of the required notice under s. 109 of the *Courts of Justice Act* to review the constitutional validity of the *Education Act*?
2. Did the Court of Appeal err in finding that the decision of the Tribunal contravened s. 15 of the *Charter*?

43 The other issues raised below were not pursued in this Court.

#### V. Analysis

##### *The Constitutionality of the Education Act and Regulations*

44 Section 109 of the *Courts of Justice Act* provides that:

109. — (1) Where the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature or of a regulation or by-law made thereunder is in question, the Act, regulation or by-law shall not be adjudged to be invalid or inapplicable unless notice has been served on the Attorney General of Canada and the Attorney General of Ontario in accordance with subsection (2).

45 No notice in compliance with this section was given either in the Divisional Court or in the Court of Appeal and no issue was raised with respect to the constitutionality of the Act. Moreover, in the Court of Appeal the respondents expressly disavowed any intention of attacking the Act or the Regulations. The Attorney General for Ontario relied on

the respondents' position in the courts below and made no submissions on the constitutionality of the Act and had no opportunity to adduce evidence or make submissions to support the Act under s. 1 of the *Charter*. I am satisfied that the Attorney General for Ontario was prejudiced by the absence of notice.

46 In the order of the Chief Justice of this Court dated February 13, 1996, he stated:

The Court of Appeal *proprio motu* found that s. 8 of the Act was a restriction to s. 15 of the *Charter* and proceeded to salvage the section by reading certain words into it. This initiative as regards s. 15 was not taken as regards s. 7.

As the law as it now stands has been amended through reading in, in order to salvage the restriction to s. 15, it is for this reason and this reason only that I will state the following constitutional questions:

1. Do s. 8(3) of the *Education Act*, R.S.O. 1990, c. E.2, as amended, and s. 6 of *Regulation 305* of the *Education Act*, infringe Emily Eaton's equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
2. If the answer to question 1 is in the affirmative, are s. 8(3) of the *Education Act*, and s. 6 of *Regulation 305* of the *Education Act*, justified as a reasonable limit under s. 1 of the *Canadian Charter of Rights and Freedoms*?

47 The order stating constitutional questions did not purport to resolve the question as to whether the decision of the Court of Appeal to raise them was valid in the absence of notice or whether this Court would entertain them. The fact that constitutional questions are stated does not oblige the Court to deal with them.

48 The purpose of s. 109 is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.

49 While this Court has not yet addressed the issue of the legal effect of the absence of notice, it has been addressed by other courts. The results are conflicting. One strand of decision favours the view that in the absence of notice the decision is *ipso facto* invalid, while the other strand holds that a decision in the absence of notice is voidable upon a showing of prejudice.

50 In *N. (D.) v. New Brunswick (Minister of Health & Community Services)* (1992), 127 N.B.R. (2d) 383, the Court of Appeal considered a situation in which the trial judge, on his own motion, set aside provisions of the *Family Services Act*, S.N.B. 1980, c. F-2.2, as contrary to the *Charter*. There had been no notice under s. 22 of the *Judicature Act*, R.S.N.B. 1973 c. J-2, as required. The Court of Appeal held, at p. 388, that "the wording of s. 22(3) leaves no doubt that notice is mandatory. For this reason, the trial judge ought not to have decided the case on a *Charter* issue raised on his own initiative without notice to the Attorneys General".

51 However, in *Evelyn Stevens Interiors Ltd., Re* (1993), (sub nom. *Ontario (Workers' Compensation Board) v. Mandelbaum, Spergel Inc.*) 12 O.R. (3d) 385, a majority of the Ontario Court of Appeal came to a different conclusion, Arbour J.A. dissenting. Grange J.A. considered an argument that, pursuant to *N. (D.) v. New Brunswick (Minister of Health & Community Services)*, *supra*, s. 109 notice was mandatory so that failure to give notice rendered a decision a nullity. He found further support for this position in the short judgment of Callaghan A.C.J.H.C. in *Roberts v. Sudbury (City)*, Ont. H.C., June 22, 1987, unreported, where Callaghan A.C.J.H.C. allowed an appeal from a decision made without notice and sent the matter back to the District Court for a rehearing. Grange J.A. also reviewed two Saskatchewan cases, *R. v. Beare* (1987), (sub nom. *R. v. Beare; R. v. Higgins*), heard together and both reported at 31 C.R.R. 118 (Sask. C.A.). In one case notice had been served, while in the other it had not. The cases concerned the validity

of the *Identification of Criminals Act*, R.S.C. 1970, c. I-1. In both cases the trial court upheld the validity of the Act. The Court of Appeal found that there was no prejudice because the Attorney General was able to present an argument in the *Higgins* case that would have applied to the *Beare* case as well. Therefore, there was no actual prejudice in the *Beare* case resulting from the failure to file notice under *The Constitutional Questions Act*, R.S.S. 1978, c. C-29. Grange J.A. also referred to *Citation Industries Ltd. v. C.J.A., Loc. 1928* (1988), 53 D.L.R. (4th) 360 (B.C. C.A.), in which the Court of Appeal dealt with a similar section under the *Constitutional Question Act*, R.S.B.C. 1979, c. 63. In that case, all counsel asked that the matter be heard on the merits even though notice had not been given to the provincial Attorney General. Seaton J.A. agreed to hear the merits because (at p. 363) "[a]t this stage nothing turns on the absence of earlier notice". Grange J.A. observed (at pp. 390-91) that:

Neither of the courts in Saskatchewan or British Columbia specifically dealt with the argument that the judgments under appeal were nullities. Nevertheless, both relied heavily on a lack of prejudice to the Attorney General in his argument on appeal. In the case at bar, counsel for the Attorney General was invited to show prejudice and was unable to do so. In my view, that should be the controlling factor. The failure to give notice was entirely inadvertent. ... We have heard full argument on the question. Nothing would be gained by sending it back but repetition and expense.

52 Arbour J.A. dissented. She held that s. 109 creates a mandatory requirement of notice, and that the presence or absence of prejudice is irrelevant. "An adjudication made in violation of that mandatory language must be considered a nullity" (at p. 394).

53 In view of the purpose of s. 109 of the *Courts of Justice Act*, I am inclined to agree with the opinion of the New Brunswick Court of Appeal in *N. (D.) v. New Brunswick (Minister of Health & Community Services)*, *supra*, and Arbour J.A. dissenting in *Mandelbaum*, *supra*, that the provision is mandatory and failure to give the notice invalidates a decision made in its absence without a showing of prejudice. It seems to me that the absence of notice is in itself prejudicial to the public interest. I am not reassured that the Attorney General will invariably be in a position to explain after the fact what steps might have been taken if timely notice had been given. As a result, there is a risk that in some cases a statutory provision may fall by default.

54 There is, of course, room for interpretation of s. 109 and there may be cases in which the failure to serve a written notice is not fatal either because the Attorney General consents to the issue's being dealt with or there has been a *de facto* notice which is the equivalent of a written notice. It is not, however, necessary to express a final opinion on these questions in that I am satisfied that under either strand of authority the decision of the Court of Appeal is invalid. No notice or any equivalent was given in this case and in fact the Attorney General and the courts had no reason to believe that the Act was under attack. Clearly, s. 109 was not complied with and the Attorney General was seriously prejudiced by the absence of notice.

55 It was suggested that notwithstanding the above, this Court should entertain the question of the validity of the provisions of the Act which were addressed by Arbour J.A. It might be suggested that a refusal to do so would be based on a technical ground. The absence of notice and the absence of a record developed in the courts and tribunals below are far from technical defects. Moreover, as a general rule, we are only authorized to make the disposition that the court appealed from ought to have made (*Supreme Court Act*, R.S.C., 1985, c. S-26, s. 45). There is, however, an additional reason for not dealing with the constitutionality of the Act. Arbour J.A. felt constrained to do so because she was of the view that the decision of the Tribunal was discriminatory and violated s. 15(1) of the *Charter*. On the basis of *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, she felt obliged to consider whether the Act purported to authorize this result. I am respectfully of the opinion that Arbour J.A. erred in this regard. If she had concluded, as I do, that the reasoning and decision of the Tribunal did not discriminate contrary to s. 15 of the *Charter*, it would have been unnecessary for her, and it is unnecessary for me, to consider the constitutional validity of the Act.

56 I will turn to the issue of the validity of the decision of the Tribunal.

***Does the Decision of the Tribunal Contravene s. 15 of the Charter?***

57 The placement of children in special education programs and services is carried out pursuant to the provisions of s. 8 of the *Education Act* and the Regulations thereunder. Prior to 1980, there was no mandatory requirement that school boards provide such programs and a disabled person could be denied status as a resident pupil at elementary school if that person was "unable by reason of mental or physical handicap to profit by instruction in an elementary school" (*The Education Act, 1974*, S.O. 1974, c. 109, s. 34(1)).

58 A change in attitude with respect to disabled persons was initiated by the report of Walter B. Williston entitled *Present Arrangements for the Care and Supervision of Mentally Retarded Persons in Ontario* (1971). With it came a recognition of the desirability of integration and de-institutionalization. The change in attitude was reflected in changes in the *Education Act*.

59 The current legal framework for the education of exceptional pupils was adopted on December 12, 1980 when Royal Assent was given to *The Education Amendment Act, 1980*, S.O. 1980, c. 61. The Act and Regulations made it mandatory for all school boards to provide special education programs and services for exceptional pupils. The policy of the Ministry of Education is that "[e]very exceptional child has the right to be part of the mainstream of education to the extent to which it is profitable" (*Special Education Information Handbook* (1984)).

60 Ontario Regulation 305, R.R.O. 1990, adopted as O. Reg. 554/81, deals exclusively with Special Identification Placement and Review Committees and appeals. It provides for the identification of exceptional pupils, a determination of their needs and placement into an educational setting where special education programs and services can be delivered. The specific program modification and services required by each exceptional pupil are outlined in the pupil's education plan. Parents and guardians are involved in the identification and placement process and provision is made for appeal of the identification with a placement decision of the board.

61 This is the process that culminated in a decision by the Tribunal in the present case. After a three-year trial period in a regular class, the IPRC, after consultation with teacher assistants and Emily's parents, determined that she should be placed in a special education class. Emily's parents appealed to a Special Education Appeal Board which unanimously confirmed the IPRC decision. The parents appealed again to the Ontario Special Education Tribunal which unanimously confirmed the decision of the Special Education Appeal Board in a hearing lasting 21 days.

62 While there has not been unanimity in the judgments of the Court with respect to all the principles relating to the application of s. 15 of the *Charter*, I believe that the issue in this case can be resolved on the basis of principles in respect of which there is no disagreement. There is general agreement that before a violation of s. 15 can be found, the claimant must establish that the impugned provision creates a distinction on a prohibited or analogous ground which withholds an advantage or benefit from, or imposes a disadvantage or burden on, the claimant.

63 In *Miron v. Trudel*, [1995] 2 S.C.R. 418, at p. 485, McLachlin J. stated:

The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established. The onus then shifts to the party seeking to uphold the law, usually the state, to justify the discrimination as "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*.

At p. 487 she added:

Furthermore, if the law distinguishes on an enumerated or analogous ground but does not have the effect of imposing a real disadvantage in the social and political context of the claim, it may similarly be found not to violate s. 15: *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872.

64 In *Egan v. Canada*, [1995] 2 S.C.R. 513, at p. 584, Cory and Iacobucci JJ. stated:

The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics.

Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others.

65 Both Gonthier J. (the Chief Justice and La Forest and Major JJ. concurring) in *Miron* and La Forest J. (the Chief Justice and Gonthier and Major JJ. concurring) in *Egan* were of the view that a distinction must be shown to be based on irrelevant personal characteristics. On this view, relevance to the legislative goal or functional value of the legislation where such is not itself discriminatory can negate discrimination. The majority view as expressed in *Miron* was that relevance may assist as a factor in showing that the case falls into the rare class of case in which a distinction on a prohibited or analogous ground does not constitute discrimination. While this does not purport to be an exhaustive treatment of the differences between the majority and the minority on this point, it is a sufficient synopsis of them for the purposes of this appeal.

66 The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 169, McIntyre J. stated that the "accommodation of differences ... is the true essence of equality". This emphasizes that the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.

67 The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within

the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

68 The interplay of these objectives relating to disability is illustrated by the evolution of special education in Ontario. The earlier policy of exclusion to which I referred was influenced in large part by a stereotypical attitude to disabled persons that they could not function in a system designed for the general population. No account was taken of the true characteristics of individual members of the disabled population, nor was any attempt made to accommodate these characteristics. With the change in attitude influenced by the Williston Report and other developments, the policy shifted to one which assessed the true characteristics of disabled persons with a view to accommodating them. Integration was the preferred accommodation but if the pupil could not benefit from integration a special program was designed to enable disabled pupils to receive the benefits of education which were available to others.

69 It follows that disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. However, with respect to disability, this ground means vastly different things depending upon the individual and the context. This produces, among other things, the "difference dilemma" referred to by the Interveners whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability. In some cases, special education is a necessary adaptation of the mainstream world which enables some disabled pupils access to the learning environment they need in order to have an equal opportunity in education. While integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality. Schools focussed on the needs of the blind or deaf, and special education for students with learning disabilities indicate the positive aspects of segregated education placement. Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides.

70 These are the basic principles in respect of which the Tribunal's decision should be tested in order to determine whether that decision complies with s. 15(1). In applying them, I do not see any purpose in distinguishing between the order of the Tribunal and the reasons for that order. That was a distinction that was sought to be made in the Court of Appeal but, in my view, the reasons and the order are to the same effect and cannot be dealt with separately in this case. Either both are valid, as I conclude, or both are invalid.

### ***The Tribunal's Decision***

#### *A Distinction*

71 It is quite clear that a distinction is being made under the Act between "exceptional" children and others. Other children are placed in the integrated classes. Exceptional children, in some cases, face an inquiry into their placement in the integrated or special classes. It is clear that the distinction between "exceptional" and other children is based on the disability of the individual child.

#### *Burden*

72 In its thorough and careful consideration of this matter, the Tribunal sought to determine the placement that would be in the best interests of Emily from the standpoint of receiving the benefits that an education provides. In arriving at the conclusion, the Tribunal considered Emily's special needs and strove to fashion a placement that would accommodate those special needs and enable her to benefit from the services that an educational program offers. The Tribunal took into account the great psychological benefit that integration offers but found, based on the three years experience in a regular class, that integration had had "the counter-productive effect of isolating her, of segregating her in the theoretically integrated setting".

73 Moreover, in deciding on the appropriate placement, the Tribunal considered each of the various categories of needs relevant to education. It found that it was not possible to meet Emily's intellectual and academic needs in the

regular class without "isolating her in a disserving and potentially insidious way". It found that Emily's communication needs would be best met in the special class. It expressed doubt as to whether her emotional and social needs were being met in the regular class. While it is not clear that the special class would meet these particular needs better, it did appear to the Tribunal that there was little, if any, social interaction between Emily and her peers in the regular class. Although not central to the Tribunal's decision, it also found that certain adaptations to the classroom, such as the provision of a special desk, physical assistance and extra supervision from educational assistants were reasonable, but that it would not be reasonably possible to accommodate Emily's particular safety needs without radically altering the classroom or establishing a very isolating level of adult supervision.

74 The Court of Appeal, at p. 9, was of the view that the Tribunal stated the principal issue as "whether Emily Eaton's special needs can be met best in a regular class or in a special class", but that it never actually answered this question. Rather, the Court of Appeal held that the Tribunal found that the integrated placement was inadequate without finding that the segregated placement would be any better. It held that the Tribunal ought not to have ordered a segregated placement unless it found that the segregated placement was better than the integrated placement.

75 In my view, the Tribunal did answer the question which it set itself, namely, which placement was superior. While it did not specifically state that the segregated placement was superior to the integrated placement, its findings clearly indicated this conclusion. The Tribunal grouped its findings into several categories of needs and interests implicated in education. With respect to Emily's communication needs, the Tribunal clearly found that "[b]ecause this need is of such over-riding importance for Emily, it makes sense to address it, at least initially, and until she demonstrates some minimal competence, in a setting where there will be maximum opportunity for [individualized, highly specialized, extremely intense, one-on-one instruction]". While the Tribunal did not indicate how Emily's academic or social needs would be better met in the segregated placement than in the integrated placement, it clearly concluded that these needs were not only unsatisfied, but that she was being isolated in a "disserving and potentially insidious way". The Tribunal also found that, with respect to Emily's physical safety, the special classroom was superior to the integrated classroom. The Tribunal looked at several categories of needs and pointed out that some, including the most important for Emily, would be better met in the segregated classroom. With respect to the others, while an express conclusion was not drawn as to how the segregated classroom would be superior, the inefficacy of the integrated classroom was established.

76 The Tribunal, therefore, balanced the various educational interests of Emily Eaton, taking into account her special needs, and concluded that the best possible placement was in the special class. It is important to note that the placement proposed was in a class located in a regular school where "the special class is integrated with the regular classes through morning circle and a buddy system which may include hand-over-hand art activities, music, reading, outings such as walks and recess, special activities like assemblies, mini olympics, interactive games, including rolling balls and playing catch" according to the testimony of the teacher of the class in which the Board proposed to place Emily. In addition, the Tribunal alluded to the requirement of ongoing assessment of Emily's best interests so that any *changes in her needs* could be reflected in the placement. Finally, the Tribunal stated:

... our decision in favour of a special class placement does not relieve the school board and the parents of the obligation to collaborate creatively in a continuing effort to meet her present and future needs. Emily's is so unusual a case that unusual responses may well be necessary for her. Such achievements can only be realized through cooperation, and most important, compromise.

It seems incongruous that a decision reached after such an approach could be considered a burden or a disadvantage imposed on a child.

77 We cannot forget, however, that for a child who is young or unable to communicate his or her needs or wishes, equality rights are being exercised on his or her behalf, usually by the child's parents. Moreover, the requirements for respecting these rights in this setting are decided by adults who have authority over this child. For this reason, the decision-making body must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective, one which attempts to make equality meaningful from the child's

point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child's best interests. A decision-making body must determine whether the integrated setting can be adapted to meet the special needs of an exceptional child. Where this is not possible, that is, where aspects of the integrated setting which cannot reasonably be changed interfere with meeting the child's special needs, the principle of accommodation will require a special education placement outside of this setting. For older children and those who are able to communicate their wishes and needs, their own views will play an important role in the determination of best interests. For younger children, and those like Emily, who are either incapable of making a choice or have a very limited means of communicating their wishes, the decision-maker must make this determination on the basis of the other evidence before it.

78 The Court of Appeal was of the view that the Tribunal's reasoning infringed s. 15(1) because the *Charter* mandates a presumption in favour of integration. This presumption is displaced if the parents consent to a segregated placement. This is reflected in the remedy that the Court of Appeal found to be appropriate. Section 8 of the Act was to be read to include a direction that, unless the parents of a disabled child consent to the placement of the child in a segregated environment, the presumption applies.

79 In my view, the application of a test designed to secure what is in the best interests of the child will best achieve that objective if the test is unencumbered by a presumption. The operation of a presumption tends to render proceedings more technical and adversarial. Moreover, there is a risk that in some circumstances, the decision may be made by default rather than on the merits as to what is in the best interests of the child. I would also question the view that a presumption as to the best interests of a child is a constitutional imperative when the presumption can be automatically displaced by the decision of the child's parents. Such a result runs counter to decisions of this Court that the parents' view of their child's best interests is not dispositive of the question. See *Re Eve*, [1986] 2 S.C.R. 388; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

80 I conclude that the placement of Emily which was confirmed by the Tribunal did not constitute the imposition of a burden or disadvantage nor did it constitute the withholding of a benefit or advantage from the child. Neither the Tribunal's order nor its reasoning can be construed as a violation of s. 15. The approach that the Tribunal took is one that is authorized by the general language of s. 8(3) of the Act. I have concluded that the approach conforms with s. 15(1) of the *Charter*. In the circumstances, it is unnecessary and undesirable to consider whether the general language of s. 8(3) or the Regulations would authorize some other approach which might violate s. 15(1).

81 In the result, the appeal is allowed, the judgment of the Court of Appeal is set aside and the judgment of the Divisional Court is restored. The appellants are entitled to costs in this Court. I would not award any costs in the Court of Appeal.

*Appeal allowed.*

16

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** Prophet River First Nation v. Canada (Attorney General) | 2017 FCA 15, 2017 CarswellNat 106 | (F.C.A., Jan 23, 2017)

1989 CarswellNat 193  
Supreme Court of Canada

Slaight Communications Inc. v. Davidson

1989 CarswellNat 193, 1989 CarswellNat 695, [1989] 1 S.C.R. 1038, [1989] S.C.J. No. 45, 15 A.C.W.S. (3d) 132, 26 C.C.E.L. 85, 40 C.R.R. 100, 59 D.L.R. (4th) 416, 89 C.L.L.C. 14,031, 93 N.R. 183, J.E. 89-775, EYB 1989-67228

## SLAIGHT COMMUNICATIONS INC. v. DAVIDSON

Dickson C.J.C., Beetz, Lamer, Wilson, Le Dain, \* La Forest and L'Heureux-Dubé JJ.

Heard: October 8, 1987

Judgment: May 4, 1989

Docket: No. 19412

Counsel: *Brian A. Grosman, Q.C.* and *John Martin*, for appellant.

*Morris Cooper* and *Fern Weinper*, for respondent.

Subject: Employment; Constitutional; Public

APPEAL from a judgment of the Federal Court of Appeal [reported at [1985] 1 F.C. 253, 12 C.C.E.L. 251, 58 N.R. 150, 85 C.L.L.C. 14,053, 16 C.R.R. 45] dismissing appellant's application pursuant to s. 28 of the *Federal Court Act* to set aside an order made by an adjudicator under s. 61.5(9)(c) of the *Canada Labour Code*. Appeal dismissed, Beetz J. dissenting and Lamer J. dissenting in part.

***Dickson C.J.C. (Wilson, La Forest and L'Heureux-Dubé concurring):***

### I

1 The respondent, Mr. Ron Davidson, a radio time salesman, was dismissed by his employer, the appellant Slaight Communications Inc., operating as Q107 FM Radio. A complaint was filed by Mr. Davidson under the *Canada Labour Code*, R.S.C. 1970, c. L-1, and an inquiry undertaken. As the matter could not be resolved or settled, Mr. Edward B. Joliffe, Q.C., was appointed by the Minister of Labour to act as adjudicator and to render a decision in accordance with the provisions of subss. (6) to (9) of s. 61.5, as en. S.C. 1977-78, c. 27, s. 21, Division V.7, Part III of the *Canada Labour Code*. Two days of hearings were held in Toronto. Twelve days later, Mr. Joliffe received a letter, written on behalf of the employer, requesting Mr. Joliffe to consider reopening the adjudication because, the letter read in part, "our client has advised us that it is in possession of certain material which may indicate that Mr. Davidson perjured his testimony before you in one or more respects." Mr. Joliffe demanded particulars of this very serious allegation. The company's counsel failed to comply. The application for another hearing was dismissed.

2 Adjudicator Joliffe reviewed at length the evidence of Ms. Stitt. Ms. Stitt was the sole witness on behalf of the employer and at the relevant time she was general sales manager of the company, though later dismissed. The adjudicator noted:

In Ms. Stitt's letter to Labour Canada of February 27, 1984 ... she specified that the 'major complaint' was Mr. Davidson's failure to achieve 'monthly sales budgets since October of 1983.' To select four months (or less) from a total of 43 months of service as evidence of unsatisfactory service is obviously specious.

Later in his ruling the adjudicator stated:

From first to last Ms. Stitt's attitude faithfully reflected the advice she attributes to Mr. Gary Slaight: 'If he failed to make budget, I'd hear about it. If he made it, the complaint would be that he could do more.' By this perverse logic it appears that the more Mr. Davidson sold, the more unacceptable his performance. Such absurd statements led this adjudicator to suggest disclosure of 'the real reason for dismissal,' but there was no response.

He concluded:

An attempt has been made in this case to prove unsatisfactory performance as just cause for dismissal. The attempt has failed. I find that Mr. Davidson was dismissed without just cause.

3 Mr. Joliffe then turned his attention to the question of an appropriate remedy, quoting subs. (9) of s. 61.5 as follows:

(9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

4 He ordered payment of \$46,628.96 plus interest and legal costs of \$2,500. He made a further order, which is central to this appeal, reading:

Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:

That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:

(1) Mr. Ron Davidson was employed by Station Q107 from June, 1980, to January 20, 1984, as a radio time salesman;

(2) That his sales 'budget' or quota for 1981 was \$248,000, of which he achieved 97.3 per cent;

(3) That his sales 'budget' or quota for 1982 was \$343,500, of which he achieved 100.3 per cent;

(4) That his sales 'budget' or quota for 1983 was \$402,200, of which he achieved 114.2 per cent;

(5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

5 An appeal by the employer to the Federal Court of Appeal was dismissed [reported at [1985] 1 F.C. 253, 12 C.C.E.L. 251, 58 N.R. 150, 85 C.L.L.C. 14,053, 16 C.R.R. 45, Urie and Mahoney JJ., Marceau J. dissenting].

6 The question to be decided by this Court is whether para. (c) of s. 61.5(9) of the *Canada Labour Code* authorizes the adjudicator to order the employer to give the employee a letter of reference of specified content and to order the employer to say nothing further about the employee. Paragraph (c), it will be recalled, reads:

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

7 Resolution of the problem involves (1) the construction and the true meaning and effect of para. (c), (2) whether the adjudicator's order in this case infringed freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and (3) if so, whether the infringement is justified under s. 1 of the *Charter*.

8 Two constitutional questions were stated in this appeal as follows:

1. Do the provisions of the adjudicator's order, pursuant to s. 61.5(9) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended, whereby the appellant was ordered to provide the respondent with a letter of recommendation of specified content combined with the further stipulation that any communication to the appellant relating to the respondent's employment with the appellant be answered exclusively by sending or delivering a copy of the letter of recommendation, infringe or deny the rights and freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

2. If the provisions of the adjudicator's order infringe or deny the rights and freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*, are they justified by s. 1 of the *Charter* and therefore not inconsistent with the *Constitution Act, 1982*?

## II — The Relationship Between Administrative Law Review And Review Under The Charter

9 I have had the benefit of reading the opinion of Justice Lamer and I am in complete agreement with his discussion of the applicability of the *Charter* to administrative decision making. I also agree with his conclusion that the positive order made by adjudicator Joliffe (to draw up and to give the respondent a specified letter of reference) infringes s. 2(b) of the *Charter* but is saved by s. 1. However, with regard to the negative order (that any inquiry about the respondent's employment at Q107 be answered exclusively by the letter of reference which is the subject of the positive order) I must respectfully disagree with the conclusion of Lamer J. that it is patently unreasonable, thereby obviating the need to consider the *Charter*. Furthermore, not only am I of the view that the negative order is reasonable in the administrative law sense, but I also believe that it is reasonable and demonstrably justified in the sense of s. 1 of the *Charter*.

10 I agree with Mahoney J. of the Federal Court of Appeal [[1985] 1 F.C., at 260-261] that:

The ordering of provision of a totally factual letter of recommendation and foreclosing the undermining of its effect which, in the circumstances disclosed by the evidence, was patently foreseeable, seems to me to be an equitable remedial requirement. It is not punitive. It is appropriate redress to the wronged employee without, in any way, injuring the employer. In my view, the order was authorized by paragraph 61.5(9)(c).

11 The precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases. A few comments nonetheless may be in order. A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact (see *Blanchard v. Control Data Can. Ltd.*, [1984] 2 S.C.R. 476 at 494-495, 14 Admin. L.R. 133, 84 C.L.L.C. 14,070, 55 N.R. 194, 14 D.L.R. (4th) 289) in the realm of value inquiry the Courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*. In contrast to s. 1, patent unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure

and sophistication of analysis. It seems to me that had Lamer J. gone on to conduct a s. 1 inquiry, his excellent analysis of the contending values in the context of the positive order would have been equally applicable to the negative order which he has instead found to be patently unreasonable.

12 I agree with Lamer J. that the order in this case is considerably different from that at issue in *National Bank of Can. v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269, 84 C.L.L.C. 14,037, 53 N.R. 203, 9 D.L.R. (4th) 10, and therefore, the determination by Beetz J. that the letter in question in *National Bank* was patently unreasonable is not applicable to the facts of this case. The focus of condemnation in *National Bank* was on the "compelling [of] anyone to utter opinions that [were] not his own" (per Beetz J., at p. 296, S.C.R.) which was exacerbated by the wide publication of the letter to all employees and management staff of the bank. That is not this case. As the adjudicator noted here, there was no real conflict of evidence about the accounts and reports.

### III — The Negative Order and Section 2(b) of the Charter

13 Adjudicator Joliffe's order that Slaight Communications Inc. answer any reference inquiry exclusively by sending the specified letter is an infringement of s. 2(b) freedom of expression. The government is attempting to prevent Q107 from expressing its opinion as to the qualifications of Mr. Davidson beyond the facts set out in the letter. The harm that it was aiming to prevent (decreased job prospects for Mr. Davidson) is only relevant to s. 1 analysis and not to s. 2(b) analysis.

### IV — Section 1 of the Charter

14 The basic test for s. 1 analysis formulated in *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138-139, 53 O.R. (2d) 719 (headnote only), 50 C.R. (3d) 1, 65 N.R. 87, 24 C.C.C. (3d) 321, 14 O.A.C. 335, 26 D.L.R. (4th) 200, 19 C.R.R. 308, has been reviewed in the reasons of Lamer J. and need not be reproduced here.

#### 1. Importance of the Objective

15 I am in firm agreement with the conclusions of Lamer J. about the importance of the objective sought to be achieved by the positive order, namely, counteracting the effects of the unjust dismissal by enhancing the ability of the employee to seek new employment without being lied about by the previous employer. This is also the objective of the negative order which, in the words of Mahoney J. in the Federal Court of Appeal [[1985] 1 F.C., at 260] was designed to "foreclos[e] the undermining of [the] effect" of the positive order. Both orders seek to achieve the same goal, the negative order complementing and reinforcing the positive order.

16 It cannot be overemphasized that the adjudicator's remedy in this case was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. Thus, in a general sense, this case falls within a class of cases in which the governmental objective is that of protection of a particularly vulnerable group, or members thereof. In *Edwards Books & Art. Ltd. v. R.*, [1986] 2 S.C.R. 713, 87 C.L.L.C. 14,001, 28 C.R.R. 1, (sub nom. *Edwards Books & Art Ltd. v. R.*; *R. v. Nortown Foods Ltd.*) 58 O.R. (2d) 442 (note), 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1, (sub nom. *R. v. Videoflicks Ltd.*) 55 C.R. (3d) 193, 19 O.A.C. 239, 71 N.R. 161, I stated for the majority [S.C.R., at 779]:

In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons. When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the Legislature for determining that the protection of the employees ought to prevail.

Consistent with the above view of the place of the *Charter*, I can think of no better way to describe the employment relationship than as expressed in P. Davies and M. Freeland, *Kahn-Freund: Labour and the Law*, 3d ed. (London: Sweet & Maxwell, 1983) at 18:

[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination. ... The main object of labour law has always been, and we venture to say will always be, a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation — legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether — must be seen in this context. It is an attempt to infuse law into a relation of command and subordination.

The objective of both the positive and negative orders made by adjudicator Joliffe is sensitive to the reality identified by Kahn-Freund, Davies and Freeland. The Courts must be just as concerned to avoid constitutionalizing inequalities of power in the workplace and between societal actors in general. It must be recalled that *Oakes*, supra, at p. 136 [[1986] 1 S.C.R.] stated that "[t]he underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified." As long as the proportionality test is met, it would not, on the facts of this case, be in accordance with those underlying principles and values for the *Charter* to be successfully invoked by an employer. The inequality in one employment relationship would be continued even after its termination, with the result that the worker looking for a new job would be placed in an even more unequal bargaining position vis-à-vis prospective employers than is normally the case. On the facts of this case, constitutionally protecting freedom of expression would be tantamount to condoning the continuation of an abuse of an already unequal relationship.

## 2. Proportionality

### (a) Rational Connection

17 The negative order is very much rationally linked to the objective, no less than the positive order. The adjudicator was plainly of the view that the respondent had been the subject of some kind of personal vendetta or "set-up", as Mahoney J. termed it [[1985] 1 F.C., at 258] which had been initiated by the employer's general manager and executed by its sales manager, the latter of whom was Mr. Davidson's immediate superior.

18 As I have indicated, the representative of the employer was found to have engaged in bad faith and duplicitous conduct, giving misleading evidence about Mr. Davidson's work performance both at the time of his dismissal and during the unjust dismissal hearing. Further, in deciding that reinstatement was not a viable remedy, the adjudicator gave as his reason that "[t]here is no sign that he would receive fair treatment by an employer which has made such vigorous efforts to justify the indefensible." With this proven history of promoting a fabricated version of the quality of Mr. Davidson's service and the concern that the employer would continue to treat him unfairly if he went back to work for the employer, it was rational for the adjudicator to attach a rider to the order for a reference letter so as to ensure that representatives of the employer did not subvert the effect of the letter by unjustifiably maligning its previous employee in the guise of giving a reference.

### (b) Minimal Impairment

19 In my view, there was no less intrusive measure that the adjudicator could have taken and still have achieved the objective with any likelihood. To the extent there was a likelihood that representatives of Q107 would not be content to pass on the letter of reference absent the kind of untrue comments that had resulted in the finding of unjust dismissal, the letter of reference would have been rendered illusory to the same degree of likelihood.

20 While an order of additional monetary compensation would clearly be less intrusive upon the appellant's freedom of expression, it would not be an acceptable substitute. Even if the adjudicator had ordered that Mr. Davidson could come back once he had secured a job and be granted compensation, above and beyond unemployment insurance for the actual period out of work, this would only be compensation for the *economic* effects of lack of employment, not

the *personal* effects. This is directly contrary to the objective sought to be achieved by the order, which is securing new employment in the shortest order possible; the corollary of this objective is, of course, a concern to alleviate the personal problems associated with being out of work. As Professor David M. Beatty puts it in "Labour Is Not a Commodity" in B.J. Reiter and J. Swan, eds, *Studies in Contract Law* (London: Butterworths, 1980) at 323-324:

The personal meaning of work is seen to go beyond rather than to be completely dependent upon the purposes of production. ... [R]eflecting the characterization of humans as, for the most part, doers and makers, the identity aspect of employment is increasingly seen to serve deep psychological needs. ... It recognizes the importance of providing the members of society with an opportunity to realize some sense of identity and meaning, some sense of worth in the community beyond that which can be taken from the material product of the institution. ... [E]mployment is seen as providing recognition of the individual's being engaged in something worthwhile. ... [E]mployment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem. With such an emphasis on contributing to society one avoids the demoralization that inevitably attends idleness and exile, even when it is assuaged by social assistance.

Monetary compensation can only be an alternative measure if labour is treated as a commodity and every day without work seen as being exhaustively reducible to some pecuniary value. As I had occasion to say in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 368, 51 Alta. L.R. (2d) 97, [1987] 3 W.W.R. 577, 28 C.R.R. 305, 38 D.L.R. (4th) 161, 74 N.R. 99, 78 A.R. 1, [1987] D.L.Q. 225, 87 C.L.L.C. 14,021: "A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being." Viewing labour as a commodity is incompatible with such a perspective, which is reflected in the remedial objective chosen by the adjudicator. To posit monetary compensation as a less intrusive measure is, in effect, to challenge the legitimacy of the objective.

21 Consider the facts of this particular case. The letter was tightly and carefully designed to reflect only a very narrow range of *facts* which, we saw, were not really contested. As already discussed, unlike in *National Bank*, supra, the employer has not been forced to state *opinions* ("views and sentiments", per Beetz J., [1984] 1 S.C.R., at 295) which are not its own. Rather, the negative order seeks to prevent the employer from passing on an opinion, such prohibition being closely tied to the history of abuse of power which had been found to exist. Furthermore, that prohibition is very circumscribed. Firstly, it is triggered only in cases when the appellant is contacted for a reference and, secondly, there is no requirement to send the letter to anyone other than prospective employers. In sum, this is a much less intrusive and carefully designed order than that in *National Bank* in which the bank was required to send to a very large audience (all the employees and management staff of the bank) what amounted to a letter of contrition which conveyed the impression that certain opinions expressed therein were those of the employer.

22 Finally, it cannot be ignored that a letter such as this may not have a great beneficial impact on an employee's job hunt. The letter is very neutral in tone, totally unembellished as it is by any opinion customary in letters of reference, and it refers to the fact of the finding of unjust dismissal. It seems to me that the adjudicator went no further than was necessary to achieve the objective and, even then, the measures adopted by the adjudicator cannot be said to have done more than to have enhanced, as opposed to having ensured, the chances of the respondent finding a job. The adjudicator did not in any sense pursue the objective without regard to the appellant's right to free expression.

### ***(c) Deleterious Effects***

23 It is clear to me that the effects of the measures are not so deleterious as to outweigh the objective of the measures. The importance of the above-discussed objective cannot be overemphasized. There are many diverse values that deserve protection in a free and democratic society such as that of Canada, only some of which are expressly provided for in the *Charter*. The underlying values of a free and democratic society both guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights. As was said in *Oakes*, at p. 136 [[1986] 1 S.C.R.] among the underlying values essential to our free and democratic society are "the inherent dignity of the human person" and "commitment to social justice and equality". Especially in light of Canada's ratification of the *International Covenant on*

*Economic, Social and Cultural Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966) and commitment therein to protect, inter alia, the right to work in its various dimensions found in art. 6 of that treaty, it cannot be doubted that the objective in this case is a very important one. In *Reference re Public Service Employee Relations Act (Alta.)*, supra, I had occasion to say at p. 349 [[1987] 1 S.C.R.]:

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of 'the full benefit of the *Charter's* protection'. I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

Given the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a state party, should generally be indicative of a high degree of importance attached to that objective. This is consistent with the importance that this Court has placed on the protection of employees as a vulnerable group in society.

24 In normal course, the suppression of one's right to express an opinion about a subject or person will be a serious infringement of s. 2(b) and only outweighed by very important objectives. In the foregoing analysis, I have sought to show that the negative order was minimally intrusive in a relative sense and also that the careful tailoring of both parts of the order has made this a much less serious infringement of s. 2(b) than, for instance, occurred in the *National Bank* case.

## V — Conclusion

25 In conclusion, I am of the opinion that both of the adjudicator's orders at issue (the positive order and the negative order) infringe s. 2(b) but are saved by s. 1. I would answer both constitutional questions in the affirmative and dismiss the appeal with costs.

**Beetz J.:**

## I — Introduction

26 I have had the advantage of reading the reasons for judgment written by Mr. Justice Lamer and then the reasons for judgment written by the Chief Justice. I refer to their statements of the facts, proceedings and constitutional questions as well as to their summary of the decisions rendered by the adjudicator and the Federal Court of Appeal.

27 Like the Chief Justice, I am in agreement with Mr. Justice Lamer's discussion of the applicability of the *Charter* to administrative decision making. I also agree with Mr. Justice Lamer's construction of s. 61.5(9)(c) of the *Canada Labour Code*.

28 However, I have the misfortune of not being able to concur with one of the two main conclusions reached by both my colleagues, and while I agree with the other main conclusion reached by Mr. Justice Lamer, I do so for reasons which differ in part from his own reasons.

29 The two impugned orders issued by the adjudicator in the case at Bar read as follows:

Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:

That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:

(1) Mr. Ron Davidson was employed by Station Q107 from June, 1980, to January 20, 1984, as a radio time salesman;

(2) That his sales 'budget' or quota for 1981 was \$248,000, of which he achieved 97.3 per cent;

(3) That his sales 'budget' or quota for 1982 was \$343,500, of which he achieved 100.3 per cent;

(4) That his sales 'budget' or quota for 1983 was \$402,200, of which he achieved 114.2 per cent;

(5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

30 The first order, which has been labelled the positive order, relates to a letter of recommendation comprising five attestations numbered (1) to (5).

31 The second order, which has been labelled the negative order, forbids the appellant to answer any inquiry about the respondent's employment at Q107 otherwise than by the letter of recommendation dictated by the adjudicator in the first order.

32 The main issues are whether these two orders infringe or deny the freedoms guaranteed to the appellant by s. 2(b) of the *Canadian Charter of Rights and Freedoms* and, if so, whether they are justified by s. 1 of the *Charter*.

33 Section 1 and 2(b) of the *Charter* provide:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

.....

2. Everyone has the following fundamental freedoms:

.....

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

34 I state my conclusions at the outset. In my view, the first order, that is the positive one, except attestation number (5) thereof, as well as the second order, that is the negative one in its entirety, violate the appellant's freedom of opinion and expression and cannot be justified under s. 1 of the *Charter*.

35 I hasten to add that the flaw which I find in the first order can easily be corrected. As for the second order, it can be replaced by another order which tends toward the same end without violating the *Charter*.

## II — The First Order

36 The flaw which I find in the first order, with particular reference to its attestations numbered (1) to (4), is that this order forces the employer to write, as if they were his own, statements of facts in which, rightly or wrongly, he may not believe, or which he may ultimately find or think to be inaccurate, misleading or false. In other words, the first order may force the former employer to tell a lie. In this particular respect, this case cannot in my opinion be distinguished from the case of *National Bank of Can. v. Retail Clerks' International Union*, where a majority of this Court held as follows at p. 296 [[1984] 1 S.C.R.]:

Remedies Nos. 5 and 6 thus force the Bank and its president to do something, and to write a letter, which may be misleading or untrue.

This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes. I cannot be persuaded that the Parliament of Canada intended to confer on the Canada Labour Relations Board the power to impose such extreme measures, even assuming that it could confer such a power bearing in mind the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of thought, belief, opinion and expression. These freedoms guarantee to every person the right to express the opinions he may have: *a fortiori* they must prohibit compelling anyone to utter opinions that are not his own.

37 It was argued that the case at Bar is different in that the letter of recommendation in question is totally factual and that the facts stated therein and found by the adjudicator were undisputed. In the Federal Court of Appeal, Mahoney J. accepted this argument. He wrote at p. 260 [[1985] 1 F.C.]:

I am, of course, aware of the decision in *National Bank of Canada v. Retail Clerks' International Union et al.*, [1984] 1 S.C.R. 269. The letter ordered in that case required the employer to express, or at least imply, opinions which it did not necessarily hold. Here, the applicant has simply been *ordered to tell the truth*. The letter sets out bald facts that are neither misleading nor disputed.

(Emphasis added.)

38 With the greatest of respect, in so accepting the argument, Mahoney J. missed the point altogether and begged the essential question: what is the truth? The facts found to be true by the adjudicator are binding for the purpose of establishing whether or not there had been an unjust dismissal. But the former employer cannot be forced to acknowledge and state them as the truth apart from his belief in their veracity. If he states these facts in the letter, as ordered, but does not believe them to be true, he does not tell the truth; he tells a lie. He may not have disputed these facts at the time of the hearing but he could change his mind later, for instance on the basis of evidence discovered after the adjudicator's decision was rendered.

39 There may be a distinction, somewhat difficult to apply, between being forced to express opinions or views which one does not necessarily entertain, and being compelled to state facts, the veracity of which one does not necessarily believe; but, in my opinion, both types of coercion constitute gross violations of the freedoms of opinion and expression or, at the very least, of the freedom of expression. That is why, with respect, I cannot possibly agree with the suggestion that the restriction to freedom of expression which results from the first order is not very serious or very grave. The superficial innocuousness of the first order should not blind us to the nature of this order and to the positive manner in which it violates the freedom of expression. It is one thing to prohibit the disclosure of certain facts. It is quite another to order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them. The prohibition constitutes a *prima facie* violation of the freedoms of opinion and expression but such a prohibition may, in some circumstances, be justified under s. 1 of the *Charter*. On the other hand, to order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them, constitutes a much more serious violation of the freedoms of opinion and expression, as was held in the case of the *National Bank of Can.* In my view, such a violation is totalitarian in nature and can never be justified under s. 1 of the *Charter*. It does not differ, essentially, from the command given to Galileo by the Inquisition to abjure the cosmology of Copernicus. As was stated in the unanimous reasons of this Court in *Que. Assn. of Protestant School Bds. v. A.G. Que.*; *Wong-Woo v. A.G. Que.*; *Orman v. A.G. Que.*; *Mak v. A.G. Que.*; *Toma v. A.G. Que.*, [1984] 2 S.C.R. 66, 54 N.R. 196, 10 D.L.R. (4th) 321, 9 C.R.R. 133, s. 1 of the *Charter* cannot be used to justify a complete negation of a constitutionally protected right or freedom [S.C.R., at 88]:

The provisions of s. 73 of *Bill 101* collide directly with those of s. 23 of the *Charter*, and are not limits which can be legitimized by s. 1 of the *Charter*. Such limits cannot be exceptions to the rights and freedoms guaranteed by the *Charter* nor amount to amendments of the *Charter*. *An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(a) of the Charter, which guarantees freedom of conscience and religion, and would have to be ruled of no force of effect without the necessity of even considering whether such legislation could be legitimized by s. 1.*

(Emphasis added.) (See also *Reference re Alta. Legislation*, [1938] S.C.R. 100, [1938] 2 D.L.R. 81, appeal dismissed [1938] 3 W.W.R. 337, [1939] A.C. 117, (sub nom. *A.G. Alta. v. A.G. Can.*), [1938] 4 D.L.R. 433, with respect to the *Accurate News and Information Act* of Alberta.)

40 In spite of its gravity however, and as indicated earlier, the flaw which I find in the first order can easily be corrected. It would suffice to add to the letter a sentence or sentences indicating that the attestations numbered (1) to (4) refer to facts as found by the adjudicator.

41 As for attestation number (5), it does not give rise to any difficulty in my view since it refers to a matter of record.

### III — The Second Order

42 The second order is in the form of a prohibition to answer enquiries relating to the respondent's employment at Q107 otherwise than be the letter of recommendation described in the first order.

43 I agree with Mr. Justice Lamer that the sending of the letter as drafted by the adjudicator, coupled with the prohibition to say or write anything else, could lead to the implication that the former employer has no further comment to make upon the performance of the respondent and that, accordingly, the letter reflects the opinion of the former employer. This being the case, the second order, coupled with the first, also violates the former employer's freedoms of opinion and expression in a manner which, for the reasons given above, cannot be justified under s. 1 of the *Charter*.

44 The risks of such an implication might be reduced and perhaps eliminated should the first order be corrected as I suggested earlier. But I believe that we must decide the case on the basis of the orders as they now stand, and not as we would if they were corrected.

45 In any event, I find the second order disproportionate and unreasonable. I believe one should view with extreme suspicion an administrative order or even a judicial order which has the effect of preventing the litigants from commenting upon and even criticizing the rulings of the deciding board or Court.

46 Adjudicators and boards who, in cases of unjust dismissal, order the sending of letters of recommendation by former employers face a dilemma. They cannot foresee all the possible types of exchanges which are susceptible to occur between former and prospective employers. They accordingly issue a blanket and perpetual prohibition to write or say anything but what they have dictated in the letter of recommendation. This can lead to absurd and even counter-productive results.

47 Thus, in the case at Bar, if after having received the letter dictated by the adjudicator, a prospective employer were to address specific questions to the former employer, relating for instance to the respondent's health or drinking habits, the appellant would have to go on answering with sales statistics. This could not but compromise the respondent's chances for employment. Or if the former employer finally saw the light and, out of remorse, became inclined to write a letter considerably more complimentary and flattering than the one dictated by the adjudicator, he could not do so.

48 The absurdity which results from the adjudicator's second order is sufficient to warrant its reversal, in my view. It is disproportionate and unreasonable from a practical point of view. Then it has to be unreasonable from an administrative law point of view and I have difficulty in conceiving how it could be reasonable within the meaning of s. 1 of the *Charter*.

49 This being said, I agree that the adjudicator was legitimately concerned by the risk that the former employer undermine the effect of the letter of recommendation. While I believe that the prohibition he issued to foreclose that possibility is disproportionate and unreasonable, I think that other legitimate means might have been devised towards the same end. The adjudicator could, for instance, have ordered the former employer to write in the letter that he had been instructed by the adjudicator to tell prospective employers that they would be well advised to read the adjudicator's decision. I do not believe that such a neutral order would be punitive, but it might alert prospective employers to the animosity displayed by the former employer towards the respondent.

#### IV — Conclusions

50 One last point before I reach my conclusions properly so called.

51 I would not like it to be thought that I condone the highly reprehensible conduct of the appellant. But under the *Charter*, freedom of opinion and freedom of expression are guaranteed to "everyone", employers and employees alike, irrespective of their labour practices and of their bargaining power.

52 I would allow the appeal, set aside the judgment of the Federal Court of Appeal as well as the first and second order of the adjudicator quoted in these reasons for judgment, and refer the matter back to the adjudicator so that these orders be replaced by an order or orders compatible with these reasons.

53 I would give an affirmative answer to the first constitutional question and a negative answer to the second constitutional question.

54 I would not make any order as to costs.

#### *Lamer J.:*

55 An adjudicator appointed by the Minister of Labour pursuant to s. 61.5(6) of the *Canada Labour Code* made an order in favour of an employee based on s. 61.5(9) of the Code. The employer challenged the said order but its appeal was dismissed by the Federal Court of Appeal. With leave of this Court, the employer is now appealing here from this judgment of the Federal Court of Appeal. The outcome of this appeal involves determining whether, under s. 61.5(9) of the *Canada Labour Code*, as it read at the time of his decision, the adjudicator had the power to make the order at issue.

#### I — Facts

56 Respondent had been employed by appellant as a "radio time salesman" for 3 1/2 years when he was dismissed on the ground that his performance was inadequate. It is not in dispute that when he was dismissed respondent received all monies to which he was entitled under his employment contract.

57 However, respondent filed a complaint with an inspector alleging that he had been unjustly dismissed. As the parties were unable to settle this complaint and respondent asked that it be referred to an adjudicator, the Minister of Labour appointed an adjudicator to hear and decide the matter in accordance with the Code.

58 After hearing the evidence and the submissions of the parties, the adjudicator made an order directing the employer to pay respondent as compensation the sum of \$46,628.96 with interest at the rate of 12 per cent and to pay his counsel the sum of \$2,500 to reimburse him for the legal costs incurred. The said order further imposed on the employer an obligation to give respondent a letter of recommendation certifying that he had been employed by station Q107 from June 1980 to January 20, 1984, and that an adjudicator had found he was unjustly dismissed and indicating the sales quotas he had been set and the amount of sales he actually made during this period. It should be noted that the order made specifically indicates the amounts to be shown as sales quotas and as sales actually made. Finally, the order directed appellant to answer requests for information about respondent only by sending this letter of recommendation.

59 This order reads as follows:

In the matter of compensation, I am satisfied that had he not been dismissed, the sales and commissions of the complainant would have at least equalled those of 1983. After taking into consideration the fact that he worked until January 20, 1984, and received certain commissions (at reduced levels) thereafter, my order is that he be paid forthwith the equivalent of 75 per cent of his 1983 earnings of \$62,171.95, being the sum of \$46,628.96.

I further order that interest be paid at the rate of 12 per cent per annum, divided by two, on the said amount from January 20 to November 20, 1984. Thereafter interest will be payable on any unpaid balance at the rate of 12 per cent per annum, which is not to be divided by two.

I say nothing of the U.I.C. payments received by the complainant, which is a matter to be resolved between the complainant and the Commission.

I further order payment of legal costs in the amount of \$2,500.00 to the complainant's solicitor and counsel, Mr. Morris Cooper.

Further orders are necessary, resembling the order made by Adjudicator Adams in the *Roberts* case, but in greater detail.

Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:

That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:

- (1) Mr. Ron Davidson was employed by Station Q107 from June, 1980 to January 20, 1984, as a radio time salesman;
- (2) That his sales 'budget' or quota for 1981 was \$248,000, of which he achieved 97.3 per cent;
- (3) That his sales 'budget' or quota for 1982 was \$343,500, of which he achieved 100.3 per cent;
- (4) That his sales 'budget' or quota for 1983 was \$402,200, of which he achieved 114.2 per cent;
- (5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

60 Appellant is challenging in this Court only the parts of the order relating to (1) the sending of a letter of recommendation and (2) the prohibition on answering a request for information in any other way than by sending this letter.

## II — Judgments of Lower Courts

61 Appellant challenged this order by filing an application with the Federal Court of Appeal to set it aside. However, the Federal Court of Appeal, made up of Urie and Mahoney JJ. with Marceau J. dissenting, dismissed this application to set aside.

62 In his reasons, Mahoney J. first said that the purpose of s. 61.5(9)(c) and the fact that it would be difficult or even impossible to find remedies similar to the remedies expressly authorized in paras. (a) and (b) meant that the presence of the word "like" in the English version of s. 61.5(9)(c) was not intended to restrict the powers conferred on the adjudicator. In his opinion, this paragraph simply expressed a kind of ejusdem generis rule which did not have the effect of limiting the scope of the powers conferred.

63 Ordering the employer to give respondent a letter of recommendation was in his opinion an equitable remedy designed to remedy the consequences of the dismissal, not to punish the employer. This letter, he thought, only stated objective facts that were not in dispute and so simply required the employer to tell the truth.

64 However, he agreed with appellant's argument that the part of the decision ordering the employer to issue a letter of recommendation imposed limitations on its freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*. In his view, however, such a limitation was justified under s. 1 of that *Charter*. He stressed that the limitation on freedom of expression was prescribed by law, since it was the Act which authorized the adjudicator to make such an order.

65 Urie J., for his part, agreed with the reasons stated by his brother Judge Mahoney. However, he indicated that he was not sure that the ejusdem generis rule applied in any way to the interpretation of s. 61.5(9)(c).

66 Finally, Marceau J. wrote his own reasons, which differ from the majority reasons in certain respects. First, he expressed agreement with Mahoney J. as to the way in which s. 61.5(9)(c) should be construed, but expressed some reservations regarding application of the ejusdem generis rule. He noted that the powers conferred on the adjudicator were already clearly limited by the fact that the orders he was empowered to make under para. (c) must be aimed at remedying or counteracting the consequences of the dismissal.

67 In his view, the remedies ordered in the case at Bar were of two types, positive and negative. The part of the order directing the employer to furnish respondent and any person seeking information about him with a letter of recommendation having a specified content was, in his opinion, an order that could be characterized as positive. It directed the employer to do something and sought to remedy the consequences of the dismissal found to be unjust: accordingly, it was authorized by s. 61.5(9)(c). The part of the order which also prohibited the employer from answering any request for information about respondent other than by issuing this letter might for its part be characterized as negative, since it prohibited the employer from doing something. Such an order, in his view, was not aimed at remedying the consequences of the dismissal and so was not authorized by the said paragraph.

68 He also considered that this part of the order infringed the freedom of thought, belief, opinion and expression guaranteed appellant by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. He said he did not think it possible to say that the limitation was prescribed by law, since the extent of the limitation was not indicated by the legislation in question. He added, however, that in any case in his opinion these freedoms were not subject to reasonable limits that could be demonstrably justified in a free and democratic society. He therefore concluded that the application to set aside should be allowed and the matter referred back to the adjudicator concerned for him to determine what remedies it would be appropriate to impose in order to counteract the effects of the dismissal.

### III — Legislation

69 The following legislation is relevant to this appeal:

#### *Canada Labour Code*

70

61.5. ...

(9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

*Canadian Charter of Rights and Freedoms*

71

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

.....

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association

.....

32. (1) This *Charter* applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

**IV — Analysis**

72 To begin with, appellant argued that the adjudicator had no power to make these parts of the order since the orders he is authorized to make under s. 61.5(9)(c) must be of the same kind as the orders expressly mentioned in s. 61.5(9)(a) and (b), in view of the word "like" that appears in the English version.

73 As can readily be seen, the English and French versions of s. 61.5(9)(c) are different. Section 61.5(9)(c) of the English version confers a general power on the adjudicator as follows:

61.5. ...

(9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to

.....

(c) do any other *like* thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

(My emphasis.)

74 The French version, for its part, does not contain any word or expression equivalent to the word "like" used in the English version. The general power conferred on the adjudicator is conferred in the following language:

61.5.

(9) Lorsque l'arbitre décide conformément au paragraphe (8) que le congédiement d'une personne a été injuste, il peut, par ordonnance, requérir l'employeur

.....

(c) de faire toute autre chose qu'il juge équitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier.

75 First of all, therefore, these two versions have to be reconciled if possible. To do this, an attempt must be made to get from the two versions of the provision the meaning common to them both and ascertain whether this appears to be consistent with the purpose and general scheme of the Code.

76 In the case at Bar, I consider, like the Federal Court of Appeal Judges, that the presence of the word "like" in para. (c) of the English version was not intended to limit the powers conferred on the adjudicator by allowing him to make only orders similar to the orders expressly mentioned in paras. (a) and (b) of that subsection, and does not have that effect. Interpreting this provision in this way would mean applying the *ejusdem generis* rule. I think it is impossible to apply this rule in the case at Bar since one of the conditions essential for its application has not been met. The specific terms (here the orders referred to in paras. (a) and (b)) which precede the general term (the power conferred on the adjudicator in para. (c) to make any order that is equitable) must have a common characteristic, a common genus. As Maxwell writes in P. St. J. Langan, ed. *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell, 1969) at 299:

Unless there is a genus or class or category, there is no room for any application of the *ejusdem generis* doctrine.

77 Professor P.-A. Côté also notes this requirement when he writes in his work titled *The Interpretation of Legislation in Canada*, trans. K. Lippel (Cowansville, Qué.: Éditions Yvon Blais, 1984) at 245:

As a third condition, the specific terms must have a significant common denominator to be considered within one given category. If this is lacking, *ejusdem generis* does not apply.

78 In the case at Bar, I do not see what characteristic could be described as common to a compensation order and a reinstatement order.

79 The only "denominator" which seems to me common to these two orders in the context of s. 61.5(9) is the fact that these orders are both intended to remedy or counteract the consequences of the dismissal found by the adjudicator to be unjust. However, para. (c) expressly provides that an order made under that paragraph must be designed to remedy or counteract any consequence of the dismissal. This "common denominator" cannot therefore assist in the application of the *ejusdem generis* rule, since the legislator has already expressly provided that the orders the adjudicator is empowered to make must have this characteristic. Even if I were to admit that the English version should prevail over the French version, which I do not admit, I would still consider that this provision is ambiguous and that the most rational way of interpreting it is to say that the presence of the word "like" in this version does not have the effect of limiting the general power conferred on the adjudicator. This interpretation is in any case much more consistent with the general scheme of the Code, and in particular with the purpose of Division V.7, which is to give non-unionized employees a means of challenging a dismissal they feel to be unjust and at the same time to equip the adjudicator with the powers necessary to remedy the consequences of such a dismissal. Section 61.5 is clearly a remedial provision and must accordingly be given a broad interpretation. The consequence of interpreting para. (c) in the manner suggested by appellant would be to limit considerably the type of order the adjudicator could make. It would in fact be very difficult to find remedies *like* the remedies mentioned in paras. (a) and (b). The extent of the compensation that can be ordered has been carefully limited by the legislator and there is not really any similarity between reinstatement and any other measure. I believe that, on the contrary, by enacting s. 61.5(9)(c), the legislator intended to vest in the adjudicator powers that would be sufficiently wide and flexible for him to adequately perform the duties entrusted to him, in each of the cases that come before him. I therefore consider that the meaning to be given to both versions is what clearly appears on the face of

the French version and that accordingly the type of order the adjudicator can make should not be limited to orders like those expressly authorized in paras. (a) and (b).

80 Appellant further argued that the adjudicator exceeded his jurisdiction since there is no connection between the order made in the case at Bar, the dismissal and the consequences of that dismissal. I cannot entirely agree with him in this regard. The part of the order dealing with the sending of a letter of recommendation is, in my view, clearly meant to counteract the consequences of the dismissal found to be unjust by the adjudicator. This part of the order is designed to prevent the employer's decision to dismiss respondent from having negative consequences for the latter's chances of finding new employment. The letter of recommendation is intended to correct the impression given by the fact of the dismissal, by clearly indicating that the dismissal was found by an adjudicator to be unjust and by clearly setting out certain "objective" facts relating to respondent's performance. The situation is therefore very different from that which existed in *National Bank of Can. v. Retail Clerks' International Union*.

81 In that case, the Canada Labour Relations Board had found that the National Bank of Canada, which had closed a unionized branch and incorporated it in a non-unionized branch, had taken its decision for anti-union reasons and had therefore infringed s. 184(1)(a) and (3)(a) of the *Canada Labour Code*. These provisions prohibit an employer, inter alia, from interfering with the formation or administration of a trade union and from suspending, transferring or laying off an employee on the ground that he is a member of a trade union. The Canada Labour Relations Board had therefore ordered the Bank to do a number of things. Among these were that it create a trust fund to further the objectives of the Code among all its employees and send the employees a letter telling them this fund had been created. The order specifically indicated what the wording of this letter should be and prohibited the employer from adding or deleting anything in its wording. Chouinard J., with whose reasons the other members of this Court concurred, said that in his opinion the part of the order prescribing the creation of a trust fund should be set aside since there was no relationship between this remedy and the alleged act and its consequences. He thought that the announcement of the creation of the fund was the key feature of the letter the employer was required to send, and concluded that this part of the order should suffer the same fate as that reserved for the part of the order dealing with the creation of the fund. Beetz J., for his part, added that in his opinion both the creation of the fund and the letter were open to the interpretation that they resulted from an initiative taken by the National Bank of Canada, reflecting the views of the Bank and in particular its approval of the *Canada Labour Code* and its objectives. He stated that in his opinion this part of the order was contrary to the democratic traditions of this country and so could not have been authorized by the Parliament of Canada.

82 In the case at Bar, the letter the employer is required to give respondent is of a different nature from the letter the National Bank of Canada was required to send in that case. It expresses no opinions and simply sets out facts which, as counsel for the appellant admitted at the hearing, and it is important to note this, are not in dispute. Ordering an employer to give a former employee a letter of recommendation containing only objective facts that are not in dispute does not seem to me to be as such unreasonable. Such an order may be completely justified in certain circumstances, and in the case at Bar there is nothing to indicate that the adjudicator was pursuing an improper objective or acting in bad faith or in a discriminatory manner. As this order was not unreasonable, it is not the function of this Court to examine its appropriateness or to substitute its own opinion for that of the person making the order, unless of course the decision impinges on a right protected by the *Canadian Charter of Rights and Freedoms*.

83 Accordingly, I am not prepared to say at this stage that the nature of this part of the order is such that the adjudicator necessarily exceeded his jurisdiction in making it. Quite apart from the constitutional argument that this order infringes the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*, therefore, I consider that the adjudicator had the power to make this part of the order at issue here. The only limitation placed by s. 61.5(9) on the type of order the adjudicator can make is that any order must be designed to "remedy or counteract any consequence of the dismissal." In my view, this part of the order is clearly intended for that purpose.

84 However, I take a different view of the part of the order that prohibits the employer from answering a request for information about respondent other than by sending this letter of recommendation. Although this part of the order is probably meant to remedy or counteract the consequences of the dismissal, I believe that the issuing of this letter in

such a context could be interpreted as meaning that appellant has no comments to make regarding the work done by respondent other than those mentioned in the letter. In such circumstances, it could thus be construed as expressing, at least by implication, appellant's opinion in this regard. Although requiring someone to write a letter is not unreasonable as such, the requirement becomes wholly unreasonable when the circumstances are such that the letter may be seen as reflecting their opinions when that is not necessarily the case. This part of the order does not prohibit the employer from stating facts found to be incorrect at the hearing, which might have been reasonable and justified: it prohibits the employer from making comments of any kind. In my view the effect of this part of the order, by thus prohibiting the employer from adding any comments whatever, is to create circumstances in which the letter of recommendation could be seen as the expression of appellant's opinions. As my brother Beetz J. so admirably phrased it in *National Bank of Canada*, at p. 296 [[1984] 1 S.C.R.]:

This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes.

85 Parliament cannot have intended to authorize such an unreasonable use of the discretion conferred by it. A discretion is never absolute, regardless of the terms in which it is conferred. This is a long-established principle. H.W.R. Wade, in his text titled *Administrative Law*, 4th ed. (Oxford: Clarendon Press, 1977) says the following at p. 336:

For more than three centuries it has been accepted that discretionary power conferred upon public authorities is not absolute, even within its apparent boundaries, but is subject to general legal limitations. These limitations are expressed in a variety of different ways, as by saying that discretion must be exercised *reasonably* and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious.

(My emphasis.)

86 This limitation on the exercise of administrative discretion has been clearly recognized in our law, by *C.U.P.E., Local 963 v. N.B. Liquor Corp.*, [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 79 C.L.L.C. 14,209, 26 N.R. 341, 97 D.L.R. (3d) 417, N.B.L.L.C. 24259, and *Blanchard v. Control Data Can. Ltd.*, [1984] 2 S.C.R. 476, 14 Admin. L.R. 133, 84 C.L.L.C. 14,070, 55 N.R. 194, 14 D.L.R. (4th) 289 inter alia. Whether it is the interpretation of legislation that is unreasonable or the order made in my view matters no more than the question of whether the error is one of law or of fact. An administrative tribunal exercising discretion can never do so unreasonably. To reiterate what I said earlier in *Blanchard* [[1984] 2 S.C.R., at 494-495]:

An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.

Not only is the distinction between error of law and of fact superfluous in light of an unreasonable finding or conclusion, but the reference to error itself is as well. Indeed, though all errors do not lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact, or a combination of the two), which is unreasonable.

In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal.

87 In the case at Bar, I consider that the adjudicator was not authorized by s. 61.5(9)(c) to order the employer not to answer a request for information about respondent, except by sending the letter of recommendation containing the aforementioned wording, since such an order is patently unreasonable. Though the adjudicator clearly had jurisdiction to make an order he felt to be equitable and proper, he lost this jurisdiction when he made a patently unreasonable decision.

88 Appellant further argued that s. 61.5(9)(c) did not empower the adjudicator to make such an order, since that paragraph does not clearly state that the adjudicator can use a remedy that differs from the remedies usually available

under the ordinary rules of common law in such circumstances. The principle underlying this argument is that, in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law. There is no need for me to rule on the merits of this principle, since I consider that in the case at Bar, by enacting para. (c), the legislator clearly indicated his intent to confer wider powers on the adjudicator than those he usually has under the ordinary rules of common law in such circumstances.

89 It now remains to assess in light of the *Canadian Charter of Rights and Freedoms* the part of the order we have found to be not unreasonable in terms of the rules of administrative law. The fact that the part of the order relating to sending the letter of recommendation is not unreasonable from an administrative law standpoint does not mean that it is necessarily consistent with the *Charter*.

90 The fact that the *Charter* applies to the order made by the adjudicator in the case at Bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives *all* his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. This idea was very well expressed by Prof. Peter Hogg when he wrote in his text titled *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 671:

The references in s. 32 to the 'Parliament' and a 'legislature' make clear that the Charter operates as a limitation on the powers of those legislative bodies. Any statute enacted by either Parliament or a Legislature which is inconsistent with the Charter will be outside the power of (*ultra vires*) the enacting body and will be invalid. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the Charter. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

91 Section 61.5(9)(c) must therefore be interpreted as conferring on the adjudicator a power to require the employer to do any other thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal, provided however that such an order, if it limits a protected right or freedom, only does so within reasonable limits that can be demonstrably justified in a free and democratic society. It is only if the limitation on a right or freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the *Charter*. The *Charter* does not provide an absolute guarantee of the rights and freedoms mentioned in it. What it guarantees is the right to have such rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. There is thus no reason not to ascribe to Parliament an intent to limit a right or freedom mentioned in the *Charter* or to allow a protected right or freedom to be limited when the language used by Parliament suggests this.

92 It would be useful, in my view, to describe the steps that must be taken to determine the validity of an order made by an administrative tribunal, which are as follows.

93 First, there are two important principles that must be borne in mind:

1. An administrative tribunal may not exceed the jurisdiction it has by statute; and
2. It must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication.

94 The application of these two principles to the exercise of a discretion leads to one of the following two situations:

1. The disputed order was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right.

(a) It is then necessary to subject the *legislation* to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

2. The legislation pursuant to which the administrative tribunal made the disputed order confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*.

(a) It is then necessary to subject the *order* made to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

(b) If it is not thus justified, the administrative tribunal has necessarily exceeded its jurisdiction.

(c) If it is thus justified, on the other hand, then the administrative tribunal has acted within its jurisdiction.

95 There is no doubt in the case at Bar that the part of the order dealing with the issuing of a letter of recommendation places, in my opinion, a limitation on freedom of expression. There is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do. The order directing appellant to give respondent a letter containing certain objective facts in my opinion unquestionably limits appellant's freedom of expression.

96 However, this limitation is prescribed by law and can therefore be justified under s. 1. The adjudicator derives all his powers from statute and can only do what he is allowed by statute to do. It is the legislative provision conferring discretion which limits the right or freedom, since it is what authorizes the holder of such discretion to make an order the effect of which is to place limits on the rights and freedoms mentioned in the *Charter*. The order made by the adjudicator is only an exercise of the discretion conferred on him by statute.

97 To determine whether this limitation is reasonable and can be demonstrably justified in a free and democratic society, therefore, one must examine whether the use made of the discretion has the effect of keeping the limitation within reasonable limits that can be demonstrably justified in a free and democratic society. If the answer is yes, we must conclude that the adjudicator had the power to make such an order since he was authorized to make an order reasonably and justifiably limiting a right or freedom mentioned in the *Charter*. If on the contrary the answer is no, then one has to conclude that the adjudicator exceeded his jurisdiction since Parliament has not delegated to him a power to infringe the *Charter*. If he has exceeded his jurisdiction, his decision is of no force or effect.

98 The test that must be applied in such an assessment has been largely defined by my brother Dickson C.J. in *R. v. Oakes*. According to that test, the objective to be served by the disputed measures must first be sufficiently important to warrant limiting a right or freedom protected by the *Charter*. Second, the party seeking to maintain the limitation must show that the means selected to attain this objective are reasonable and justifiable. To do this, it will be necessary to apply a form of proportionality test involving three separate components: the disputed measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. The means chosen must also be such as to impair the right or freedom as little as possible, and finally, its effects must be proportional to the objective sought.

99 I consider that the objective sought by the order made in the case at Bar is sufficiently important to justify some limitation on freedom of expression. The purpose of the order is clearly, as required by the Code and as I indicated above, to counteract, or at least to remedy, the consequences of the dismissal found by the adjudicator to be unjust. In my opinion, such an objective is sufficiently important to warrant a limitation on a right or freedom mentioned in the *Charter*. I think it is important for the legislator to provide certain mechanisms to restore equilibrium in the relations between an employer and his employee, so that the latter will not be subject to arbitrary action by the former. These observations should not be taken as meaning that in my view all employers necessarily try to abuse their position. However, it cannot be denied that some employees are in an especially vulnerable position in relation to their employers and that the forces involved are usually not equal. Accordingly, I think that mechanisms designed to remedy or counteract the consequences of an unlawful action taken by an employer are justified in such a context. It should also be noted that in these circumstances the limitation on rights or freedoms is not in fact made until after the act committed by the employer has been found by an adjudicator to be unlawful, and only in order to remedy the consequences of that act found to be unlawful.

100 An order directing the employer to give respondent a letter of recommendation containing objective facts also seems to me to be reasonable and justifiable in these circumstances. It has the three characteristics necessary to meet the proportionality test. As I mentioned earlier, the purpose of the letter of recommendation is to correct the impression given by the fact of the dismissal, by clearly indicating that the dismissal was found by an adjudicator to be unjust, and by clearly indicating certain "objective" facts that are not in dispute regarding the respondent's performance. A reinstatement order is not always desirable and a compensation order is not always adequate to remedy the consequences of an unjust dismissal. It is possible in some cases for a dismissal to have very negative consequences on the former employee's chances of finding new employment. It seems to me, therefore, that there will be times when such an order is the only means of attaining the objective sought, that of counteracting or remedying the consequences of the dismissal. It is certainly very rationally connected to the latter, since in certain cases it is the only way of effectively remedying the consequences of the dismissal. It is also limited to requiring that the employer state "objective" facts which, in the case at Bar, are not in dispute and do not require the employer to express any opinion, since the part of the order regarding the prohibition on answering a request for information about respondent other than by issuing this letter has been found to be unreasonable, and accordingly outside the jurisdiction conferred on the adjudicator. The employer may thus, if this part found to be unreasonable is removed, indicate for example that he was directed to write the letter and that it therefore does not necessarily contain all his views about the work done by respondent. Taking these circumstances into account, I do not see any way of attaining this objective in the case at Bar without impairing the employer's freedom of expression. Finally, I consider that the consequences of the order are proportional to the objective sought. As I have already said, the latter is important in our society. The limitation on freedom of expression is not what could be described as very serious. It does not abolish that freedom, but simply limits its exercise by requiring the employer to write something determined in advance. This limitation on freedom of expression mentioned in the *Charter* is thus in my opinion kept within reasonable limits that can be demonstrably justified in a free and democratic society. In making this part of the order, therefore, the adjudicator did not infringe the *Charter* and acted within his jurisdiction.

101 As this appeal is covered by s. 52(d) of the *Federal Court Act*, R.S.C. 1970, 2d Supp., c. 10, I would refer the matter back to the adjudicator in question for him to make an order consistent with this judgment.

102 Accordingly, I would allow the appeal at Bar, reverse the judgment of the Federal Court of Appeal, invalidate the order made by the adjudicator and refer the matter back to him so he may make a new order consistent with the instant judgment, the whole with costs.

*Appeal dismissed*

#### Footnotes

\* Le Dain J. took no part in the judgment.

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2014 ONSC 5274  
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2014 CarswellOnt 11369, 2014 ONSC 5274, 244 A.C.W.S. (3d) 10

**In the Matter of the Companies' Creditors  
Arrangement Act, R.S.C. 1985, c. c-36, as Amended**

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Newbould J.

Heard: July 25, 2014

Judgment: September 11, 2014

Docket: 09-CL-7950

Counsel: Benjamin Zarnett, Graham Smith, for Monitor and Canadian Debtors  
Ken Rosenberg, for Canadian Creditors' Committee  
Michael Barrack, D.J. Miller, Michael Shakra, for UK Pension Claimants  
Tracy Wynne, for EMEA Debtors  
Kenneth Kraft, for Wilmington Trust, National Association  
Richard Swan, Gavin Finlayson, Kevin Zych, for Ad Hoc Group of Bondholders  
Shayne Kukulowicz, for US Unsecured Creditors' Committee  
John D. Marshall, for Law Debenture Trust Company of New York  
Brett Harrison, for Bank of New York Mellon  
Andrew Gray, Scott Bomhof, for US Debtors

Subject: Insolvency

CLAIM by bondholders for post-filing interest against an insolvent estate under *Companies' Creditors Arrangement Act*.

***Newbould J.:***

1 Nortel Networks Corporation ("NNC") and other Canadian debtors filed for and were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, ("CCAA") on January 14, 2009. On the same date, Nortel Network Inc. ("NNI") and other US debtors filed petitions in Delaware under the United States Bankruptcy Code, 11 U.S.C., Chapter 11.

2 Beginning in 1996, unsecured *pari passu* notes were issued under three separate bond indentures, first by a US Nortel corporation guaranteed by Nortel Networks Limited ("NNL"), a Canadian corporation, and then by NNL in several tranches jointly and severally guaranteed by NNC and NNI (the "crossover bonds"). Thus all of the notes are payable by Nortel entities in both Canada and the US, either as the maker or guarantor. Under claims procedures in both the Canadian and US proceedings, claims by bondholders for principal and pre-filing interest in the amount of US \$4.092 billion have been made against each of the Canadian and US estates. The bondholders also claim to be entitled to post-filing interest and related claims under the terms of the bonds which, as of December 31, 2013, amounted to approximately US\$1.6 billion.

3 The total assets realized on the sale of Nortel assets worldwide which are the subject of the allocation proceedings amongst the Canadian, US, and European, Middle East and African estates ("EMEA") are approximately US\$7.3 billion, and thus the post-filing bond interest claims of now more than US\$1.6 billion represent a substantial portion of the total assets available to all three estates. While the post-filing bond interest grows at various compounded rates under the terms of the bonds, the US\$7.3 billion is apparently not growing at any appreciable rate because of the very conservative nature of the investments made with it pending the outcome of the insolvency proceedings. Apart from the bondholders, the main claimants against the Canadian debtors are Nortel disabled employees, former employees and retirees.

4 The bond claims in the Canadian proceedings have been filed pursuant to a claims procedure order in the CCAA proceedings dated July 30, 2009. The order contemplated that the claims filed under it would be finally determined in accordance with further procedures to be authorized, including by a further claims resolution order. By order dated September 16, 2010, a further order was made in the CCAA proceedings that authorized procedures to determine claims for all purposes.

5 By direction of June 24, 2014, it was ordered that the following issues be argued:

(a) whether the holders of the crossover bond claims are legally entitled in each jurisdiction to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US\$4.092 billion); and

(b) if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

6 The hearing in the US Bankruptcy Court was scheduled to proceed at the same time as the hearing in this Court but was adjourned due to an apparent settlement between the US Debtors and certain bondholders.

7 The Monitor and Canadian debtors, supported by the Canadian Creditors' Committee, the UK Pension Claimants, the EMEA debtors, and the Wilmington Trust take the position that in a liquidating CCAA proceeding such as this, post-filing interest is not legally payable on the crossover bonds as a result of the "interest stops" rule. The Ad Hoc Group of Bondholders, supported by the US Unsecured Creditors' Committee, Law Debenture Trust Company of New York and Bank of New York Mellon take the position that there is no "interest stops" rule in CCAA proceedings and that the right to interest on the crossover bonds is not lost on the filing of CCAA proceedings and can be the subject of negotiations regarding a CCAA plan of reorganization. They take the position that no distribution of Nortel's sale proceeds that fails to recognize the full amount of the crossover bondholders' claims, including post-filing interest, can be ordered under the CCAA except under a negotiated CCAA plan duly approved by the requisite majorities of creditors and sanctioned by the court.

8 For the reasons that follow, I accept the position and hold that post-filing interest is not legally payable on the crossover bonds in this case.

### **The interest stops rule**

9 In this case, the bondholders have a contractual right to interest. The other major claimants, being pensioners, do not. The Canadian debtors contend that the reason for the interest stops rule is one of fundamental fairness and that the rule should apply in this case.

10 The Canadian debtors contend that the interest-stops rule is a common law rule corollary to the *pari passu* rule governing rateable payments of an insolvent's debts and that while the CCAA is silent as to the right to post-filing interest, it does not rule out the interest-stops rule.

11 The bondholders contend that to deny them the right to post-filing interest would amount to a confiscation of a property right to interest and that absent express statutory authority the court has no ability to interfere with their contractual entitlement to interest. I do not see their claim to interest as being a property right, as the bonds are unsecured. See *Thibodeau v. Thibodeau* (2011), 104 O.R. (3d) 161 (Ont. C.A.), at para. 43. However, the question remains as to whether their contractual rights should prevail.

12 It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment. See *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652 (Ont. C.A.) at para. 25, per Blair J.A. and *Indalex Ltd., Re* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.J. [Commercial List]), at para. 16 per Morawetz J. This common law principle has led to the development of the interest stops rule. In *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610 (Ont. S.C.J. [Commercial List]), Blair J. (as he then was) stated the following:

**20** One of the governing principles of insolvency law - including proceedings in a winding-up - is that the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of the insolvency. This principle has led to the development of the "interest stops rule", i.e., that no interest is payable on a debt from the date of the winding-up or bankruptcy. As Lord Justice James put it, colourfully, in *Re Savin* (1872), L.R. 7 Ch. 760 (C.A.), at p. 764:

I believe, however, that if the question now arose for the first time I should agree with the rule [i.e. the "interest stops rule"], seeing that the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time.

13 This rule is "judge-made" law. See *Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.), at 647, per Sir G. M. Giffard, L.J.

14 In *Shoppers Trust*, Blair J.A. referred to *pari passu* principles in the context of the interest stops rule and the common law understanding of those rules in liquidation proceedings. He stated:

25. The rationale underlying this approach rests on a fundamental principle of insolvency law, namely, that "in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up": *Humber Ironworks, supra*, at p. 646 Ch. App. Unless this is the case, the principle of *pari passu* distribution cannot be honoured. See also *Re McDougall*, [1883] O.J. No. 63, 8 O.A.R. 309, at paras. 13-15; *Principal Savings & Trust Co. v. Principal Group Ltd. (Trustee of)* (1993), 109 D.L.R. (4th) 390, 14 Alta. L.R. (3d) 442 (C.A.), at paras. 12-16; and *Canada (Attorney General) v. Confederation Trust Co.* (2003), 65 O.R. (3d) 519, [2003] O.J. No. 2754 (S.C.J.), at p. 525 [O.R.] While these cases were decided in the context of what is known as the "interest stops" rule, they are all premised on the common law understanding that claims for principal and interest are provable in liquidation proceedings to the date of the winding-up.

15 The interest stops rule has been applied in winding-up cases in spite of the fact that the legislation did not provide for it. In *Shoppers Trust*, Blair J.A. stated:

26. Thus, it was of little moment that the provisions of the *Winding-up Act* in force at the time of the March 10, 1993 order did not contain any such term. The 1996 amendment to s. 71(1) of the *Winding-up and Restructuring Act*, establishing that claims against the insolvent estate are to be calculated as at the date of the winding-up, merely clarified and codified the position as it already existed in insolvency law.

16 In *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.* (1992), 11 C.B.R. (3d) 193 (Alta. C.A.), Kerans J.A. applied the interest stops rule in a bankruptcy proceeding under the BIA even although, in his view, the BIA assumed that interest was not payable after bankruptcy but did not expressly forbid it. He did so on the basis of the

common law rule enunciated in *Savin, Re* [(1872), 7 Ch. App. 760 (Eng. Ch. Div.)], quoted by Blair J. in *Confederation Life*. Kerans J.A. stated:

19. ... I accept that *Savin* expresses the law in Canada today: claims provable in bankruptcy cannot include interest after bankruptcy.

17 In *Confederation Life*, Blair J. was of the view that the Winding-Up Act and the BIA could be interpreted to permit post-filing interest. Yet he held that the common law insolvency interest stops rule applied. He stated:

22 This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the Winding-Up Act and section 121 of the BIA, which might be read to the contrary, in my view....

23 Yet the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

18 Thus I see no reason to not apply the interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application. The issue is whether the rule should apply to this CCAA proceeding.

### **Nature of the CCAA proceeding**

19 When the Nortel entities filed for CCAA protection on January 14, 2009, and filed on the same date in the US and the UK, the stated purpose was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. However that hope quickly evaporated and on June 19, 2009 Nortel issued a news release announcing it had sold its CMDA business and LTE Access assets and that it was pursuing the sale of its other business interests. Liquidation followed, first by a sale of Nortel's eight business lines in 2009-2011 for US\$2.8 billion and second by the sale of its residual patent portfolio under a stalking-horse bid process in June 2011 for US\$4.5 billion. The sale of the CMDA and LTE assets was approved on June 29, 2009.

20 The Canadian debtors contend that this CCAA proceeding is a liquidating proceeding, and thus in substance the same as a bankruptcy under the BIA. The bondholders contend that there is no definition of a "liquidating" CCAA proceeding and no distinct legal category of a liquidating CCAA, essentially arguing that like beauty, it is in the eyes of the beholder.

21 In this case, I think there is little doubt that this is a liquidating CCAA process and has been since June, 2009, notwithstanding that there was some consideration given to monetizing the residual intellectual property in a new company to be formed (referred to as IPCO) before it was decided to sell the residual intellectual property that resulted in the sale to the Rockstar consortium for US\$4.5 billion. In *Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List]), Morawetz J. referred to his recognizing in his June 29, 2009 Nortel decision approving the sale of the CMDA and LTE assets that the CCAA can be applied in "a liquidating insolvency". See also Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013) at p. 167, in which she states "increasingly, there are 'liquidating CCAA' proceedings, whereby the debtor corporation is for all intents and purposes liquidated".

22 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), Farley J. recognized in para. 7 that a CCAA proceeding might involve liquidation. He stated:

It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company ... provided the same is proposed in the best interests of the creditors generally.

23 It is quite common now for there to be liquidating CCAA proceedings in which there is no successful restructuring of the business but rather a sale of the assets and a distribution of the proceeds to the creditors of the business. Nortel is unfortunately one of such CCAA proceedings.

#### **Can the interest stops rule apply in a CCAA proceeding?**

24 There is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the CCAA, let alone under a liquidating CCAA process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest. Accordingly, it is necessary to deal with first principles and with various cases raised by the parties.

25 The Canadian debtors contend that the rationale for the interest stops rule is equally applicable to a liquidating CCAA proceeding as it is in a BIA or Winding-Up proceeding. They assert that the reason for the interest stops rule is one of fundamental fairness. An insolvency filing under the CCAA stays creditor enforcement. Accordingly, it is unfair to permit the bondholders with a contractual right to receive a payment on account of interest, and thus compensation for the delay in receipt of payment, while other creditors such as the pension claimants, who have been equally delayed in payment by virtue of the insolvency, receive no compensation. They cite Sir G. M. Giffard, L.J. in *Humber Ironworks*:

I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

26 In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Services*], Deschamps J. reaffirmed that the purpose of a CCAA stay of proceedings is to preserve the *status quo*. She stated at para. 77:

The CCAA creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.

27 If post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights and obtaining post-judgment interest, the Canadian Creditors' Committee contend that the *status quo* has not been preserved.

28 It has long been recognized that the federal insolvency regime includes the CCAA and the BIA and that the two statutes create a complimentary and interrelated scheme for dealing with the property of insolvent companies. See *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62 and 64, per Laskin J.A.

29 Recently the Supreme Court of Canada analysed the CCAA and indicated that the BIA and CCAA are to be considered parts of an integrated insolvency scheme, the court will favour interpretations that give creditors analogous entitlements under the CCAA and BIA, and the court will avoid interpretations that give creditors incentives to prefer BIA processes.

30 In *Century Services*, Deschamps J. enunciated guiding principles for interpreting the CCAA. Deschamps J. also stated that the case was the first time that the Supreme Court was called upon to directly interpret the provisions of the CCAA. The case involved competing interpretations of the federal *Excise Tax Act* ("ETA") and the CCAA in considering a deemed trust for GST collections. The ETA expressly excluded the provisions in the BIA rendering deemed trusts ineffective, but did not exclude similar provisions in the CCAA. In holding in favour of a stay under the CCAA, Deschamps J. was guided in her interpretation of the relevant CCAA provision by the desire to have similar results under the BIA and CCAA.

31 In her analysis, Deschamps J. made a number of statements, including

Because the CCAA is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a CCAA reorganization is ultimately unsuccessful. (para. 23)

With parallel CCAA and BIA restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation. (para. 24)

Moreover, a strange asymmetry would arise if the interpretation giving the ETA priority over the CCAA urged by the Crown is adopted here: the Crown would retain priority over GST claims during CCAA proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the BIA, creditors' incentives would lie overwhelmingly with avoiding proceedings under the CCAA and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the CCAA can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert. (para. 47)

Notably, acting consistently with its goal of treating both the BIA and the CCAA as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes... (para. 54)

The CCAA and BIA are related and no gap exists between the two statutes which would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy. (para. 78)

32 In *Indalex Ltd., Re*, [2013] 1 S.C.R. 271 (S.C.C.), a case involving a competition between a deemed trust under provincial pension legislation and the right of a lender to security granted under the DIP lending provisions of the CCAA, Deschamps J. had occasion to refer to the *Century Services* case and her statement in *Century Services* in para 23 referred to above. She then stated:

In order to avoid a race to liquidation under the BIA, courts will favour an interpretation of the CCAA that affords creditors analogous entitlements.

33 Thus it is a fair comment taken the direction of the Supreme Court in *Century Services* and *Indalex* regarding the aims of insolvency law in Canada to say that if the common law principle of the interest stops rule was applicable to proceedings under the BIA and *Winding-Up Act* before legislative amendments to those statutes were made, (or if the comments of Blair J. in *Confederation Life* are accepted that the BIA still might be read to prevent its application but does not trump the application of the rule), there is no reason not to apply the interest stops rule in liquidating CCAA proceedings. I accept this and note that there is no provision in the CCAA that would not permit the application of the rule.

34 There are also policy reasons for this result, and they flow from *Century Services* and *Indalex*. I accept the argument of the Canadian Creditors' Committee that to permit some creditors' claims to grow disproportionately to others during the stay period would not maintain the *status quo* and would encourage creditors whose interests are being disadvantaged to immediately initiate bankruptcy proceedings, threatening the objectives of the CCAA.

35 In my view, there is no need for there to be a "liquidating" CCAA proceeding in order for the interest stops rule to apply to a CCAA proceeding. The reasoning for the application of the common law insolvency rule, being the desire to prevent a stay of proceedings from militating against one group of unsecured creditors over another in violation of the *pari passu* rule, is equally applicable to a CCAA proceeding that is not a liquidating proceeding. In such a proceeding, the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done.

36 The bondholders contend, however, that *Stelco Inc., Re*, 2007 ONCA 483, 32 B.L.R. (4th) 77 (Ont. C.A.) is binding authority that the interest stops rule does not apply in any CCAA proceeding. I do not agree. The facts of the case were quite different and did not involve a claim for post-filing interest against the debtor. Stelco was successfully restructured under the CCAA by a plan of compromise and arrangement approved by the creditors. The sanctioned plan did not provide for payment of post-petition interest. As among senior unsecured debenture holders, subordinated (junior) debenture holders and ordinary unsecured creditors, the plan treated all in the same class and *pro rata* distributions were calculated on the basis that no post-filing interest was allowed. That result was not challenged.

37 The relevant pre-filing indenture in *Stelco* provided that in the event of any insolvency, the holders of all senior debt would first be entitled to receive payment in full of the principal and interest due thereon, before the junior debenture holders would be entitled to receive any payment or distribution of any kind which might otherwise be payable in respect of their debentures. While the plan cancelled all Stelco debentures, subject to section 6.01(2) of the plan, that section provided that the rights between the debenture holders were preserved. The plan was agreed to by the junior debenture holders. After the plan had been sanctioned, the junior debenture holders challenged the senior debt holders' right to receive the subordinated payments towards their outstanding interest.

38 Wilton-Siegel J. rejected the argument, holding that the subordination agreement continued to operate independently of the sanctioned plan and was not affected by it. While it is not clear why, the junior Noteholders contended that interest stopped accruing in respect of the claims of the senior debenture holders against Stelco after the CCAA filing. There was no issue about a claim against Stelco for post-filing interest, as no such claim had ever been made. The issue was a contest between the two levels of debenture holders. However, Wilton-Siegel J. stated that in situations in which there was value to the equity, a CCAA plan could include post-filing interest. I take this statement to be *obiter*, but in any event, it is not the situation in Nortel as there is no equity at all. At the Court of Appeal, O'Connor A.C.J.O, Goudge and Blair J.J.A. agreed that the interest stops rule did not preclude the continuation of interest to the senior note holders from the subordinated payments to be made by the junior note holders under the binding inter-creditor arrangements.

39 In the course of its reasons, the Court of Appeal stated that there was no persuasive authority that supports an interest stops rule in a CCAA proceeding, and referred to statements of Binnie J. in *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.), [*NAV Canada*]. A number of comments can be made.

40 First, *Stelco* did not involve proceeding or claims against the debtor for post-filing interest. Second, the decision in *Stelco* was derived from the terms of negotiated inter-creditor agreements in the note indenture that were protected by plan. There was nothing about the common law interest stops rule that precluded one creditor from being held to its agreement to subordinate its realization to that of another creditor including foregoing its right to payment until the creditor with priority received principal and interest. That is what the Court of Appeal concluded by stating "We do not accept that there is a 'Interest Stops Rule' that precludes such a result". Third, the general statements made in *Stelco* and *NAV Canada* must now be considered in light of the later direction in *Century Services* and *Indalex*. I now turn to *NAV Canada*.

41 In *NAV Canada*, Canada 3000 Airlines filed for protection under the CCAA. Three days later the Monitor filed an assignment in bankruptcy on its behalf. Federal legislation gave the airport authorities a right to apply to the court authorizing the seizure of aircraft for outstanding payments owed by an airline for using an airport. The contest in the case was between the airport authorities and the owners/lessors of the aircraft as to the extent that the owners/lessors were liable for those payments and whether a seizure order could be made against the aircraft leased to the airline. It was ultimately held that the owners/lessors were not liable for the outstanding payments owed by the airline but that the aircraft could be seized.

42 Interest on the arrears was raised in the first instance before Ground J. He held that the airport authorities were entitled as against the bankrupt airline to detain the aircraft until all amounts with interest were paid in full or security

for such payment was posted under the provisions of the legislation, i.e. interest continued to accrue and be payable after bankruptcy. The Court of Appeal did not deal with interest as in their view it was relevant only if the airport authorities had a claim against the owners/lessors of the aircraft, which the court held they did not.

43 In the Supreme Court, which also dealt with an appeal from Quebec which dealt with the same issues, nearly the entire reasons of Binnie J. dealt with the issues as to whether the owners/lessors of the aircraft were liable for the outstanding charges and whether the aircraft could be seized by the airport authorities. It was held that the owners/lessors were not directly liable for the charges owed by the airline but that the aircraft could be seized until the charges were paid.

44 At the end of his reasons, Binnie J. dealt with interest and held that it continued to run until the earlier of payment, the posting of security, or bankruptcy. The bondholders rely on the last two sentences of the following paragraph from the reasons of Binnie J. which refer to the running of interest under the CCAA:

96 Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the *Bankruptcy and Insolvency Act*.

45 The Quebec airline in question had first filed to make a proposal under the BIA and when that proposal was rejected by its creditors, it was deemed to have made an assignment in bankruptcy as of the date its proposal was filed. Thus the comments of Binnie J. regarding the CCAA could not have related to the Quebec airline, but only to Canada 3000, which had been under the CCAA for only three days before it was assigned into bankruptcy. It is by no means clear how much effort, if any, was spent in argument on the three days' interest issue. Binnie J. did not refer to any argument on the point.

46 There was no discussion of the common law interest stops rule and whether it could apply during the three day period in question or whether it should apply to a liquidating CCAA proceeding. Nor was there any discussion of the definition of claim in the CCAA, being a claim provable within the meaning of the BIA, and how that might impact a claim for post-filing interest under the CCAA. The statement regarding interest under the CCAA was simply conclusory. It may be fair to say that the statement of Binnie J. was *per incuriam*.

47 In my view, the statement of Binnie J. should not be taken as a blanket statement that interest always accrues in a CCAA proceeding, regardless of whether or not it is a liquidating proceeding. The circumstances in *NAV Canada* were far different from Nortel involving several years of compound interest in excess of US\$1.6 billion out of a total world-wide asset base of US\$7.3 billion. The statement of Binnie J. should now be construed in light of *Century Services* and *Indalex*.

### Need for a CCAA plan

48 The bondholders contend that there is no authority under the CCAA to effect a distribution of a debtor's assets absent a plan of arrangement or compromise that must be negotiated by the debtor with its creditors, and that as a plan can include payment of post-filing interest, it is not possible for a court to conclude that the bondholders have no right to post-filing interest. They assert that there is no jurisdiction for a court to compromise a creditor's claim in a CCAA proceeding except in the context of approving a plan approved by the creditors. They also assert that plan negotiations cannot meaningfully take place "in earnest" until the allocation decision as to how much of the US\$7.3 billion is to be allocated to each of the Canadian, US, or EMEA estates.

49 One may ask what is left over in this case to negotiate. The assets have long been sold and what is left is to determine the claims against the Canadian estate and, once the amount of the assets in the Canadian estate are known, distribute the assets on a *pari passu* basis. This is not a case in which equity is exchanged for debt in a reorganization of a business such as *Stelco*.

50 However, even if there were things to negotiate, they would involve creditors compromising some right, and bargaining against those rights. What those rights are need to be determined, and often are in CCAA proceedings.

51 In this case, compensation claims procedure orders were made by Morawetz J. The order covering claims by bondholders is dated July 30, 2009. It was made without any objection by the bondholders. That order provides for a claim to be proven for the purposes of voting and distribution under a plan. The claims resolution order of Morawetz J. dated September 16, 2010 provides for a proven claim to be for all purposes, including for the purposes of voting and distribution under any plan. The determination now regarding the bondholders claim for post-filing interest is consistent with the process of determining whether these claims by the bondholders are finally proven. Contrary to the contention of the bondholders, it is not a process in which the court is being asked to compromise the bondholders' claim for post-filing interest. It is rather a determination of whether they have a right to such interest.

52 It is perhaps not necessary to determine at this stage how the assets will be distributed and whether a plan, or what type of plan, will be necessary. However, in light of the argument advanced on behalf of the bondholders, I will deal with this issue.

53 I first note that the CCAA makes no provision as to how money is to be distributed to creditors. This is not surprising taken that plans of reorganization do not necessarily provide for payments to creditors and taken that the CCAA does not expressly provide for a liquidating CCAA process. There is no provision that requires distributions to be made under a plan of arrangement.

54 A court has wide powers in a CCAA proceeding to do what is just in the circumstances. Section 11(1) provides that a court may make any order it considers appropriate in the circumstances. Although this section was provided by an amendment that came into force after Nortel filed under the CCAA, and therefore by the amendment the new section does not apply to Nortel, it has been held that the provision merely reflects past jurisdiction. In *Century Services*, Deschamps J. stated:

**65** I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

**67** The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

**68** In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence. (underlining added)

55 I note also that payments to creditors without plans of arrangement or compromises are often ordered. In *Timminco Ltd., Re*, 2014 ONSC 3393 (Ont. S.C.J.), Morawetz J. noted at para. 38 that the assets of Timminco had been sold and distributions made to secured creditors without any plan and with no intention to advance a plan. In that case, there was a shortfall to the secured creditors and no assets available to the unsecured creditors. The fact that the distributions went to the secured creditors rather than to an unsecured creditor makes no difference to the jurisdiction under the CCAA to do so.

56 In *AbitibiBowater Inc., Re*, 2009 QCCS 6461 (C.S. Que.), Gascon J.C.S. (as he then was) granted a large interim distribution from the proceeds of a sale transaction to senior secured noteholders ("SSNs"). The bondholders opposed the distribution on the same grounds as advanced by the bondholders in this case:

56 The Bondholders claim that the proposed distribution violates the CCAA. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.

57 By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.

58 Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

57 Justice Gascon did not accept this argument. He stated:

71 Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada. (underlining added)

58 Justice Gascon was persuaded that the distribution should be made as it was part and parcel of a DIP loan arrangement that he approved. Whatever the particular circumstances were that led to the exercise of his discretion, he did not question that he had jurisdiction to make an order distributing proceeds without a plan of arrangement. I see no difference between an interim distribution, as in the case of *AbitibiBowater*, or a final distribution, as in the case of *Timminco*, or a distribution to an unsecured or secured creditor, so far as a jurisdiction to make the order is concerned without any plan of arrangement.

59 There is a comment by Laskin J.A. in *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.) that questions the right of a judge to order payment out of funds realized on the sale of assets under a CCAA process, in that case to pension plan administrators for funding deficiencies. He stated:

[I]n my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds.

60 This was an *obiter* statement. But in any event Justice Laskin was discussing a situation in which all parties agreed that the CCAA proceedings "were spent". That is, there was effectively no CCAA proceeding any more. This is not the situation with Nortel and I do not see the *obiter* statement as being applicable. As stated by Justice Gascon, distribution orders without a plan are common in Canada.

61 While it need not be decided, I am not persuaded that it would not be possible for a court to make an order distributing the proceeds of the Nortel sale without a plan of arrangement or compromise.

## Conclusion

62 I hold and declare that holders of the crossover bond claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US\$4.092 billion).

63 Those seeking costs may make cost submissions in writing within 10 days and responding submissions may be made in writing within a further 10 days. Submissions are to be brief and include a proper cost outline for costs sought.

*Claim dismissed.*

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2015 ONCA 681  
Ontario Court of Appeal

Nortel Networks Corp., Re

2015 CarswellOnt 15461, 2015 ONCA 681, 127 O.R. (3d) 641, 259  
A.C.W.S. (3d) 15, 32 C.B.R. (6th) 21, 340 O.A.C. 234, 391 D.L.R. (4th) 283

**In the Matter of the Companies' Creditors  
Arrangement Act, R.S.C. 1985, c. C-36, as amended**

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks  
Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel  
Networks International Corporation and Nortel Networks Technology Corporation

Janet Simmons, E.E. Gillese, Paul Rouleau JJ.A.

Heard: April 29, 2015  
Judgment: October 13, 2015  
Docket: CA C59703

Proceedings: affirming *Nortel Networks Corp., Re* (2014), 121 O.R. (3d) 228, 2014 ONSC 4777, 2014 CarswellOnt 17193  
(Ont. S.C.J. [Commercial List])

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Subject: Civil Practice and Procedure; Insolvency

APPEAL by bondholders from judgment reported at *Nortel Networks Corp., Re* (2014), 2014 ONSC 4777, 2014  
CarswellOnt 17193, 121 O.R. (3d) 228 (Ont. S.C.J. [Commercial List]), finding interest stops rule applied in *Companies'  
Creditors Arrangement Act* proceedings and that bondholders were not legally entitled to claim or receive any amounts  
beyond outstanding principal debt and pre-petition interest.

***Paul Rouleau J.A.:***

**A. Overview**

1 This appeal represents another chapter in the Nortel proceeding under the *Companies' Creditors Arrangement Act*,  
R.S.C. 1985, c. C-36 ("*CCAA*"), which has been on-going since January 2009. A parallel proceeding under Chapter 11  
of the United States *Bankruptcy Code* has also been on-going in Delaware since that time.

2 The *Ad Hoc* Group of Bondholders (the "appellant") brings this appeal with leave. The group represents substantial  
holders of "crossover bonds", which are unsecured bonds either issued or guaranteed by certain of the Canadian Nortel

entities. The relevant indentures provide for the continuing accrual of interest until payment, at contractually specified interest rates, as well as other post-filing payment obligations, such as make-whole provisions and trustee fees.

3 In contrast, the claims of other claimants, such as Nortel pensioners and former employees, do not have a provision for interest on amounts owing to them.

4 Holders of the crossover bonds have filed claims for principal and pre-filing interest in the amount of US\$4.092 billion against each of the Canadian and U.S. Nortel estates. They also claim they are entitled to post-filing interest and related claims under the terms of the crossover bonds. As of December 31, 2013, the amount of this claim was approximately US\$1.6 billion. The total of these two amounts represents a significant portion of the proceeds generated from the worldwide sale of Nortel's business lines and other Nortel assets, totalling approximately \$7.3 billion. This latter amount is apparently not growing at any appreciable rate because of the conservative nature of the investments made with it pending the outcome of the insolvency proceedings.

5 In the context of a joint allocation trial, the *CCAA* judge directed that two issues be argued:

1. whether the holders of the crossover bond claims are legally entitled ... to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US\$4.092 billion); and

2. if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

6 The *CCAA* judge answered the first question in the negative and so he did not need to answer the second question. In reaching that conclusion, he accepted that the common law "interest stops rule", which has been held to be a fundamental tenet of insolvency law, applies in the *CCAA* context. He disagreed with the appellant's submission that the Supreme Court of Canada's decision in *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.) [hereinafter *Canada 3000*], and this court's subsequent decision in *Stelco Inc., Re*, 2007 ONCA 483, 35 C.B.R. (5th) 174 (Ont. C.A.), are binding authority that the interest stops rule does not apply in the *CCAA* context.

7 On appeal, the appellant raises two related issues — whether the *CCAA* judge erred in concluding that an interest stops rule applies in *CCAA* proceedings and, if not, whether he erred in concluding that the holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest.

8 I would dismiss the appeal. As I will explain, there are sound legal and policy reasons for applying the interest stops rule in the *CCAA* context, and as I read *Stelco Inc., Re* and *Canada 3000*, they do not preclude such a result. Nor do I see a basis for varying the order that he made.

## **B. Background**

9 In the *CCAA* court's initial order of January 14, 2009, the Canadian Debtors<sup>1</sup> were directed, subject to certain exceptions, to make no payments of principal or interest on account of amounts owing by the Canadian Debtors to any of their creditors as of the filing date, unless approved by the Monitor. Further, all proceedings and enforcement processes, and all rights and remedies of any person against the Canadian Debtors were stayed absent consent of the Canadian Debtors and the Monitor, or leave of the court.

10 In accordance with a claims procedure order dated July 30, 2009, claims against the Canadian Debtors were required to be filed by a claims bar date. Under a subsequent claims resolution order dated September 16, 2010, a disputed claim could be brought before the *CCAA* court for final determination.

11 As previously noted, holders of the crossover bonds filed proofs of claim that included not only the principal amount of the debt and interest accrued to the date of insolvency but also contractual claims for interest and other amounts post-filing.

12 In May 2014, a joint allocation trial, conducted by way of video-link by the *CCAA* judge in Ontario and Judge Gross in Delaware, commenced on the issue of the allocation of the sale proceeds among the debtor estates, including the Canadian and U.S. estates. In his 2015 decision, the *CCAA* judge, citing the "fundamental tenet of insolvency law that all debts shall be paid *pari passu*" and that "all unsecured creditors receive equal treatment" held that the \$7.3 billion in funds generated from the Nortel liquidation should be allocated on a *pro rata* basis as among the estates: 2015 ONSC 2987, 23 C.B.R. (6th) 249 (Ont. S.C.J. [Commercial List]), at para. 209. He ordered, at para. 258, that the funds be allocated among the debtor estates in accordance with a number of principles, including the principle that each debtor estate "is to be allocated that percentage of the [liquidation proceeds] that the total allowed claims against that Estate bear to the total allowed claims against all Debtor Estates." A number of parties have sought leave to appeal that decision.

13 It was on June 24, 2014, while the joint allocation trial was proceeding, that the *CCAA* judge directed that the two issues set out above be decided.

### C. Decision Below

14 The *CCAA* judge began his analysis with a review of cases applying the interest stops rule in the bankruptcy and winding-up context. He noted the relationship between the interest stops rule and the *pari passu* principle, which he described as "a fundamental tenet of insolvency law" that requires equal treatment of unsecured creditors. He found there was "no reason to not apply the [common law] interest stops rule to a *CCAA* proceeding because the *CCAA* does not expressly provide for its application." The issue was "whether the rule should apply to this *CCAA* proceeding."

15 He went on to conclude that "[t]here is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the *CCAA*, let alone under a liquidating *CCAA* process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest." In reaching this conclusion, he distinguished *Stelco* and *Canada 3000* and found that the application of the interest stops rule was supported by the more recent decisions in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Services*], and *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.).

16 The *CCAA* judge thus ordered that "holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US\$4.092 billion)."

### D. Issues on Appeal

17 The appellant raises two related issues:

1. Did the *CCAA* judge err in concluding that an interest stops rule applies in *CCAA* proceedings?
2. If the *CCAA* judge did not err in concluding that an interest stops rule applies in *CCAA* proceedings, did he err in holding that holders of Crossover Bonds Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?

### E. Analysis

#### ***(1) Did the CCAA judge err in concluding that an interest stops rule applies in CCAA proceedings?***

18 The appellant, supported by the Bank of New York Mellon and the Law Debenture Trust Company of New York as indenture trustees, submits that the *CCAA* judge erred in concluding that the interest stops rule applies.

19 First, the appellant submits he applied inapplicable case law and misinterpreted case law in concluding that the rule did and should apply. Among other things, the appellant criticizes the *CCAA* judge's application of the Supreme Court of Canada's decisions in *Century Services* and *Indalex*, which deal with the inter-play between the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

20 The appellant also submits that the application of the interest stops rule in the *CCAA* context is inconsistent with the *CCAA* and would have negative practical consequences.

21 Finally, the appellant submits that *Canada 3000* and *Stelco* are binding authority that preclude the application of the interest stops rule in the *CCAA* context and that the *CCAA* judge violated the principle of *stare decisis* in refusing to follow them.

22 I will deal with these submissions in turn, beginning with a discussion of the interest stops rule and the related *pari passu* principle.

(a) *Should the interest stops rule apply in CCAA proceedings?*

**(i) Origin and scope of the interest stops rule**

23 It is well settled that the *pari passu* principle applies in insolvency proceedings. This principle, to the effect that "the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of insolvency" is said to be one of the "governing principles of insolvency law" in Canada: *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.T.C. 486 (Ont. S.C.J. [Commercial List]), at para. 20, *per* Blair J.<sup>2</sup> In fact, the *pari passu* principle has been said to be the foremost principle in the law of insolvency not just in Canada but around the world: Rizwaan J. Mokal "Priority as Pathology: The *Pari Passu* Myth" (2001) 60:3 Cambridge L.J. 581, at p. 581. According to an article in the Cambridge Law Journal, "[c]ommentators claim to have found [the *pari passu*] principle entrenched in jurisdictions far removed ... in geography and time": Mokal, at pp. 581-582.

24 The *pari passu* principle is rooted in the need to treat all creditors fairly and to ensure an orderly distribution of assets.

25 As explained in *Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.), nearly 150 years ago, a necessary corollary of the *pari passu* principle is the interest stops rule. Absent the interest stops rule, the fairness and orderly distribution sought by the *pari passu* principle could not be achieved. Selwyn L.J. explained the rationale for the interest stops rule, at pp. 645-646:

In the present case we have to consider what are the positions of the creditors of the company, when, as here, there are some creditors who have a right to receive interest, and others having debts not bearing interest.

.....

It is very difficult to conceive a case in which the assets of a company could be ... immediately realized and divided; but suppose they had a simple account at a bank, which could be paid the next day, that would be the course of proceeding. Justice, I think, requires that that course of proceeding should be followed, and that no person should be prejudiced by the accidental delay which, in consequence of the necessary forms and proceedings of the Court, actually takes place in realizing the assets; but that, in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up. I, therefore, think that nothing should be allowed for interest after that date.

26 Giffard L.J. similarly stated, at p. 647-648:

That rule ... works with equality and fairness between the parties; and if we are to consider convenience, it is quite clear that, where an estate is insolvent, convenience is in favour of stopping all the computations at the date of the winding-up.

.....

I may add another reason, that I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

27 Thus, the primary purpose behind the common law interest stops rule is fairness to creditors. Another purpose is to achieve the orderly administration of an insolvent debtor's estate.

28 The common law interest stops rule has been consistently applied in proceedings under bankruptcy and winding-up legislation. In fact, as explained by Blair J. in *Confederation Life Insurance Co.* at paras. 22-23, the rule has been applied even when the legislation might be read to the contrary:

This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the *Winding-Up Act* and section 121 of the *BIA*, which might be read to the contrary, in my view.

.....

Yet, the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

29 I will now turn to the question of whether the interest stops rule should be applied in the *CCAA* context.

**(ii) Should the interest stops rule apply in CCAA proceedings?**

30 The respondents<sup>3</sup> maintain that one would expect the interest stops rule to apply in *CCAA* proceedings given that *CCAA* proceedings are insolvency proceedings to which the common law *pari passu* principle applies. Consistent with the *pari passu* principle and the related interest stops rule, creditors in *CCAA* proceedings must surely expect to be treated fairly and not see creditors with interest entitlements have their claims grow, post-insolvency, disproportionately to those with no, or lesser, interest entitlements. In the respondents' submission, the same reasoning used by courts to conclude that the interest stops rule applies in winding-up and bankruptcy proceedings leads to the conclusion that the interest stops rule applies in *CCAA* proceedings.

31 The appellant, on the other hand, submits that *CCAA* proceedings are different from other insolvency proceedings in that they do not immediately or permanently alter the rights of creditors. The filing is intended to give the debtor breathing space so that a plan of compromise or arrangement can be negotiated with creditors and the business can continue. The objective of a *CCAA* proceeding is a consensual, statutory compromise in the form of a *CCAA* plan. Such a *CCAA* plan can provide for any kind of distribution, provided it is approved by the requisite majority of creditors and the court.

32 In the appellant's submission, until a plan is negotiated or the proceeding is converted to bankruptcy or winding-up, the rights of creditors are not altered; rather, their rights to execute on them are simply stayed. In the appellant's view, therefore, unless and until this sought-after compromise of rights is negotiated, only the exercise of the rights is stayed. The *CCAA* filing does not affect the right to accrue interest; it only stays the collection of that interest.

33 The appellant further argues that the *CCAA* judge's decision is contrary to the established *CCAA* practice and the reasonable expectations of the parties in this proceeding. In particular, the appellant notes that a *CCAA* plan may, and often does, provide for the recovery of post-filing interest. The appellant also submits that the application of the interest

stops rule would allow debtors to obtain a permanent interest holiday simply by filing for *CCAA* protection, even if the filing were later withdrawn, causing a permanent prejudice to the creditors not contemplated by the *CCAA*. And, the appellant submits that an interest stops rule would create a disincentive for creditors to participate in *CCAA* proceedings since they would not be compensated for delays under the *CCAA* even if there were ultimately assets available to do so

34 I do not accept the appellant's submissions on this point. Admittedly, there are differences between the *CCAA* and other insolvency schemes, including that the *CCAA* does not provide for a fixed scheme of distribution. Further, assuming a plan of compromise or arrangement under the *CCAA* is negotiated it may or may not result in a distribution to creditors. Nevertheless, in my view, the same principles that underpin the conclusion that the interest stops rule is necessary in bankruptcy and winding-up proceedings — namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate - apply with equal force to *CCAA* proceedings. I say so for several reasons.

35 First, the *CCAA* is part of an integrated insolvency regime, which also includes the *BIA*. The Supreme Court of Canada in *Century Services* considered the *CCAA* regime and opined, at para. 24, that "[w]ith parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation". The court went on to explain, at para. 78, that the *CCAA* and *BIA* are related and "no 'gap' exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy".

36 Consistent with the notion of harmonization, because the common law interest stops rule applies upon bankruptcy under the *BIA*, it should follow that the common law rule also applies in a *CCAA* proceeding unless, of course, the rule is ousted by the *CCAA*. The *CCAA* does not address entitlement to claim post-filing interest let alone oust the common law rule with clear wording.

37 Second, if the interest stops rule were not to apply in *CCAA* proceedings, the creditors who do not have a contractual right to post-filing interest would, as the Supreme Court explained in *Century Services* at para. 47, have "skewed incentives against reorganizing under the *CCAA*" and this would "only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert." This concern over skewed incentives was confirmed in *Indalex* where the Supreme Court held, at para. 51, that "[i]n order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those they would receive under the *BIA*.

38 Without an interest stops rule under the *CCAA*, the creditors with no claim to post-filing interest would have an incentive to proceed under the *BIA* or the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, where the interest stops rule operates to prevent creditors, such as the appellant, who have a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors.

39 Third, as recognized by the Supreme Court in *Century Services* at para. 77, the "*CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all". This is achieved through grouping all claims within a single proceeding and staying all actions against the debtor, thus putting creditors on an equal footing: *Century Services*, para. 22.

40 As submitted by the Canadian Creditors' Committee, if post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights to sue the debtor and obtaining a judgment that bears interest, the *status quo* has not been preserved.

41 Fourth, if the interest stops rule were not to apply in *CCAA* proceedings, the key objective of that statute — to facilitate the restructuring of corporations through flexibility and creativity — may be undermined. This is because of the asymmetrical entitlement to interest that would be created. Creditors with an entitlement to post-filing interest may be less motivated to compromise than those creditors without such an entitlement. Using the case under appeal as an

example, if post-filing interest is allowed to accrue, the delay and failure to reach a compromise will see the appellant's proportionate claim against the assets of the debtors rise very significantly at the expense of other creditors. One could well understand that if the urgency for reaching a compromise and the incentive to compromise are significantly lower for one group of unsecured creditors than for the balance of the unsecured creditors, restructuring will be more difficult to achieve and the ability to reach creative solutions will be lessened.

42 Furthermore, if the amount of an unsecured creditor's legal entitlement is constantly shifting as post-filing interest accrues, the ability to find a compromise that is acceptable to all creditors at any one point in time will pose a greater challenge than if the entitlements are fixed as of the date of filing.

43 Fifth, the principle of fairness supports the application of the interest stops rule. Insolvency proceedings are intended to be fair processes for liquidating or restructuring insolvent corporations. How, one may ask, is it fair if the appellant, an unsecured creditor, sees its claim against the assets of the debtor balloon from \$4.092 billion to \$5.692 billion (as of December 31, 2013) because of contractual provisions when the claims of unsecured creditors, who have no such contractual provisions and who have been prevented for almost seven years by the *CCAA* stay from converting their claims into court judgments that would bear interest, have seen no increase at all? Delays in liquidating the Nortel assets have helped the Monitor achieve the very significant recoveries made (\$7.3 billion) and, in fairness, this achievement should be for the benefit of all creditors.

44 Finally, I wish to respond to the appellant's concerns.

45 As to past practice and the reasonable expectations of the parties, I do not view the existence of an interest stops rule as being contrary to established *CCAA* practice or as preventing a *CCAA* plan from providing for post-filing interest. Parties may negotiate for a plan that provides for payments of more or less than a creditor's legal entitlement in lieu of the foregone interest. Thus, I do not accept the appellant's submission that there would be a disincentive to participate in *CCAA* proceedings, which is based on the premise that post-filing interest may not be recovered under a *CCAA* plan.

46 The appellant also raised the concern that a debtor company could obtain a permanent interest holiday, resulting in unfairness. The appellant says that if there are proceeds over and above the amounts needed to satisfy the pre-filing claims of creditors, those proceeds would be for the benefit of the shareholders of the debtor. This follows from the fact that the *CCAA* contains no provision for the payment of a "surplus" to creditors and the interest stops rule would prevent the unsecured creditors from recovering any post-filing interest. The debtor could therefore resort to the *CCAA* to stop interest from accruing and operate his business interest free.

47 This hypothetical raises the same concern about the loss of post-filing interest but in a somewhat different way. The concern is that a debtor may seek *CCAA* protection to avoid the obligation to pay interest.

48 There may well be exceptional situations where, at some point in a *CCAA* proceeding, the common law interest stops rule risks working an unfairness of some sort. I leave for another day what orders, if any, might be made by a *CCAA* judge in cases such as the hypothetical presented by the appellant where a debtor might be considered to benefit unfairly as a result of the common law interest stops rule. I note, however, that in order to achieve the remedial purpose of the *CCAA*, *CCAA* courts have been innovative in their interpretation of their stay power and in the exercise of their authority in the administration of *CCAA* proceedings. This approach has been specifically endorsed by the Supreme Court of Canada in *Century Services* and would no doubt guide the court should the need arise: see, for example, paras. 61 and 70.

49 In conclusion, there are sound reasons for adopting an interest stops rule in the *CCAA* context. I now turn to the argument that *Canada 3000* and *Stelco* preclude the application of the rule.

*(b) Are Canada 3000 and Stelco binding authorities to the effect that the interest stops rule does not apply in CCAA proceedings?*

50 The appellant vigorously maintains that the *CCAA* judge was bound by *Canada 3000* and *Stelco*, which both confirm that the interest stops rule does not apply in *CCAA* proceedings.

51 I would not give effect to this submission. As I will explain, both of these decisions should be read narrowly and do not constitute a precedent with respect to the issue raised in this appeal — whether the common law interest stops rule applies in *CCAA* proceedings.

**(i) Canada 3000**

***Background and lower court decisions***

52 The decision in *Canada 3000* arose out of the collapse of three airlines — Canada 3000 Airlines Ltd. and Royal Aviation Inc. (collectively "Canada 3000"), and Inter-Canadian (1991) Inc. ("Inter-Canadian"). Canada 3000 filed for protection under the *CCAA* and, three days later, filed for bankruptcy. Inter-Canadian filed a *BIA* proposal but the proposal ultimately failed and so it too was placed into bankruptcy effective as of the date it filed its notice of intention to make a proposal.

53 At the time the airlines collapsed, they owed significant amounts in unpaid airport and navigation charges. As a result, various airport authorities and NAV Canada sought remedies under the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 ("*Airports Act*") and the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 ("*CANSCA*"). In particular, they sought orders seizing and detaining aircraft leased by the bankrupt airlines. While the lessors of the planes retained legal title to the aircraft, the bankrupt airlines were the registered owner for the purposes of the *Aeronautics Act*, R.S.C. 1985, c. A- 2.

54 The airport authorities and NAV Canada brought proceedings in Ontario and Quebec.

55 In Ontario, Ground J. dismissed motions for orders permitting the airport authorities and NAV Canada to seize and detain the aircraft leased by Canada 3000: *Canada 3000 Inc., Re* (2002), 33 C.B.R. (4th) 184 (Ont. S.C.J.). On the question of interest, he concluded, at para. 73, that the airport authorities and NAV Canada were entitled to charge interest on the unpaid charges up to the date of payment or the posting of security for payment.

56 On appeal from Ground J.'s decision, this court held that the interest question need not be determined since the airport authorities and NAV Canada did not have the right to detain the aircraft: *Canada 3000 Inc., Re* (2004), 69 O.R. (3d) 1 (Ont. C.A.), at para. 197.

***Supreme Court's decision***

57 On appeal to the Supreme Court of Canada, the court determined that the airport authorities and NAV Canada had the right to detain the aircraft leased and operated by the bankrupt airlines. The issue of post-filing interest was, therefore, an issue the court had to decide.

58 In deciding that issue, Binnie J. made the following comment at para. 96:

While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

[Emphasis added.]

59 The appellant submits that the underlined words are binding *ratio* and must be followed in this case.

60 While I agree that Binnie J.'s comment about the *CCAA* is not *obiter*, I am not convinced that it should be read as broadly as the appellant contends. In *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 (S.C.C.), Binnie J. warned, at

para. 57, against reading "each phrase in a judgment ... as if enacted in a statute". Rather, the question to be asked is "what did the case decide?".

61 To answer what *Canada 3000* decided about post-filing interest under the *CCAA*, it is important to consider the context in which Binnie J. made his comment, including the facts of the case, the issues before the court, the structure of his reasons, the wording he used, and what he said as well as what he did not say.

62 At para. 40., Binnie J. defined the "two major questions raised by the appeals" as follows: (1) "are the *legal titleholders* liable for the debt incurred by the registered owners and operators of the failed airlines to the service providers?" and (2) "even if they are not so liable, are *the aircraft* to which they hold title subject on the facts of this case to judicially issued seizure and detention orders to answer for the unpaid user charges incurred by *Canada 3000* and *Inter-Canadian*?" (emphasis in original). The answer to those two questions turned on the interpretation of the *Airports Act* and *CANSCA*. As Binnie J. noted at para. 36, the case was "from first to last an exercise in statutory interpretation".

63 After engaging in a lengthy exercise of statutory interpretation, he concluded that: (1) under s. 55 of *CANSCA*, the legal titleholders were not jointly and severally liable for the charges due to NAV Canada; and (2) under s. 56 of *CANSCA* and s. 9 of the *Airports Act*, the airport authorities and NAV Canada were entitled to apply for an order detaining the aircraft operated by the failed airlines.

64 Binnie J. then addressed eight additional arguments made by the parties and just before his last paragraph on disposition, he included a section simply entitled "Interest", starting at para. 93.

65 He began his analysis of the interest issue by outlining the statutory authority for charging interest: s. 9(1) of the *Airports Act* expressly provided for the payment of interest, and while *CANSCA* did not explicitly provide for interest, a regulation under *CANSCA* imposed interest: para. 93.

66 "The question then", said Binnie J. at para. 95, was "how long the interest can run". He addressed that question as follows, at paras. 95-96:

The airport authorities and NAV Canada have possession of the aircraft until the charge or amount in respect of which the seizure was made is paid. It seems to me that this debt must be understood in real terms and must include the time value of money.

Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

[Emphasis added.]

67 Significantly, Binnie J. made no mention in his reasons of the common law interest stops rule or the related *pari passu* principle. Nor did he cite any case law dealing with those issues. In fact, even though it is well established that the interest stops rules applies under the *BIA*, he did not rely on the common law rule in support of his finding that interest stopped on bankruptcy. Instead, he relied on ss. 121 and 122 of the *BIA* in concluding that the interest payable under the *Airports Act* and the regulation under *CANSCA* did not accrue post-bankruptcy.

68 Binnie J.'s analysis of the issue is rooted in the factual and statutory context of the case. In discussing the accrual of interest under the *CCAA*, he specified that the interest was on "unpaid charges", namely charges under *CANSCA* and

the *Airports Act*. Binnie J. was not answering an abstract legal question but rather deciding how long interest ran in the particular factual and statutory context.

69 In effect, I read Binnie J. as saying that a *CCAA* filing does not stop the accrual of interest under *CANSCA* or the *Airports Act* but the statutory provisions of the *BIA* ss. 121 and 122 do. He was not deciding whether, in the absence of the right to interest under *CANSCA* and the *Airports Act*, interest would have accrued or been stopped by the common law interest stops rule.

70 Let me add that I agree with the *CCAA* judge's comment that Binnie J.'s statement in *Canada 3000* should "now be construed in light of *Century Services* and *Indalex*". In fact, one can well imagine that the court's interpretation of *CANSCA* and the *Airports Act* as allowing the accrual of interest in a *CCAA* proceeding but not in a *BIA* proceeding might have been different had it reached the Supreme Court after these two more recent cases. That question, however, is for another day. For now, I turn to this court's decision in *Stelco*.

## (ii) *Stelco*

### *Background and motion judge's decision*

71 The post-filing interest issue in *Stelco* arose in "the final chapter of the financial restructuring of *Stelco*" under the *CCAA: Stelco Inc., Re* (2006), 24 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]), at para. 1. The final chapter involved competing claims to a portion of the amount payable to the holders of subordinated notes (the "Junior Noteholders") pursuant to *Stelco*'s plan of arrangement (the "Plan"). The claim to these funds ("Turnover Proceeds") was made by the "Senior Debentureholders".

72 The dispute over the Turnover Proceeds arose after *Stelco*'s Plan had been sanctioned and *Stelco* had emerged from restructuring with its debt reorganized. The Senior Debentureholders claimed the Turnover Proceeds on the basis of subordination provisions contained in the Note Indenture under which *Stelco* had issued convertible unsecured subordinated debentures to the Junior Noteholders.

73 Under the terms of the Note Indenture, the Junior Noteholders expressly agreed that, in the event that the debtor became insolvent, they would subordinate their right of repayment until after repayment in full of "Senior Debt".

[74] The plan of arrangement that had been approved was a "no interest" plan, meaning that distribution from *Stelco* to the creditors did not include or account for post-filing interest. The Plan, however, provided that the rights as between the Senior Debentureholders and the Junior Noteholders were preserved. The Senior Debentureholders, who had not received payment of post-filing interest from *Stelco* under the Plan, demanded payment of it from the Junior Noteholders pursuant to the terms of the Note Indenture. The Junior Noteholders argued, among other things, that the subordination provisions did not survive the Plan's implementation and that the Senior Debentureholders were not entitled to claim post-filing interest from them.

75 The motion judge, and on appeal, this court ruled in favour of the Senior Debentureholders. The courts found that the Plan was expressly drafted to preserve the subordination provisions and that the *CCAA* does not purport to affect rights as between creditors to the extent that they do not directly involve the debtor.

### *How to read Stelco?*

76 The appellant and the respondents offer different readings of *Stelco*.

77 The appellant argues that this court's decision is binding authority for the proposition that the interest stops rule does not apply in the *CCAA* context. The passages relied on by the appellant include para. 67:

[T]here is no persuasive authority that supports an Interest Stops Rule in a *CCAA* proceeding. Indeed, the suggested rule is inconsistent with the comment of Justice Binnie in [*Canada 3000*] at para. 96, where he said:

While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

78 The respondents, for their part, read the case more narrowly as a resolution of an inter-creditor dispute. They submit that the *ratio* of the case is that there was no rule that prohibited giving effect to the agreed upon inter-creditor postponement. To the extent that this court discussed the interest stops rule in the abstract, its comments are *obiter*.

79 I agree with the respondents. In my view, the court in *Stelco* did not need to decide whether the interest stops rule applies in *CCAA* proceedings for it to decide the inter-creditor dispute before the court and so its statements about the rule's application are not binding.

80 This court expressly noted, at para. 44, that it was dealing with an inter-creditor dispute. The Junior Noteholders had accepted the subordination terms in the Note Indenture. They had agreed not to be paid anything, in the event of insolvency, until those who held Senior Debt were paid principal and interest in full. The court affirmed, at para. 44, that the *CCAA* does not change the relationship among creditors where it does not directly involve the debtor.

81 As noted, this was a "no interest" plan, meaning that the Senior Debentureholders received no post-filing interest from Stelco. Rather, they sought and eventually received payment of post-filing interest from the Junior Noteholders' share of the proceeds. The court found that the Stelco Plan contemplated the continued accrual of interest to Senior Debentureholders for the purpose of their rights as against the Junior Noteholders after the *CCAA* filing date: paras. 59 and 70. It noted that *CCAA* plans can and sometimes do provide for payments in excess of claims filed in *CCAA* proceedings. There was no rule precluding the payment of post-filing interest to the Senior Debentureholders in accordance with the Stelco Plan: para. 70.

82 The court's conclusion that the Junior Noteholders could not rely on the interest stops rule is consistent with the traditional interest stops rule. The interest stops rule relates to claims by creditors against the debtor. It does not deal with arrangements as between creditors. In other words, whether or not the interest stops rule applies in *CCAA* proceedings did not need to be decided because the agreement between creditors fell outside the scope of that rule.

83 The appellant makes two further submissions based on its interpretation of s. 6.2(1) of the Note Indenture. That paragraph reads as follows:

6.2 Distribution on Insolvency or Winding-up.

.....

(1) the holders of all Senior Debt will first be entitled to receive payment in full of the principal thereof, premium (or any other amount payable under such Senior Debt), if any, and interest due thereon, before the Debentureholders will be entitled to receive any payment or distribution of any kind or character, whether in cash, property or securities, which may be payable or deliverable in any such event in respect of any of the Debentures;

[Emphasis added.]

84 The first argument is that the Senior Debentureholders were only entitled to receive principal, premium and interest "which may be payable or deliverable in any such event", the event being insolvency or bankruptcy proceedings. Therefore, the court must have concluded, at least implicitly, that the Senior Debentureholders would have been entitled to maintain their claim for post-filing interest against Stelco.

85 The second argument is that, by the terms of s. 6.2(1), the Senior Debentureholders were only entitled to interest "due thereon" and so they could not claim post-filing interest from the Junior Noteholders unless they could claim post-filing interest from Stelco.

86 I would not give effect to either submission.

87 In *Stelco*, the court did not address either argument and we do not have a copy of the entire agreement nor do we have the other agreements that form part of the factual matrix. Without that context, this court is not in the position to interpret s. 6.2(1).

88 In my view, the key question for this court is not how to properly interpret s. 6.2(1) but, rather, how we should read the reasons in *Stelco*. What did the *Stelco* court decide, and specifically, should we read the panel as implicitly deciding that the Senior Debentureholders could not recover post-filing interest from the Junior Noteholders unless they could claim post-filing interest against *Stelco*?

89 In discussing post-filing interest, the court's only mention of the Senior Debentureholders' claim as against *Stelco* is found at paras. 57-59, where the panel expressly rejected the argument that "any claim the Senior [Debentureholders] have for interest must be based on a "claim" [as defined in the Plan] they have against *Stelco* for such interest" and that "[i]f the Senior Debt does not include post-filing interest, there can be no claim against the [Junior] Noteholders for such amounts": see paras. 58-59.

90 Admittedly, the panel made this comment in discussing the effect of the *Stelco* Plan as opposed to the effect of the interest stops rule. However, as I read the section on post-filing interest as a whole, the court is saying that the Junior Noteholders agreed to be bound by the deal they made. They had agreed to the subordination provisions that guaranteed full payment to the Senior Debentureholders in the event of insolvency, and the Plan affirmed that the Senior Noteholders could claim the full amount that would have been owing had there been no *CCAA* filing. In this court's words at para. 70, there is no interest stops rule "that precludes such a result." In my view, therefore, this court did not make an implicit finding that the Senior Debentureholders had to be able to claim post-filing interest from *Stelco* in order to claim post-filing interest from the Junior Noteholders.

91 In conclusion, I consider the comment that there is no persuasive authority that supports an interest stops rule in *CCAA* proceedings to be *obiter*. *Stelco* dealt with the effect of an agreement as between creditors as to how, between them, they would share distributions. Whether or not interest stops upon a *CCAA* filing was of no import in answering that question.

***(2) If the CCAA judge did not err in concluding that an interest stops rule applies in CCAA proceedings, did he err in holding that holders of Crossover Bonds Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?***

92 The appellant objects to the wording of the *CCAA* judge's order. It provides that "holders of Crossover Bond Claims are not legally entitled to claim *or receive* any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). While the appellant asked the *CCAA* judge to amend his order to delete "or receive", he refused. The appellant submits that, to the extent this precludes the bondholders from receiving post-filing interest under a *CCAA* plan, the *CCAA* judge erred. The appellant notes that all the parties in this proceeding agree that a *CCAA* plan may provide for post-filing interest.

93 As I explained above, the interest stops rule does not preclude the payment of post-filing interest under a plan of compromise or arrangement.

94 As I read the *CCAA* judge's reasons and order, he did not decide otherwise. His decision confirms that the common law interest stops rule applies in *CCAA* proceedings. If a plan of compromise or arrangement is concluded, it should not, for example, be read as limiting any right to recover post-filing interest creditors may have as amongst themselves, as existed in *Stelco*, or from non-parties. Nor does it dictate what any creditor may seek in bargaining for a fair plan of compromise or arrangement. In that regard, I do not interpret the *CCAA* judge's use of the words "or receive" as preventing the appellant from seeking and obtaining such a result in a negotiated plan. In particular, I note the *CCAA*

judge's comment at para. 35 of his reasons that "the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done."

95 The appellant also seeks clarification as to the effect of the words "*any amounts* under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). The appellant notes that, without clarification, the wording of the order could potentially preclude the recovery of other contractual entitlements under the relevant indentures, such as costs and make-whole provisions, even though no arguments were advanced before the *CCAA* judge with respect to any amounts other than post-filing interest.

96 The issue the *CCAA* judge was directed to answer was "whether the holders of the crossover bond claims ... [were] legally entitled ... to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest". As indicated in the appellant's factum, the only arguments advanced before the *CCAA* judge related to post-filing interest and not any other amounts under the indentures. The appellant does not appear to have made submissions to the *CCAA* judge with respect to the costs and make-whole fees it now raises in its factum. This court is in no position to deal with the new argument raised by the appellant. Further, beyond making the broad submission noted above, the appellant did not expand on that submission and direct the court to the specific claims or indenture provisions it relies on in support of its argument or explain why the claims should not be caught by the order.

97 As I have already indicated, the *CCAA* judge's order confirms that the interest stops rule, and the limits imposed by the rule, apply in *CCAA* proceedings. To the extent that the appellant maintains that there are other contractual entitlements under the relevant indentures not covered by the interest stops rule, it is up to the *CCAA* court to decide if those can now be raised and ruled upon.

## F. Final Comments

98 I acknowledge that the Nortel *CCAA* proceedings are exceptional, particularly with respect to the length of the delay. The amount the appellant claims for post-filing interest and related claims under the indentures, and the resulting impact on other unsecured creditors is so great because of the length of that process. The principle, however, is the same whether the *CCAA* process is short or long. After the imposition of a stay in *CCAA* proceedings, allowing one group of unsecured creditors to accumulate post-filing interest, even for a relatively short period of time, would constitute unfair treatment vis-à-vis other unsecured creditors whose right to convert their claim into an interest-bearing judgment is stayed.

99 This decision does not purport to change or limit the powers of *CCAA* judges. Although the decision clearly settles at the outset of a *CCAA* proceeding whether there is a legal entitlement to post-filing interest, it does not dictate how the proceeding will progress thereafter until a plan of compromise or arrangement is approved, or the *CCAA* proceeding is otherwise brought to an end.

100 The determination of legal entitlement is important as it clearly establishes the starting point in a *CCAA* proceeding. It tells creditors, debtors and the court what legal claim a particular creditor has. Its significance is not only for purposes of setting the voting rights of creditors on any proposed plan of compromise or arrangement, it also ensures that, in assessing any such proposed plan, the parties will know what they are or are not compromising and the court will be equipped to consider the fairness of such a plan.

## G. Disposition

101 For these reasons, I would dismiss the appeal. Pursuant to the agreement of the parties, I would award the respondent Monitor, as successful party, costs as against the appellant fixed in the amount of \$40,000, inclusive of disbursements and applicable taxes. I would make no other order as to costs.

**Janet Simmons J.A.:**

I agree

***E.E. Gillese J.A.:***

I agree

*Appeal dismissed.*

#### Footnotes

- 1 There are five Canadian Debtors: Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation.
- 2 As explained in Roderick J. Wood's text on bankruptcy and insolvency law, "insolvency law is the wider concept, encompassing bankruptcy law but also including non-bankruptcy insolvency systems.": Roderick J. Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Law Inc., 2009), at p. 1.
- 3 The respondents are the Monitor, the Canadian Debtors, the Canadian Creditors' Committee and the Wilmington Trust, National Association. While technically The Bank of New York Mellon and the Law Debenture Trust Company of New York are also respondents, they support the appellant's position and so my use of the term "respondents" excludes them.

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**REPORT OF THE COMMITTEE**

Thursday, November 25, 2010

**The Standing Senate Committee on Banking Trade and Commerce**

has the honour to present its

**SIXTH REPORT**

---

Your Committee, to which was referred Bill S-216, An Act to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act in order to protect beneficiaries of long term disability benefits plans has, in obedience to the Order of Reference of June 17, 2010, examined the said bill and now reports as follows:

Your Committee recommends that this Bill not be proceeded with further in the Senate for the reasons that follow.

Your Committee notes that Bill S-216 attempts to retroactively enhance the priority of claims for unfunded long-term disability liabilities in proceedings commenced pursuant to the Bankruptcy and Insolvency Act before the coming into force of the amendments contained in the bill, which may generate claims that conflict with court-approved settlement agreements already in force, resulting in litigation that would be detrimental to the interests of long-term disability claimants including the former employees of Nortel.

Your Committee believes that Bill S-216 would cause companies to prefer liquidation to restructuring, because it would confer preferred status on claims for unfunded long-term disability liabilities in liquidation proceedings, while conferring super-priority status on similar claims in restructuring proceedings under the Bankruptcy and Insolvency Act; and

Your Committee notes that Bill S-216 would reduce the amount that some creditors would otherwise hope to recover in bankruptcy proceedings, increasing risk for investors and financing costs for bond-issuing companies, which your Committee believes would be detrimental to the currently fragile growth of the Canadian economy.

This report was adopted in committee on the following vote:

YEAS – The Honourable Senators: Ataulajhan, Dickson, Greene, Kochhar, Mockler and Plett (6).

NAYS – The Honourable Senators: Eggleton, Harb, Hervieux-Payette, Moore and Ringuette (5).

Respectfully submitted,

CÉLINE HERVIEUX-PAYETTE, P.C.  
*Deputy Chair*

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Canada

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# Fresh Start: A Review of Canada's Insolvency Laws

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# Fresh Start: A Review of Canada's Insolvency Laws

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## Letter from Minister James Moore

The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* require that the Minister of Industry report to Parliament on the provisions and operation of both Acts in 2014. I am pleased to table this report in fulfillment of that responsibility.

The Government of Canada launched a public consultation in May 2014, with the release of a Discussion Paper seeking input on key aspects of Canada's insolvency regime and its administration. The public consultations built on previous research and analysis of economic and insolvency trends by departmental officials, as well as contributions from stakeholders. The results of the review activities are captured in this report.

Insolvency laws are important marketplace framework legislation that have an impact on Canada's competitiveness. An efficient, well-functioning insolvency regime is vital to Canada's continued economic prosperity. Stakeholders told us that Canada's insolvency laws have responded well to the needs of Canadian consumers and businesses, particularly during the recent recession. At the same time, Canada's insolvency laws must evolve to meet the needs of the economy and changes in the global marketplace. Our government is committed to ensuring that Canadian insolvency legislation maintains its status among the most modern regimes in the world.

In tabling this report, I would like to thank the many Canadians who participated in the review. The extensive public feedback in response to the Discussion Paper, including input from insolvency experts, academics, and other stakeholder groups, will inform our work as the review continues in the coming parliamentary session.

The Honourable James Moore  
Minister of Industry

## Introduction

In 2008, the world experienced one of the deepest economic downturns since the Great Depression. Canada was not spared as we experienced a recession that was felt across Canada, a record number of personal insolvencies and the failure or restructuring of numerous businesses.

Canada's post-2008 performance led G7 countries with the highest level of job creation and one of the best growth rates coming out of the recession. Canada experienced a positive macroeconomic environment, including a low federal government debt-to-gross domestic product ratio, the lowest overall tax rate on new business investment among G7 countries, a sound approach to regulation of financial institutions and a stable, low inflation environment. These factors were reinforced by the Economic Action Plan, which responded to the global crisis by reducing taxes, investing in infrastructure, enhancing skills training, supporting sectoral and regional adjustment and facilitating business lending. Despite lingering turmoil in certain countries, Canada is projected to continue its stable growth as domestic firms reinvest to enhance their competitiveness.

Even in a growing economy, Canadians will face challenges: one of the highest consumer debt-to-income ratios in the G20 and changing demographic trends that are increasingly imposing financial burdens on the “sandwich” generation will test consumers’ resilience; and globalization will present new business opportunities but also greater challenges from international competitors.

In this context, Canada’s insolvency environment continues to evolve: relationship lending, which was once predominant, is declining; new players, including private equity and distressed debt traders, are presenting unique challenges to corporate restructuring efforts; financial market innovations, such as credit and other derivatives, are shifting parties’ interests and incentives; and the growth in cross-border insolvency proceedings is increasing the complexity of cases and bringing new competing interests for scarce resources.

What remains constant is that there will be individuals and businesses who, for various reasons, find themselves overwhelmed by debt. For them, and for the benefit of the economy, an effective insolvency regime is necessary to ensure an

efficient process to settle debts and, where appropriate, provide individuals with a fresh start and businesses with an opportunity for financial rehabilitation.

Canada's insolvency laws are well-regarded internationally and are frequently cited as a model in international insolvency panels, such as the United Nations Commission on International Trade Law (UNCITRAL). While these laws proved robust during the 2008 downturn, it is critical to ensure that they remain responsive to new challenges in the constantly evolving domestic and global economic landscapes. To that end, the *Bankruptcy and Insolvency Act*<sup>1</sup> (BIA) and the *Companies' Creditors Arrangement Act*<sup>2</sup> (CCAA) include a statutory provision that requires their periodic review. This report is a step in the review process.

## Canada's Insolvency Framework

Canada's insolvency regime is composed primarily of two Acts, the BIA and the CCAA. The BIA provides the legislative framework to address personal and corporate insolvency. In a bankruptcy, a trustee liquidates the bankrupt's assets and distributes the proceeds in a fair and orderly way among the creditors. Alternatively, the BIA provides procedures for insolvent consumers and businesses to avoid bankruptcy by negotiating an agreement with their creditors to reorganize their financial affairs. This is referred to as a "proposal".

The CCAA provides the legislative framework for insolvent companies with more than \$5 million in debt to reorganize under court

supervision. It enables the insolvent company to seek a court order staying its creditors from taking action against it while it negotiates an arrangement to reorganize its financial affairs. A monitor is appointed by the Court to watch over the restructuring and provide information to the Court and creditors. While corporate restructurings can occur under either Act, the CCAA's court-driven process provides greater flexibility for judges to deal with the specific issues in the cases before them.

"Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs."<sup>3</sup>

The Superintendent of Bankruptcy (the Superintendent) is part of the administrative framework, overseeing the functioning of the insolvency regime and

ensuring its integrity. The Superintendent has statutory responsibility to supervise the administration of all estates and matters under the BIA, and regulates the trustees who administer consumer and commercial bankruptcies and proposals. The Superintendent also has certain functions under the CCAA, including maintaining a public record of CCAA proceedings and investigating complaints regarding the conduct of monitors. In fulfilling his mandate, the Superintendent sets standards and provides guidance to stakeholders regarding expected conduct through directives, notices, position papers and compliance programs.

## I. History

The BIA has its roots in the *Bankruptcy Act* of 1919, which was substantially reformed in 1949. The BIA was further amended in 1992, 1997 and 2008-2009. The CCAA came into force in 1933 but only became a commonly used restructuring statute in the 1980's. It was amended in 1997 and 2009.

The 1992 reforms focussed on maximizing creditor value through reorganization and rehabilitation, improving the equitable distribution to suppliers and employees and improving the administration of the BIA. The 1997 reforms encouraged consumer debtor responsibility, and improved the reorganization provisions and the administration of the Acts, including the introduction of specialized provisions related to securities firms and international insolvencies.

The most recent legislative reforms, which came into force in 2009, had four main objectives: to encourage the restructuring of viable, but financially troubled, companies; to better protect workers' claims for unpaid wages and vacation pay; to make the bankruptcy system fairer and reduce abuse; and, to improve the administration of the system. Best practices that developed under the CCAA were codified in order to enhance certainty in restructuring proceedings. Unpaid wages of up to \$2,000 per employee and unremitted pension contribution claims were prioritized ahead of secured creditors and collective agreements were protected. Debtors who had high income-tax debt were denied an automatic discharge from bankruptcy and those with surplus income were required to pay more into their estate and remain in bankruptcy for a longer period of time.

## II. Economic Implications

Insolvency legislation is a key component of Canada’s marketplace framework legislation that governs commercial relationships for both consumers and businesses. Certain and reliable rules provide security for investors and lenders that, in turn, influences the cost and availability of credit in the Canadian marketplace.<sup>5</sup> This can help attract higher levels of domestic and foreign investment while the fresh start provided by bankruptcy offers a safety net that

“Capital and credit, in their myriad of forms, are the lifeblood of modern commerce.”<sup>4</sup>

promotes entrepreneurship.<sup>6</sup> Efficient bankruptcy and insolvency processes help

to ensure that debtors’ assets can be returned to productive use quickly, improving Canada’s overall economic performance.<sup>7</sup> Equitable treatment of stakeholders and transparent processes also help to protect the integrity of the insolvency regime.

Although broad economic considerations are important, it is essential to not lose sight of the individuals and businesses affected by these events and who must be dealt with equitably.

## III. Objectives of Insolvency Policy

In a dynamic, market-based economy, insolvency is a fact of life. From time to time, individuals and businesses will encounter financial difficulty, as a result of choices made, economic downturns or personal misfortune beyond their control.

“Despite the proven wisdom of the policies underpinning the insolvency legislation, it is understandable that few appreciate the ‘haircuts’ or even outright losses that bankruptcies trigger.”<sup>8</sup>

Countries have traditionally taken different approaches to the social and legal consequences of excessive debt. Canada adopted a “fresh start” policy for consumers, which relieves honest but unfortunate debtors of excessive debts. In recent years, there has been movement internationally towards the fresh start approach, which reduces costs for creditors and the negative social consequences for individuals faced with unmanageable debts.

Within the commercial insolvency sphere, Canada has encouraged the financial rehabilitation of viable, but financially distressed, businesses as that typically increases recoveries for creditors, maintains supplier relationships and protects jobs. Other countries are moving in a similar direction.

The objectives underlying the BIA and CCAA include minimizing the impact of a debtor's insolvency on all stakeholders by pursuing an equitable distribution of the debtor's assets and, where possible, by rehabilitation of the debtor. This is achieved by legislation that:

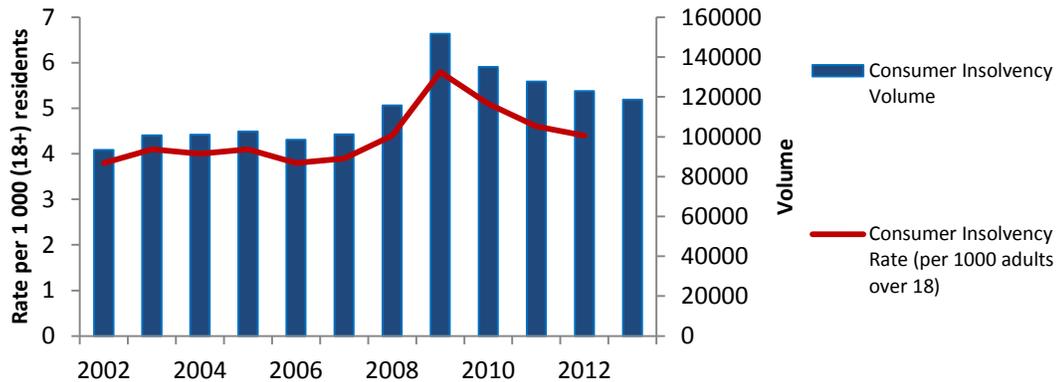
- ❖ provides certainty to promote economic stability and growth;
- ❖ maximizes the value of assets;
- ❖ strikes a balance between liquidation and reorganization;
- ❖ ensures equitable treatment of similarly situated creditors;
- ❖ provides for timely, efficient and impartial resolution of insolvency;
- ❖ preserves the insolvency estate to allow equitable distribution to creditors;
- ❖ ensures transparent and predictable insolvency laws that contain incentives for gathering and dispensing information; and
- ❖ recognizes existing creditor rights and establishes clear rules for ranking of priority claims.<sup>9</sup>

## Insolvency Trends

### I. Consumer

The Canadian consumer insolvency rate (the number of consumer insolvencies per 1,000 residents aged 18 years or older) has trended higher over the past few decades. This may be due to greater comfort with, and easier access to, consumer credit and reduced stigma related to bankruptcy. While the period of 2002-2007 saw a relatively stable consumer insolvency rate, the 2008 downturn pushed it to a new peak in 2009. Since that time, the rate has trended back towards pre-recession levels.

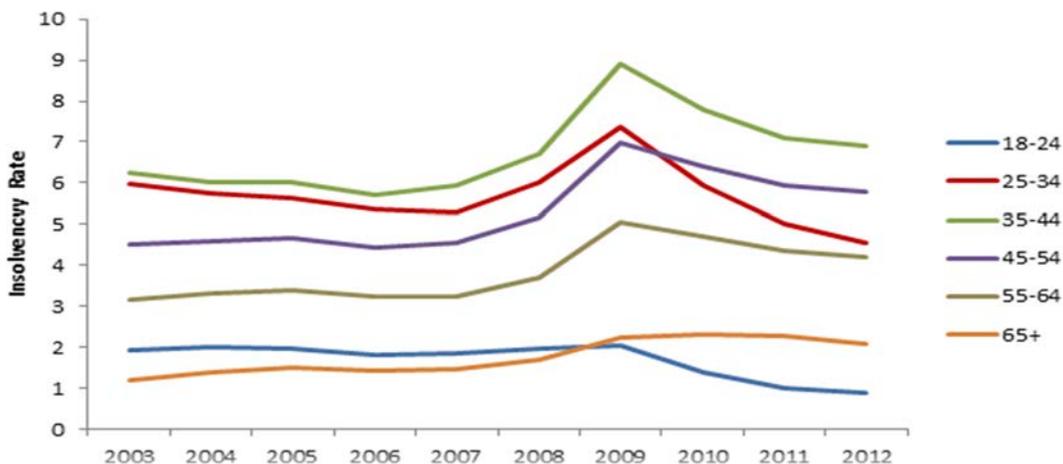
## Consumer Insolvency Rate and Volume



Source: Office of Superintendent of Bankruptcy

The rate of insolvencies is not evenly distributed among Canadians when viewed by age. Those aged 35-54 are at the highest risk of insolvency. Since 2008 two potentially significant trends have appeared. The consumer insolvency rates for Canadians older than 35 are higher than prior to the recession and insolvency rates for Canadians younger than 35 are lower. This could be indicative of delayed transition to financial autonomy by offspring placing greater financial burdens on parents. It is too early to determine whether the trend is an anomaly or indicative of a longer-term change.

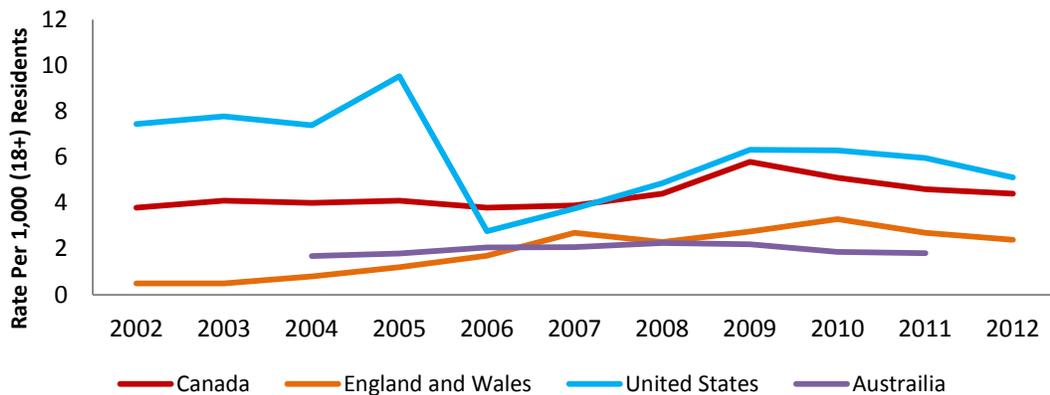
## Consumer Insolvency Rate by Age Cohort



Source: Office of Superintendent of Bankruptcy

Internationally, it can be difficult to compare consumer insolvency rates because countries have taken different approaches to the social and legal consequences of excessive debt. Different levels of social stigma related to insolvency may also impact consumer insolvency rates. That being said, Canada's consumer insolvency rate appears high compared to some other developed countries.

## Consumer insolvency rate: international comparison



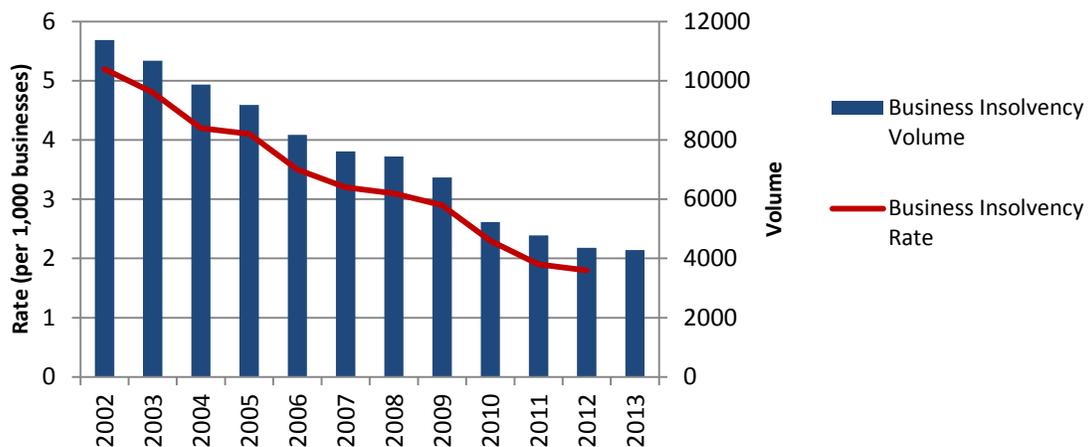
Sources: Statistics Canada, OECD, American Bankruptcy Institute, United Kingdom Office of National Statistics, Australian Bureau of Statistics, with Industry Canada calculations.

This could be a sign that Canada's insolvency regime is readily accessible, providing Canadians overwhelmed by debt with the fresh start they need. Alternatively, it could be a sign that Canadians are not managing their use of credit appropriately. Furthermore, because Canadians have the highest debt-to-income ratio among G7 countries, consumers are more susceptible to economic shocks, such as job loss or other negative life events.

## II. Business

In contrast to the consumer insolvency trends, the business insolvency rate (the number of business insolvencies per 1,000 businesses operating in Canada) has fallen nearly 70 percent since 2002.

## Business Insolvency Rate and Volume

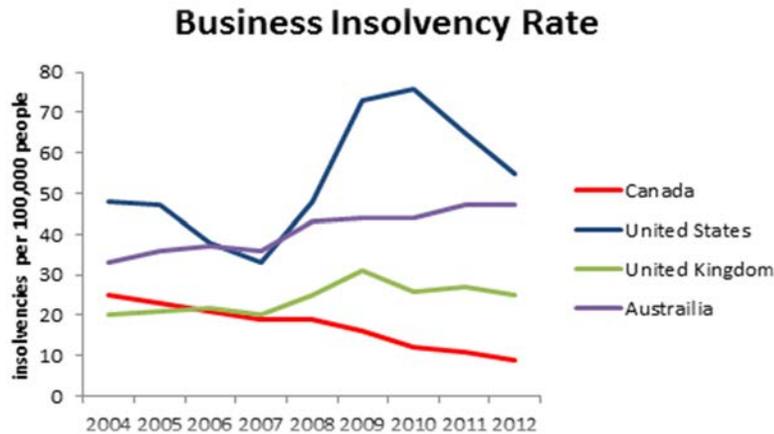


Source: Office of Superintendent of Bankruptcy

It is unclear why the business insolvency rate continues to trend downwards. It may be related to the relatively low cost of credit during the past decade, although other countries experienced low credit cost yet saw their business insolvency rates climb. It could also be attributed to closer monitoring by lenders, resulting in remedial actions before businesses reach the tipping point into insolvency. Finally, the cost of formal insolvency proceedings may have encouraged more private workouts or business closures.

Of note, unlike other periods of economic downturn, the 2008 recession did not result in an increase in the business insolvency volume. This is consistent with anecdotal evidence that suggests lenders were hesitant to trigger defaults post-2008 as there was a very limited market for distressed assets.

Internationally, Canada has a lower per capita business insolvency rate (the number of business insolvencies per 100,000 individuals) than comparable countries. The 2008 downturn resulted in spikes in business insolvencies in both the United States and United Kingdom whereas Canada maintained its downward trend. Australia's business insolvency rate continued to climb throughout the period.



Sources: Trading Economics; OECD; Industry Canada calculations.

## Review Process

The 2009 reforms to both the BIA and CCAA require the Minister of Industry to lay before Parliament a report on the provisions and operation of the Acts.<sup>10</sup> Industry Canada has monitored the Canadian insolvency marketplace to identify emerging trends and issues. In early 2013, a systematic environmental scan was initiated in order to gain a comprehensive understanding of how Canada's insolvency laws are functioning. The review included an examination of academic research and expert commentary, of insolvency proceedings and judicial decisions, and of domestic and international economic and insolvency trends. It was complemented by a broad outreach effort to an array of key stakeholders, including insolvency practitioners and academics, industry associations and employee and retiree groups, among others.

In May 2014, Industry Canada launched an on-line public consultation based on a wide-ranging discussion paper (the Discussion Paper) in order to obtain the views of Canadians. More than 70 individuals and organizations made submissions on a variety of issues. Interested stakeholders were also given the opportunity to meet with Industry Canada officials to share their views in person or by teleconference. Annex A provides a list of written submissions received by the Department. The Discussion Paper and submissions may be found at:

[http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h\\_cl00870.html](http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00870.html)

Industry Canada Statutory Review of Insolvency Laws  
[http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h\\_cl00870.html](http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00870.html)

This report fulfills the Minister of Industry's statutory obligation. Pursuant to the BIA and CCAA, this report is to be referred to a Parliamentary committee designated to review it and report back to Parliament within one year or such further time authorized by Parliament.

## What Canadians Said

Overall, most stakeholders are generally satisfied that the BIA and CCAA achieve their objectives in an efficient manner. That being said, Industry Canada received submissions regarding a large number of issues that could be addressed to improve the functionality of Canada's insolvency regime. Below are descriptions of several key issues that generated significant stakeholder commentary. The list is not intended to be exhaustive nor is it intended to exclude other issues. Industry Canada intends to continue to examine all matters raised in the public consultations.

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### I. Consumer Issues

***Registered Disability Savings Plans*** – When an individual becomes bankrupt, the trustee gathers together the bankrupt's assets for distribution to the bankrupt's creditors. The BIA, however, provides that the bankrupt is entitled to keep certain property that is exempt under provincial law and the BIA (e.g. personal belongings, work tools, pension entitlements and funds held in registered retirement savings plans).

Stakeholders expressed a strong preference to see an exemption added to the BIA for registered disability savings plans, which are intended to provide for the financial needs of severely disabled individuals when those who care for them are no longer able to provide support.

***Licence Denial Regimes*** – Provinces are responsible for issuing licences or permitting Canadians to engage in certain activities, such as driving. Some provinces have linked the ability to obtain or renew a licence to the payment of debts owed to the province or other specified entities. While this is within the province's authority in normal circumstances, it creates a conflict with the bankruptcy regime if the provincial legislation permits a creditor to demand

payment outside the insolvency process, instead of inside the process like all the other unsecured creditors.

There was stakeholder consensus that licence denial regimes – to the extent they purport to apply to debts released in bankruptcy – violate the fresh start principle and could have a significant, negative impact on the bankrupt and other creditors. As a result, stakeholders suggested that such regimes should not apply to debts released in bankruptcy.

***Family Law and Equalization*** – Family law and insolvency proceedings often intersect. In recognition of the social importance of family-related obligations, the BIA provides that spousal and child support orders are not releasable in bankruptcy. In a recent case before the Supreme Court of Canada,<sup>11</sup> a spousal claim for an equalization payment against property that was exempt from seizure under provincial law as against other creditors – but not as against a claim for equalization – was defeated. The Court suggested that as a matter of fairness insolvency law should ensure that such claims are protected in the future.

Stakeholders agreed with the Court’s assessment that the BIA should expressly protect equalization claims against exempt property held by the bankrupt.

***Reaffirmation Agreements*** – Through bankruptcy proceedings, an individual can have most of his or her debts released. In some cases, however, the bankrupt may wish to “reaffirm” (i.e. reinstate) a debt obligation for specific reasons. For example, anecdotal evidence suggests that car loans are often reaffirmed in order to permit the bankrupt to continue to use a vehicle that is required for work, especially in rural areas. Currently, a bankrupt may reaffirm a debt either through a written contract or by conduct (e.g. by making a payment on the debt following discharge from bankruptcy).

Stakeholders expressed concern that reaffirmation defeats the fresh start principle. There was also concern that bankrupts might not realize the consequences of reaffirmation by conduct. As a result, the majority of stakeholders were supportive of limitations in the BIA on reaffirmation by conduct.

There was no consensus regarding other consumer issues that were identified in the Discussion Paper, including responsible lending, consumer deposits, implementation of a federal exemption list and discharge of student loans.

## II. Commercial Issues

**Intellectual Property** – The knowledge-based economy continues to expand in importance in addition to the manufacturing-based, bricks-and-mortar economy. Stakeholders told us that it is crucial that Canada’s insolvency laws respond as effectively to financial distress involving intangible and intellectual property as they do to “hard” assets, such as real estate, equipment and inventory.

On this topic there was substantial consensus that Canada’s insolvency laws require significant modernization. It was recognized that amendments implemented in 2009 were a positive first step but that they were not broad enough to address all of the shortfalls. There remain aspects related to intellectual property for which there were calls for change, including modernizing the language related to the existing provisions on copyright and patents and ensuring that all types of intellectual property are recognized and properly treated.

**Priorities** – Bankruptcy is often described as a “zero-sum game” because there are finite and insufficient assets available to satisfy the bankrupt’s debts and liabilities. Changing the ranking according to which creditors are entitled to be paid would impact all creditors. This could, in turn, affect the cost and availability of credit for Canadians. As noted by the Standing Senate Committee on Banking, Trade and Commerce, “...the availability of credit at reasonable cost has implications for the levels of domestic and foreign investment, entrepreneurship and innovations, and personal investment and consumption.”<sup>12</sup>

In response to the Discussion Paper, there were calls from employee groups, pensioners, fresh produce sellers, small businesses and tax authorities seeking priority payment on the basis that they experience different vulnerabilities and, therefore, are in need of special protection. It was conveyed that there is a need to consider the unique risks and challenges in different sectors of the economy. On the other hand, lenders and insolvency practitioners suggested caution in considering these types of requests due to the potential impacts on credit cost and availability, particularly for financing of inventory that is related to farming. Some stakeholders recommended that options outside of insolvency should be considered in order to offer more secure protection for socially important claims and to protect the integrity of insolvency proceedings.

***Streamlined Proceedings*** – Insolvency proceedings, particularly corporate restructurings, can be complex, requiring significant time, effort and expertise. As a result, one of the key issues for insolvency law is to put in place efficient processes that permit a quick resolution, while ensuring fairness through necessary checks and balances.

In the CCAA context, most stakeholders supported streamlining measures, such as reducing the need for court approval of interim actions. Better disclosure of professional fees was also raised although there was no consensus on concrete actions that should be taken.

Stakeholders also suggested that the cost of restructuring under existing mechanisms is often too high for small and medium-sized businesses. This would suggest a more streamlined proceeding may be warranted, especially given the importance of small business entrepreneurs in driving the economy.

***Cross-border Insolvencies*** – Globalization continues to transform the world’s economy and create new markets and opportunities for Canadian workers and businesses. At the same time, as business becomes more international, the number of cross-border insolvencies has also increased.

Some stakeholders suggested that reforms may be necessary to ensure Canada’s insolvency laws keep pace with globalization trends. They pointed to work being undertaken by UNCITRAL’s insolvency working group, in which Canada is an active participant. Others, however, cautioned that any potential reforms should take into account the conditions necessary to promote investment in Canada and to protect the legitimate interests of Canadian firms in global markets.

***Financial Contracts*** – Innovation in the financial markets has resulted in continual evolution of products that assist business and investors in managing risks, including credit risk. It is in the intersection of these financial instruments and insolvency law that stakeholders are seeing emerging issues that may require policy responses to ensure that the balance in insolvency proceedings is maintained.

Most stakeholders indicated support for measured disclosure requirements, which would provide greater transparency for other creditors and the courts. There was no consensus regarding possible changes to rebalance the competing interests between those who use these financial products and other insolvency stakeholders.

### III. Administrative Issues

**Accessibility** – The insolvency regime provides Canadians with unmanageable debts a potential for a fresh start. The administration of files is carried out by private sector trustees. This means that the cost of accessing the insolvency system is based, to a certain extent, on market forces. Existing measures, such as the Bankruptcy Assistance Program and agreements to pay trustee fees post-discharge under the BIA, are intended to ensure access to bankruptcy.

Some stakeholders have suggested that there may still be accessibility issues as the cost of a simple bankruptcy, estimated to be as high as \$1,500, may be too high for low and no-income individuals. They suggested that new options could be developed to ensure better access to the insolvency regime.

**Legislative Structures** – Currently, Canada’s insolvency regime is implemented by a number of different laws under the mandate of different Ministers: the BIA, CCAA and the *Canada Business Corporations Act* fall under the responsibility of the Minister of Industry; the *Winding-up and Restructuring Act*, which can be used by certain corporations and financial institutions, falls under the shared responsibility of the Ministers of Industry and Finance; the *Canada Transportation Act*, under the Minister of Transport, can be used to resolve the insolvency of certain railway companies; and, the *Farm Debt Mediation Act*, under the Minister of Agriculture and Agri-Food, is available to insolvent Canadian farmers.

While there was little consensus as to concrete action, many stakeholders expressed support for rationalization of the current legislative structure.

**Modernization** – The BIA was last comprehensively reformed in 1949, with significant amendments being made on several occasions since 1992. Some stakeholders suggested that a comprehensive review of the BIA may be warranted in order to remove outdated concepts and provisions. Other stakeholders suggested that the role and powers of the Superintendent could be enhanced.

Stakeholders also raised a number of issues that are tangential to insolvency law policy, including taxation issues, the operation of the Wage Earner Protection Program, and regulation of pensions. These matters could impact on the

effectiveness and efficiency of the insolvency regime and could be considered in the context of the review.

## Conclusion

The 2008 economic downturn led many developed economies into a deep recession. Canada's experience was better than most as a result of positive actions taken to address the downturn yet, still, a significant number of Canadians suffered personal insolvency and major firms failed. The BIA and CCAA were up to the challenge and played their part by providing individuals with the needed fresh start and offering viable but financially troubled firms the opportunity to restructure.

That being said, stakeholders have been clear in expressing the need for the BIA and CCAA to be reviewed and updated periodically due to the evolving insolvency environment. As key marketplace framework legislation, the BIA and CCAA play an important role in Canada's economic performance. They also affect the lives and livelihoods of hundreds of thousands of Canadians every year. It is imperative that legislation of this significance is reviewed and updated to ensure it continues to meet its objectives.

This report and the review that supported it is one important step towards that goal. A parliamentary committee review and report stage will occur next. During this time, Industry Canada will continue to reach out to stakeholders, including academics and insolvency experts, and conduct further study and analysis. Decisions regarding any potential reforms will be made following the parliamentary committee report stage.

## Endnotes

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
2. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
3. *Century Services Inc. v. Canada (Attorney-General)*, 210 SCC 60 (CanLii), [2010] 3 S.C.R. 379 at paragraph 18.
4. The World Bank, *Principles for Effective Insolvency and Creditor Rights Systems (Revised)*, 2005.
5. The World Bank, *Principles for Effective Insolvency and Creditor Rights Systems (2001)*.
6. Armour, John and Cumming, Doug, *Bankruptcy Law and Entrepreneurship*, ECGI Working Paper Series in Law (2008).
7. Succurro, Marianna, *Bankruptcy Systems and Economic Performance Across Countries: Empirical Evidence*, Working Paper, Department of Economics and Statistics, University of Calabria, (2008).
8. *Schreyer v. Schreyer*, 2011 SCC 35 (CanLII), [2011] 2 SCR 605 at paragraph 19.
9. R. J. Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law Book, 2009) at page 4 (referring to the UNCITRAL Legislative Guide on Insolvency Law at page 14).
10. BIA section 285; CCAA section 63.
11. *Schreyer v. Schreyer*, 2011 SCC 35 (CanLII), [2011] 2 SCR 605.
12. Debtors and Creditors Sharing the Burden: A Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*, Report of the Standing Senate Committee on Banking, Trade and Commerce; November 2003.

## ANNEX A – STAKEHOLDER SUBMISSIONS

Air Canada Pionairs  
American Frozen Food Institute, Virginia  
Anne Clark-Stewart  
Assuris, Ontario  
Barb Sabathil  
Benoit Mario Papillon, Université du Québec Trois-Rivières  
BC Produce Marketing Association  
Bruce Leonard, Esq., Ontario  
Canadian Association of Insolvency and Restructuring Professionals  
Canadian Bankers Association  
The Canadian Bar Association  
Canadian Bond Investors Association  
Canadian Federation of Agriculture  
Canadian Federation of Independent Business  
Canadian Federation of Pensioners  
Canadian Institute of Actuaries  
Canadian Life and Health Insurance Association Inc.  
Carol Martin  
Cavendish Farms, New Brunswick  
Consumers Council of Canada  
Credit Union Central of Canada  
Dennis A. Fege  
Doug Querns  
EarthFresh Foods, Ontario  
Edward Song  
Fresh Produce Alliance, Ontario  
Fresh Produce Association of the Americas, Arizona  
Frozen Potato Products Institute, Virginia  
Gail Clark  
Government of Alberta  
Healthy Trends Produce LLC, Arizona  
Holland Marsh Growers' Association, Ontario  
Hoyes Michalos and Associates Inc., Ontario  
Hugh C. Stewart  
Iain Ramsay, Kent Law School, United Kingdom  
Insolvency Institute of Canada  
Insurance Corporation of British Columbia  
International Insolvency Institute  
International Swaps and Derivatives Association, Inc., New York  
IPR Fresh, Arizona  
James Callon (former Superintendent of Bankruptcy), Ontario  
Jean-Daniel Breton, CPA, CA, FCIRP, Québec

Jerry Hockin  
Kaliroy Premium Greenhouse Tomatoes, Arizona  
Ken Rowan & Associates Inc., Ontario  
L&M Companies, Inc., Ontario  
Laurie Gescheke  
Leo Wynberg, CA, CIRP  
Marion Evans  
Melinda Long  
Nishaben Patel  
The Ontario Produce Marketing Association  
The Oppenheimer Group, British Columbia  
Paddon & Yorke Inc., Ontario  
Planned Lifetime Advocacy Network, British Columbia  
Prince Edward Island Potato Board  
Roderick J. Wood, University of Saskatchewan and  
F.R. (Dick) Matthews, Q.C., University of Alberta  
Rumanek & Company Ltd.  
Sam Babe, J.D., M.B.A., Ontario  
Sandia Distributors Inc., Arizona  
SCRG, a Sears Canada retirees association, Ontario  
Sheila Maxwell  
TMX Group Limited  
Unifor, Ontario  
United States Department of Agriculture  
United States Fresh Fruit and Vegetable Trade Associations  
WaudWare Incorporated, Ontario

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## Second Report

[Standing Committee on Industry, Science and Technology \(INDU\)](#)

42nd Parliament, 1st Session

**Study**

[Review of the Government of Canada report entitled "Fresh Start: A Review of Canada's Insolvency Laws"](#)

### Review of the Government of Canada report entitled "Fresh Start: A Review of Canada's Insolvency Laws"

In accordance with its mandate under Standing Order 108(2), your Committee has considered the Report of Industry Canada on the provisions and operation of the Act, pursuant to the Bankruptcy and Insolvency Act, R.S. 1985, c. B-3, sbs. 285(1) and Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, which was tabled in the House of Commons on Tuesday, October 21, 2014 during the 2<sup>nd</sup> Session of the 41<sup>st</sup> Parliament.

The Committee has concurred in the findings of the Report.

A copy of the relevant *Minutes of Proceedings* ([Meeting No. 34](#)) is tabled.

Respectfully submitted,

**DAN RUIMY**  
*Chair*

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HOUSE OF COMMONS  
CHAMBRE DES COMMUNES  
CANADA

# House of Commons Debates

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VOLUME 148 • NUMBER 126 • 1st SESSION • 42nd PARLIAMENT

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OFFICIAL REPORT  
(HANSARD)

**Monday, December 12, 2016**

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**Speaker: The Honourable Geoff Regan**

The environment minister did not attempt to answer my Question No. 575 and the questions I have raised therein, even in the slightest. I have in my possession the purported response received from that department. I also posed questions to the Departments of Finance and ESDC, and they did not respond.

Let me just highlight the questions that were asked in writing and submitted in proper format: How would the carbon tax impact family budgets? How many people would a carbon tax push below the low income cut-off line? By how much would it increase the market basket measure of goods, a measure used by Statistics Canada to determine the affordability of common household goods? How would it impact people in each province? How would it impact grocery bills? How would it impact electricity bills?

The environment minister provided nothing more than vague talking points in her response. What little substance the minister did provide is concerning. She said:

Any impacts on business and consumers will be modest...

A carbon tax is a big deal. The Canadian Taxpayers Federation says that the costs will be approximately \$1,028 per person, or \$4,112 for a family of four. Does that sound modest to the House? Does the government expect Canadians who live on fixed incomes to find an extra \$1,000 per person to pay for this costly new government scheme?

Professor Nicholas Rivers has said that the carbon tax would add 11 cents a litre to the price of gasoline, 10% to electricity, and 15% to natural gas.

I could go on with—

**The Speaker:** Order. I think the member is going on and it is getting into debate. I would like him to stick to the point of order, if he would, please.

**Hon. Pierre Poilievre:** Mr. Speaker, if I could just conclude by saying that the questions I was asking were not in search of opinions or talking points from any particular political party, but for specific numbers.

Presumably any government that is proposing to implement a tax of this size, this magnitude, and with these consequences would have calculated the actual costs and impacts on Canadian families. That information, I am sure, exists within the Government of Canada. It will have been documented and it will have been provided to ministers before such a policy could ever have been considered, and certainly before Treasury Board would ever approve it.

Given that it must exist, it must be provided to Canadians. That is why I asked for the government to do so through the very specific use of Order Paper questions, to which the government is bound by parliamentary tradition as old as this country to respond.

It has not responded, and therefore it falls to you, Mr. Speaker, as the presiding officer of the House to ensure that the Standing Orders are upheld, that the questions are answered, and that Canadians get all of the facts before they have to pay the costs that the government will impose upon them.

**The Speaker:** I thank the hon. member for Carleton for raising his point of order. I will take it under consideration and come back to the House.

*Routine Proceedings*

## ROUTINE PROCEEDINGS

• (1510)

[*English*]

### CONTROLLED DRUGS AND SUBSTANCES ACT

**Hon. Jane Philpott (Minister of Health, Lib.)** moved for leave to introduce Bill C-37, An Act to amend the Controlled Drugs and Substances Act and to make related amendments to other Acts.

(Motions deemed adopted, bill read the first time and printed)

\* \* \*

[*Translation*]

## COMMITTEES OF THE HOUSE

### AGRICULTURE AND AGRI-FOOD

**Mr. Pat Finnigan (Miramichi—Grand Lake, Lib.):** Mr. Speaker, I have the honour to present, in both official languages, the fourth report of the Standing Committee on Agriculture and Agri-Food in relation to its study of genetically modified animals for human consumption.

Pursuant to Standing Order 109, the committee requests that the government table a comprehensive response to this report.

[*English*]

### INDUSTRY, SCIENCE AND TECHNOLOGY

**Mr. Dan Ruimy (Pitt Meadows—Maple Ridge, Lib.):** Mr. Speaker, I have the honour to present, in both official languages, the second report of the Standing Committee on Industry, Science and Technology entitled, “Review of the Government of Canada report entitled ‘Fresh Start: A Review of Canada’s Insolvency Laws’”.

### HEALTH

**Mr. Bill Casey (Cumberland—Colchester, Lib.):** Mr. Speaker, I have the honour to present, in both official languages, the sixth report of the Standing Committee on Health entitled, “Report and Recommendations on the Opioid Crisis in Canada”.

Pursuant to Standing Order 109, the committee requests that the government table a response to this report.

We are pleased and excited that all members of the committee were involved with this report and made contributions to it.

### ACCESS TO INFORMATION, PRIVACY AND ETHICS

**Mr. Blaine Calkins (Red Deer—Lacombe, CPC):** Mr. Speaker, I have the honour to present, in both official languages, the fourth report of the Standing Committee on Access to Information, Privacy and Ethics entitled, “Protecting the Privacy of Canadians: Review of the Privacy Act”.

Pursuant to Standing Order 109, the committee requests that the government table a comprehensive response to this report.

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**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** Yankson v. R. | 2005 TCC 751, 2005 CCI 751, 2005 CarswellNat 3811, 2005 CarswellNat 6906, 2005 D.T.C. 1709 (Eng.), [2006] 1 C.T.C. 2391, 135 C.R.R. (2d) 371, [2005] T.C.J. No. 567 | (T.C.C. [Informal Procedure], Nov 22, 2005)

2003 SCC 3, 2003 CSC 3  
Supreme Court of Canada

Siemens v. Manitoba (Attorney General)

2002 CarswellMan 574, 2002 CarswellMan 575, 2003 SCC 3, 2003 CSC 3, [2002] S.C.J. No. 69, [2003] 1 S.C.R. 6, [2003] 4 W.W.R. 1, [2003] A.C.S. No. 69, 102 C.R.R. (2d) 345, 119 A.C.W.S. (3d) 564, 173 Man. R. (2d) 1, 221 D.L.R. (4th) 90, 293 W.A.C. 1, 299 N.R. 267, 34 M.P.L.R. (3d) 163, 47 Admin. L.R. (3d) 205, 55 W.C.B. (2d) 609, J.E. 2003-270, REJB 2003-36968

**David Albert Siemens, Eloisa Ester Siemens and Sie-Cor Properties Inc. o/ a The Winkler Inn, Appellants v. The Attorney General of Manitoba and the Government of Manitoba, Respondents and The Attorney General of Canada, the Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General for Alberta, 292129 Alberta Ltd., operating as The Empress Hotel, 484906 Alberta Ltd., operating as Lacombe Motor Inn, Leto Steak & Seafood House Ltd., Neubro Holdings Inc., operating as Lacombe Hotel, Wayne Neufeld, 324195 Alberta Ltd., operating as K.C.'s Steak & Pizza, and Katerina Kadoglou, Interveners**

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

Heard: October 31, 2002  
Judgment: October 31, 2002  
Written reasons: January 30, 2003  
Docket: 28416

Proceedings: additional reasons to 2002 CarswellMan 461 (S.C.C.); affirming 2000 MBCA 152, [2001] 2 W.W.R. 515, 153 Man. R. (2d) 106, 238 W.A.C. 106, 85 C.R.R. (2d) 59 (Man. C.A.); affirming 2000 MBQB 140, [2001] 2 W.W.R. 491, 151 Man. R. (2d) 49, 78 C.R.R. (2d) 268 (Man. Q.B.)

Counsel: *David G. Hill* and *Curtis A. Knudson*, for appellants  
*Shawn Greenberg* and *Jayne Kapac*, for respondents  
*Robert W. Hubbard*, for intervener Attorney General of Canada  
*Hart Schwarts*, for intervener Attorney General for Ontario  
*Gabriel Bourgeois, Q.C.*, for intervener Attorney General for New Brunswick  
*Roderich Wiltshire*, for intervener Attorney General for Alberta  
*Ronald J. Dumonceaux* and *Graham K. Neill*, for interveners 292129 Alberta Ltd. et al.

Subject: Public; Constitutional; Human Rights

ADDITIONAL REASONS to appeal by plaintiffs from judgment reported at 2000 MBCA 152, 2000 CarswellMan 655, [2001] 2 W.W.R. 515, 153 Man. R. (2d) 106, 238 W.A.C. 106, 85 C.R.R. (2d) 59 (Man. C.A.), dismissing appeal of judgment reported at 2000 CarswellMan 479, 2000 MBQB 140, [2001] 2 W.W.R. 491, 151 Man. R. (2d) 49, 78 C.R.R. (2d) 268 (Man. Q.B.), dismissing their appeal from ruling that *Gaming Control Local Option (VLT) Act* is constitutional.

MOTIFS SUPPLÉMENTAIRES au pourvoi interjeté par les demandeurs à l'encontre de l'arrêt publié à 2000 MBCA 152, 2000 CarswellMan 655, [2001] 2 W.W.R. 515, 153 Man. R. (2d) 106, 238 W.A.C. 106, 85 C.R.R. (2d) 59 (Man. C.A.), qui a rejeté le pourvoi à l'encontre du jugement publié à 2000 CarswellMan 479, 2000 MBQB 140, [2001] 2 W.W.R. 491, 151 Man. R. (2d) 49, 78 C.R.R. (2d) 268 (Man. Q.B.), qui a rejeté leur pourvoi à l'encontre de la décision ayant conclu que la *Loi sur les options locales en matière de jeu (appareils de loterie vidéo)* était constitutionnelle.

**The judgment of the court was delivered by Major J.:**

## I. Introduction

1 In 1999, the Government of Manitoba enacted local option legislation enabling municipalities to hold binding plebiscites on the prohibition of video lottery terminals ("VLTs") in their communities. The legislation set out the procedure by which the plebiscites were to be initiated, held, and given effect. In addition, the legislation contained a specific section dealing with the Town of Winkler, which had held a non-binding plebiscite supporting a prohibition of VLTs the previous year. As a result of the legislation, VLTs were prohibited in Winkler until such time as a future binding plebiscite, held in accordance with the legislation, would permit their return to the municipality.

2 Both the Manitoba Court of Queen's Bench and the Court of Appeal concluded that the *Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44 ("VLT Act"), either as a whole or s. 16 in particular, was neither *ultra vires* the provincial legislature, nor did it violate the *Canadian Charter of Rights and Freedoms*. The appellants subsequently challenged the legislation before this Court on the grounds that s. 16, dealing specifically with Winkler, violates ss. 2(b), 7, and 15(1) of the *Charter*. They also argued that the legislation is *ultra vires* the provincial government because it is an affront to Parliament's exclusive jurisdiction over criminal law. On October 31, 2002, the Court unanimously dismissed their appeal. These are the reasons for that decision.

## II. Facts

3 The Manitoba Lotteries Corporation ("MLC") is responsible for operating lottery schemes, including VLTs, in the province. The MLC enters into agreements with "siteholders" to place VLTs on the siteholders' property. The siteholders then receive a per centage of the VLTs' revenue. However, the VLTs remain the property of the MLC and, according to the terms of the siteholder agreement, can be removed at any time, with or without cause.

4 The appellants, David and Eloisa Siemens, are the sole shareholders of Sie-Cor Properties Inc., which purchased The Winkler Inn in 1993. They invested a considerable amount of money in the renovation and expansion of the Inn, and submitted that VLTs were an important consideration when making their investment. The appellants increased the number of VLTs from 8 to 10 when they first purchased The Winkler Inn, and then from 10 to 12 in the fall of 1994. Their mortgage payments roughly coincided with the monthly VLT revenue.

5 In August 1998, the Town of Winkler passed a resolution to hold a plebiscite regarding VLTs in the municipality. The plebiscite was held in conjunction with the October municipal elections. The question was:

Should the Town of Winkler request that the Provincial Government ban video lottery terminals in Winkler, which would result in the Town of Winkler losing its annual municipal VLT grant?

Approximately 50 per cent of eligible voters participated in the plebiscite, including Mr. and Mrs. Siemens. A sizeable majority (77.8 per cent) of the votes cast were in favour of requesting a ban on VLTs. In response to the plebiscite, the Town of Winkler passed a resolution in December 1998 to forward the results to the Government of Manitoba. Sie-Cor Properties Inc., in turn, filed an application in the Court of Queen's Bench seeking a declaration that the resolution was invalid and an order of *certiorari* quashing it.

6 In July 1999, while Sie-Cor's application was proceeding to a hearing, the Manitoba Government passed the VLT Act. The Act permits municipalities to hold binding plebiscites regarding the prohibition of VLTs within their jurisdictions.

In addition, the government used the new legislation as an opportunity to give effect to the plebiscite that had already been held in Winkler. Specifically, s. 16 of the Act seeks to terminate the siteholder agreements in Winkler and deems that a resolution prohibiting VLTs was passed in accordance with the Act. Pursuant to this legislation, the siteholder agreement with The Winkler Inn was terminated effective December 1, 1999.

### III. Relevant Statutory Provisions

7 *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44

1 In this Act,

.....

"plebiscite" means a vote by the electors of a municipality on a resolution approved by the council or stated on a petition

(a) to prohibit video lottery gaming within the municipality, or

(b) where video lottery gaming within the municipality is prohibited because of a plebiscite, to permit video lottery gaming within the municipality;

.....

"video lottery gaming" means the operation of a lottery scheme, as defined in the *Criminal Code* (Canada), that involves the use of a video lottery terminal.

.....

3(1) Notwithstanding section 3 of *The Manitoba Lotteries Corporation Act*, no person shall carry on any video lottery gaming, under a siteholder agreement or otherwise, within a municipality while a resolution prohibiting video lottery gaming within the municipality is in effect.

3(2) A resolution prohibiting video lottery gaming within a municipality comes into effect on the first day of the fifth month following the month in which it is approved by a majority of the votes cast in a plebiscite and continues in effect until a resolution permitting video lottery gaming within the municipality is approved by a majority of the votes cast in a plebiscite.

.....

16(1) Each siteholder agreement existing before the coming into force of this section respecting the operation of video lottery terminals at a site located in the Town of Winkler is terminated on the first day of the fifth month following the month in which this Act comes into force, and the corporation shall remove all video lottery terminals from sites located in the Town of Winkler as soon as practicable after that day.

16(2) A resolution to prohibit video lottery gaming within the Town of Winkler is deemed for the purposes of this Act to have been approved by a plebiscite and is deemed to come into effect on the first day of the fifth month following the month in which this Act comes into force.

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

207.1(1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful

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

*Constitution Act, 1867*

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -

.....

13. Property and Civil Rights in the Province.

.....

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

#### *Canadian Charter of Rights and Freedoms*

2. Everyone has the following fundamental freedoms:

.....

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

.....

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

.....

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

#### **IV. Judgments Below**

##### ***A. Manitoba Court of Queen's Bench (2000), [2001] 2 W.W.R. 491***

8 In February 2000, Hamilton J. heard arguments on a motion to have certain questions of law determined before trial on Sie-Cor's *certiorari* application. At issue was whether the VLT Act, either as a whole or s. 16 in particular, was *ultra vires* the provincial legislature as an invasion into the federal government's criminal law power, and whether s. 16 violated ss. 2(b), 6, 7, and 15(1) of the *Charter*. It was also argued that the legislation constituted prohibited discrimination under the Manitoba *Human Rights Code*, S.M. 1987-88, c. 45. Hamilton J. rejected all the appellants' claims.

9 In dismissing the division of powers argument, Hamilton J. relied on *R. v. Furtney*, [1991] 3 S.C.R. 89 (S.C.C.). That case held that gaming was a matter within the "double aspect" doctrine, such that both Parliament and the provincial legislatures had jurisdiction to legislate in that area. She found that the VLT Act was, therefore, *prima facie* within the legislative authority of the Manitoba Government. She also found that the VLT Act was not an attempt to enact criminal law, as the legislation lacked both penal consequences and a criminal law purpose.

##### ***B. Manitoba Court of Appeal (2000), [2001] 2 W.W.R. 515***

10 In a short oral judgment delivered by Twaddle J.A. (Kroft and Steel JJ.A. concurring), the Manitoba Court of Appeal dismissed the appeal on all grounds, expressing that it was in "substantial agreement" with Hamilton J., "both with respect to the declarations made and her reasons for them."

#### **V. Issues**

11 By order of the Chief Justice dated December 19, 2001, the following constitutional questions were stated for the Court's consideration:

- (1) Is *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44, in its entirety *ultra vires* the Legislature of the Province of Manitoba as it relates to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?
- (2) Is s. 16(1) of *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44, *ultra vires* the Legislature of the Province of Manitoba as it relates to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?
- (3) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms*?
- (4) If the answer to question 3 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?
- (5) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?
- (6) If the answer to question 5 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?
- (7) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
- (8) If the answer to question 7 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

## VI. Analysis

### A. Interpreting the VLT Act

12 A significant portion of the appellants' submissions focused on the proper characterization and interpretation of the VLT Act, and particularly s. 16 of that Act. The main thrust of their argument was that s. 16 of the VLT Act did not "give effect" to the plebiscite that occurred in Winkler in 1998 and that, therefore, the constitutionality of the legislation must be assessed without reference to that plebiscite. They noted that s. 16 does not explicitly refer to the 1998 plebiscite, and that s. 16(2) refers to the indefinite "a plebiscite" rather than the definite "the plebiscite." As well, they submitted that the subsection deems a resolution prohibiting gaming to have been passed by a municipal plebiscite in Winkler, when no such resolution was ever approved by the town council. These characteristics allegedly demonstrate that s. 16 of the VLT Act did not give effect to the plebiscite that actually occurred in Winkler in the fall of 1998, and that it unfairly attributes a binding plebiscite to the residents of Winkler, who never voted in such a plebiscite.

13 The appellants expressed puzzlement at being affected by the 1998 plebiscite, as that plebiscite was not held pursuant to a resolution prohibiting VLTs, as required by the Act. The answer to that puzzlement is that the VLT Act has a more general application, and, in accordance with the principles of purposive interpretation, that s. 16 was intended to incorporate the wishes already expressed by Winkler voters into the broader provincial scheme.

14 No doubt the legislation could have been drafted in a way that more explicitly expressed the purpose of s. 16. Nevertheless, given the entire context of the legislation, the legislative purpose is clear. The Town of Winkler held a non-binding plebiscite in the fall of 1998, in which a majority of votes cast supported a request to remove VLTs from the community. The town council forwarded the results of the plebiscite to the provincial government. In response, the provincial government enacted legislation prohibiting the operation of VLTs in Winkler and terminating all siteholder agreements in that community.

15 The appellants acknowledged at the appeal that, if the government had wished to enact legislation dealing solely with the prohibition of VLTs in the Town of Winkler, it could legitimately have done so. However, instead of giving effect to the Winkler plebiscite in an Act designed solely for that purpose, the government incorporated a section prohibiting VLTs in Winkler into a larger statute that established a scheme for all municipalities to prohibit or reinstate VLTs through binding plebiscites. I cannot see how the legislative structure chosen by the government affects the Act's constitutionality. Through the VLT Act, the province attempted to bring Winkler within the larger scheme of VLT plebiscites in the province. In order to do so, it deemed that Winkler voters had approved a VLT prohibition in accordance with the Act. All the parties agree that the Winkler plebiscite did not, in fact, approve such a prohibition. Indeed, since the Winkler plebiscite preceded the introduction of the VLT Act, it was impossible for voters to do so. Regardless, the legislature had the latitude to give effect to the Winkler plebiscite by various means, including the deeming provision it used. Unless the legislation is otherwise unconstitutional, the particular means chosen by the legislature cannot be used as a basis to declare it invalid.

16 It should be noted that the less-than-ideal legislative drafting is not an independent ground upon which legislation can be found unconstitutional. The wording of the statute is only relevant to the analysis in so far as it informs the determination of the pith and substance of the legislation. As long as the pith and substance of s. 16 falls within the provincial sphere of legislative authority, it is immaterial whether it could have been drafted in clearer terms.

17 Similarly, it cannot be concluded that the wording of s. 16 dictates that the appellants' *Charter* claims must be assessed without considering the Winkler plebiscite of 1998. This Court has stated on numerous occasions that the evaluation of *Charter* claims should be contextual: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at p. 344 (per Dickson J. (as he then was)), *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.), at pp. 1355-1356 (per Wilson J.), *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 (S.C.C.), at pp. 224-226 (per Cory J.), *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (S.C.C.), at para. 87 (per Bastarache J.), *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), at para. 62 (per Iacobucci J.). The purpose and effects of the legislation cannot be examined in a vacuum, but must be considered in light of the facts as they are known to both the claimant and the legislator.

18 The rationale for contextual analysis is particularly strong in this case. But for the 1998 Winkler plebiscite, the provincial government would never have enacted s. 16 of the VLT Act. The legislature did not single out the Town of Winkler on an arbitrary basis; rather, it enacted s. 16 to respond to the wishes of Winkler voters. If the Court were to ignore the 1998 plebiscite in assessing the *Charter* claims, it would be ignoring the very circumstances that gave rise to the impugned section. This is both logically and legally flawed. Nevertheless, the analysis of the *Charter* claims is not dependent on the existence of the 1998 plebiscite, and the legislation would have been upheld in any event. The contextual analysis merely strengthens that conclusion.

### ***B. The Division of Powers Claim***

19 To determine whether the Manitoba Government had legislative authority to enact the VLT Act, it is necessary to identify the pith and substance of that legislation. In *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31 (S.C.C.), at para. 53, it was held that the pith and substance analysis involves an inquiry into both the purpose of the legislation and its effects. LeBel J. also wrote that, where a specific section of the legislation is being challenged, its pith and substance should be identified before that of the Act as a whole. If the impugned section is *ultra vires*, it may still be upheld if it is sufficiently integrated into a valid provincial legislative scheme (para. 58). However, since the appellants in the present case have challenged both s. 16 and the VLT Act as a whole, it is necessary to identify the pith and substance of both in any event.

20 The purpose of s. 16 of the VLT Act is to prohibit VLTs in Winkler and to cancel all existing siteholder agreements with respect to VLTs. The legislative debates on the VLT Act indicate that s. 16 was enacted to give effect to the plebiscite that had already been held in Winkler, albeit before the Act came into force. The responsible Minister said:

As you may be aware, Madam Speaker, last fall the citizens of Winkler conducted a plebiscite requesting the removal of VLTs from that community. This legislation supports that community's will. This legislation will recognize the legitimacy of the 1998 VLT plebiscite in Winkler.

(Manitoba, Legislative Assembly, *Debates and Proceedings* (Hansard), 5th Sess., 36th Leg., vol. XLIX, No. 57A, July 8, 1999, at p. 4092 (Ms Render))

The effect of s. 16(1) of the VLT Act was to cancel the siteholder agreement with The Winkler Inn. Further, as indicated, s. 16(2) attempted to bring the non-binding Winkler plebiscite within the local option scheme outlined in the other sections of the Act. The Act allows plebiscites to be held on whether to prohibit VLTs within the municipality or, where a VLT prohibition is already in effect, on whether to reinstate VLTs within the municipality. Thus, by deeming a resolution prohibiting VLTs to have been approved in Winkler in accordance with the Act, the effect of s. 16(2) is to put the Town of Winkler into the "starting position" of prohibiting VLTs. If a subsequent VLT plebiscite is to be held in Winkler, the question will ask whether to reinstate VLTs in that community.

21 More broadly, the purpose of the VLT Act as a whole seems to be, quite simply, to allow municipalities to express, by binding plebiscite, whether they wish VLTs to be permitted or prohibited within their communities. This purpose is evident from the title of the Act, *The Gaming Control Local Option (VLT) Act*, which clearly expresses the government's desire to obtain local input on the issue of VLTs. The VLT Act was the government's response to two reports: the Manitoba Lottery Policy Review's *Working Group Report* (1995) (the "Desjardins Report"), and the Manitoba Gaming Control Commission's *Municipal VLT Plebiscite Review* (Winnipeg: The Commission, 1998). Both reports recommended that municipal plebiscites be held to determine local opinion on the issue of VLTs.

22 The pith and substance of the VLT Act falls within a provincial head of legislative authority. As Stevenson J. wrote for this Court in *Furtney, supra*, at p. 103, gaming is a matter that falls within the "double aspect" doctrine. Accordingly, gaming can be subject to legislation by both the federal and provincial governments:

In my view, the regulation of gaming activities has a clear provincial aspect under s. 92 of the *Constitution Act, 1867* subject to Parliamentary paramountcy in the case of a clash between federal and provincial legislation. . . . Altogether apart from features of gaming which attract criminal prohibition, lottery activities are subject to the legislative authority of the province under various heads of s. 92, including, I suggest, property and civil rights (13), licensing (9), and maintenance of charitable institutions (7) (specifically recognized by the *Code* provisions). Provincial licensing and regulation of gaming activities is not *per se* legislation in relation to criminal law.

Without foreclosing discussion on other potential heads of jurisdiction, it is sufficient for this appeal to find that the VLT Act was, *prima facie*, validly enacted under ss. 92(13) and 92(16). Section 16(1) deals specifically with the siteholder agreements, which are contractual in nature and thereby fall under property and civil rights. On a broader level, the municipal plebiscites empower each community to determine whether VLTs will be permitted, thereby invoking matters of a local nature.

23 The VLT Act is not, as the appellants have submitted, a colourable attempt to legislate criminal law. The Act does not possess the relevant characteristics outlined by Rand J. in *Reference re Validity of s. 5(a) of Dairy Industry Act (Canada)*, (*Margarine Case*) (1948), [1949] S.C.R. 1 (S.C.C.), at p. 50, and affirmed by the Privy Council in (1950), [1951] A.C. 179 (Canada P.C.), at p. 196, and, more recently, in *Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783, 2000 SCC 31 (S.C.C.), at para. 27. These are (1) a prohibition, (2) coupled with a penalty, and (3) a criminal law purpose. The respondents conceded that the VLT Act contains a prohibition, namely, s. 3(1) prohibits the operation of VLTs in municipalities that have banned them as the result of a binding plebiscite. Nevertheless, this alone is insufficient to establish that the VLT Act is, in pith and substance, criminal law. The Act does not create penal consequences, and was not enacted for a criminal law purpose.

24 Although s. 3(1) prohibits the operation of VLTs in relevant municipalities, it does not create a provincial offence. Nor does it impose a penalty for operating VLTs in those municipalities. If VLT operators were to be charged with any offence, it would be under the gaming provisions in the *Criminal Code*, which prohibit gambling *except* in accordance with lottery schemes conducted and managed by the provinces. The effect of s. 3(1) of the VLT Act is simply to remove the exception and give full effect to the existing federal offences.

25 However, even if the VLT Act did create a provincial offence or impose a fine, that would not necessarily make it an attempt to legislate criminal law. Section 92(15) of the *Constitution Act, 1867* allows the provincial legislatures to impose fines or other punishments as a means of enforcing valid provincial law, and the provinces have enacted countless punishable offences within their legislative spheres. Motor vehicle offences are the classic example, and they have been declared constitutionally valid in, *inter alia*, *O'Grady v. Sparling*, [1960] S.C.R. 804 (S.C.C.) (careless driving), and *Ross v. Ontario (Registrar of Motor Vehicles)* (1973), [1975] 1 S.C.R. 5 (S.C.C.) (provincial licence suspension upon conviction for *Criminal Code* impaired driving offence). The mere presence of a prohibition and a penalty does not invalidate an otherwise acceptable use of provincial legislative power.

26 The appellants submitted that the VLT Act contains penal consequences because it terminates all siteholder agreements in municipalities that have voted to prohibit VLTs in accordance with the Act. Relying on this Court's decision in *Johnson v. Alberta (Attorney General)*, [1954] S.C.R. 127 (S.C.C.), they argued that the provisions of the VLT Act result in the forfeiture of VLTs, which can be characterized as a penalty. However, the termination of siteholder agreements cannot be characterized as a forfeiture within the meaning of the criminal law. At all times during a siteholder agreement, the MLC maintains ownership of the VLTs. The siteholder (in this case, the appellants) has no property interest in the machines. Therefore, when the agreement is terminated and the VLTs are removed from the siteholder's establishment, the siteholder is not required to forfeit any property. The siteholder has merely lost the opportunity to earn a percentage of the revenue that the VLTs generate.

27 That is sufficient to distinguish the present appeal from *Johnson, supra*, which properly identified the alleged penalty as a forfeiture. In that case, the impugned legislation specifically denied property rights in slot machines. Where the machines were being operated contrary to the legislation, the Act allowed police to confiscate those machines even if, except for the legislation, they would have been considered the property of the offender. In short, a violation of the legislation struck down in *Johnson* resulted in a loss of property. In the present case, however, the VLT Act merely allows the MLC to reclaim its own VLTs. This cannot be considered a forfeiture.

28 The conclusion that the VLT Act does not impose penal consequences makes it unnecessary to determine whether it was enacted for a criminal law purpose. Nevertheless, certain submissions made during the course of proceedings warrant a brief response. The appellants argued that the VLT Act was enacted for purposes of public morality, and that it was, therefore, an attempt to legislate criminal law. This submission is flawed on several bases. First, the trial judge found no evidence indicating that this law was enacted to regulate public morality. The province has authority to regulate gaming, and this includes provisions regulating where gaming may be conducted. Just as the province can regulate when and where alcohol may be legally consumed, so can it regulate when and where individuals can legally operate VLTs. It does not follow that, in doing so, the province is somehow regulating public morality.

29 Second, the province and individual municipalities may have any number of reasons for restricting gaming to certain locations. Some may concern the local economy, and others may be purely aesthetic or cultural. There is no basis on which to assume that the dominant purpose for prohibiting VLTs in certain locations is to regulate public morality. Indeed, the fact that the VLT Act does not affect VLTs located at racetracks or other "premises dedicated to gaming activity" suggests that the government was not attempting to condemn VLTs on any moral basis. See *Gaming Control Act*, S.M. 1996, c. 74, s. 1. Rather, it supports the interpretation that the VLT Act was designed merely to limit more "incidental" contact with VLTs - in taverns, for example - in municipalities that wish to do so.

30 Third, the presence of moral considerations does not *per se* render a law *ultra vires* the provincial legislature. In giving Parliament exclusive jurisdiction over criminal law, the *Constitution Act, 1867* did not intend to remove all morality from provincial legislation. In many instances, it will be impossible for the provincial legislature to disentangle moral considerations from other issues. For example, in the present case, it is difficult to ignore the various social costs associated with gambling and VLTs. As the Desjardins Report, *supra*, examined in detail, government-run gambling can have adverse social consequences, including addiction, crime, bankruptcy, and reductions in charitable gaming. The provincial government can legitimately consider these social costs when deciding how to regulate gaming in the province. The fact that some of these considerations have a moral aspect does not invalidate an otherwise legitimate provincial law.

31 The dominant purpose of the VLT Act is to regulate gaming in the province. Any moral aspects of the VLT Act fall within the doctrine of "incidental effects," recently affirmed by this Court in *Kitkatla Band, supra*, at para. 54, and *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21 (S.C.C.), at para. 23. Where a law is in pith and substance related to the provincial legislative sphere, it will not be struck down merely because it has incidental effects on a federal head of power. For instance, in *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59 (S.C.C.), it was held that a provincial law restricting nude entertainment at licensed taverns was valid. It is reasonable to assume that such a law would have had some incidental effects on public morality. Yet the Court found that the law was validly enacted because in pith and substance it dealt with licensing, local matters, and property and civil rights.

32 In the present appeal, the provincial government passed a law that was within a provincial head of legislative authority. Although there is a possibility that local morality may affect which municipalities choose to ban VLTs through binding plebiscites, the dominant purpose of the VLT Act is not to express moral disapproval of VLTs. In as much as there is a moral aspect to the VLT Act, this effect is incidental to the overall regulatory scheme and does not infringe on Parliament's exclusive authority to legislate criminal law.

33 In making this determination, I am mindful of the presumption of constitutionality recognized in *Reference re Farm Products Marketing Act (Ontario)*, [1957] S.C.R. 198 (S.C.C.), at p. 255, *McNeil v. Nova Scotia (Board of Censors)*, [1978] 2 S.C.R. 662 (S.C.C.), at pp. 687-688, *Re Firearms Act, supra*, at para. 25. When faced with two plausible characterizations of a law, we should normally choose that which supports the law's constitutional validity.

34 The Attorney General of Canada's intervention in support of the provincial government creates a situation of attempted federal-provincial cooperation. The governments, in the absence of jurisdiction, cannot by simple agreement lend legitimacy to a claim that the VLT Act is *intra vires*. However, given that both federal and provincial governments guard their legislative powers carefully, when they do agree to shared jurisdiction, that fact should be given careful consideration by the courts: *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 (S.C.C.), at pp. 19-20, *Kitkatla Band, supra*, at paras. 72-73.

35 This principle is further bolstered in the present case by the explicit interaction of the *Criminal Code* and provincial gaming legislation. Section 207(1)(a) of the *Criminal Code* specifically creates an exception to the gaming and betting offences where a lottery scheme has been established by a province. It was first enacted in 1969 for the purpose of decriminalizing lotteries and allowing each province to determine whether it wished to establish a lottery scheme. Where no such scheme exists, the *Criminal Code* offences still apply. Parliament has intentionally designed a structure for gaming offences that affirms the double aspect of gaming and promotes federal-provincial cooperation in this area. Section 207(1)(a) removes the possibility of operational conflict and, with it, any question of paramountcy.

36 I conclude that the VLT Act in its entirety, and s. 16 in particular, are *intra vires* the provincial legislature. The Act's purposes are to regulate gaming in the province and to allow for local input on the issue of VLTs, both of which fall under the powers enumerated in s. 92 of the *Constitution Act, 1867*. It is not an attempt to legislate criminal law, as it has neither penal consequences nor a criminal law purpose. Finally, the issues of interjurisdictional immunity and paramountcy do not arise in this case, and they need not be discussed beyond what has already been stated.

### C. The Claim of Improper Delegation

37 Before turning to the various *Charter* claims, a brief comment is warranted on the argument raised by the intervening group of Alberta merchants. They challenged the entire VLT Act on the ground that it constitutes an improper abdication of the legislature's law-making powers and usurps the authority of the Lieutenant Governor. These interveners submit that, by allowing municipalities to hold binding plebiscites, the provincial government has given them the power to make and repeal law. This, they argue, violates the provincial legislature's exclusive authority to make laws for the province.

38 This submission fails, as the interveners' argument rests on an incorrect characterization of the impugned legislation. The VLT Act does not, in any way, empower municipal voters to enact legislation. The Act has been wholly drafted, debated and enacted by the provincial legislature, and has been given Royal Assent by the Lieutenant Governor. It sets out how the municipal plebiscites will take place and what their effects will be in the relevant municipalities. The only role played by municipal electors is in initiating and voting in a plebiscite. The results of the plebiscite determine whether the prohibition in s. 3 of the VLT Act will apply in the municipality. In other words, the application of the statutory VLT prohibition is conditional upon there being a certain plebiscite result. Consequently, the VLT Act falls within the category of "conditional legislation" which was upheld by the Privy Council in *Russell v. R.* (1882), (1881-82) L.R. 7 App. Cas. 829 (Canada P.C.), at p. 835:

. . . the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency.

39 Through the VLT Act, the Manitoba Government has employed a statutory instrument to bind itself to respect local opinion. Nowhere does the Act, in purpose or effect, give municipal voters the power to legislate. This case is distinguishable from the *Reference re Initiative and Referendum Act (Manitoba)* (1916), 27 Man. R. 1 (Man. C.A.), upon which the interveners based their argument. There, the impugned legislation allowed voters to submit laws for approval by ballot and, if approved, the proposed law would be deemed an Act of the provincial legislature. Here, there has been no attempt to bypass the Legislative Assembly or to usurp its law-making function. The Act merely allows municipalities to decide on the applicability of the Act to their communities.

40 Finally, I would add that the interveners' argument would severely restrict Parliament and the provincial legislatures from enacting "local option" legislation, which was upheld over a century ago by the Privy Council in *Russell, supra*, with respect to the *Canada Temperance Act*. That decision was affirmed by the Privy Council in *Reference re Canada Temperance Act*, [1946] A.C. 193 (Ontario P.C.), and there is no need to question its continued validity as authority on this issue.

### D. The Claim under s. 2(b) of the Charter

41 According to the appellants, the effect of the "deemed vote" in s. 16 of the VLT Act was to deny them the right to vote in a plebiscite under the Act and, therefore, to violate their freedom of expression in s. 2(b) of the *Charter*. There is no question since this Court's decision in *Haig v. R.*, [1993] 2 S.C.R. 995 (S.C.C.), that casting a vote is a form of expression that is protected under s. 2(b). The question in this case is whether s. 16 of the VLT Act actually violates this freedom. I conclude that it does not.

42 While *Haig* held that voting is a protected form of expression, it also concluded that there is no constitutional right to vote in a referendum. See *L'Heureux-Dubé J.*, at pp. 1040-1041:

A referendum is a creation of legislation. Independent of the legislation giving genesis to a referendum, there is no right of participation. The right to vote in a referendum is a right accorded by statute, and the statute governs the terms and conditions of participation. . . . In my view, though a referendum is undoubtedly a platform for expression, s. 2(b) of the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to *anyone*, let alone to *everyone*. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law. [emphasis in original]

A municipal plebiscite, like a referendum, is a creation of legislation. In the present case, any right to vote in a plebiscite must be found within the language of the VLT Act. It alone defines the terms and qualifications for voting. Accordingly, the appellants cannot complain that the VLT Act, itself, denied them the right to vote in a VLT plebiscite.

43 A *caveat* was added in *Haig* that, once the government decides to extend referendum voting rights, it must do so in a fashion that is consistent with other sections of the *Charter*. However, as the appellants submitted that they had been denied referendum voting rights on a discriminatory basis, their claim should be assessed under s. 15(1), of which more will be said below.

44 Finally, it is worth noting that the VLT Act does not prevent the residents of Winkler from voting in future plebiscites on the issue of VLTs. They have not been disenfranchised from VLT plebiscites. Like all other residents of Manitoba, they are free to initiate a plebiscite under the Act to either reinstate or remove VLTs from their municipality.

#### ***E. The Claim under s. 7 of the Charter***

45 The appellants also submitted that s. 16 of the VLT Act violates their right under s. 7 of the *Charter* to pursue a lawful occupation. Additionally, they submitted that it restricts their freedom of movement by preventing them from pursuing their chosen profession in a certain location, namely, the Town of Winkler. However, as a brief review of this Court's *Charter* jurisprudence makes clear, the rights asserted by the appellants do not fall within the meaning of s. 7. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests. As La Forest J. explained in *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 (S.C.C.), at para. 66:

. . . the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

More recently, *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 (S.C.C.), concluded that the stigma suffered by Mr. Blencoe while awaiting trial of a human rights complaint against him, which hindered him from pursuing his chosen profession as a politician, did not implicate the rights under s. 7. See Bastarache J., at para. 86:

The prejudice to the respondent in this case . . . is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security of the person would be to stretch the meaning of this right.

46 In the present case, the appellants' alleged right to operate VLTs at their place of business cannot be characterized as a fundamental life choice. It is purely an economic interest. The ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the *Charter*.

#### ***F. The Claim under s. 15(1) of the Charter***

47 The appellants argued that their rights under s. 15(1) of the *Charter* were violated by s. 16 of the VLT Act. This claim should be analyzed in accordance with the three-pronged test summarized by Iacobucci J. in *Law, supra*, at para. 88:

(A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;

(B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and

(C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

The appellants submitted that part (A) of the test was met because s. 16 of the VLT Act distinguished between residents of Winkler and all other residents of Manitoba. They further argued that this distinction was based on the analogous ground of residence, and was discriminatory because it denied them the opportunity to vote in a binding plebiscite on the issue of VLTs.

48 There is no merit in this ground of appeal. First, although s. 16 of the VLT Act clearly makes a distinction between Winkler and other municipalities, it is implausible that residence in Winkler constitutes an analogous ground of discrimination. Residence was rejected as an analogous ground in both *Haig, supra*, and *R. v. Turpin*, [1989] 1 S.C.R. 1296 (S.C.C.). Further, the majority in *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 (S.C.C.), clearly stated that the analogous ground recognized in that case was "Aboriginality-residence," and that "no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground" (para. 15). In rejecting the claimant's s. 15 argument in *Haig*, the majority explained, at p. 1044, why residence is an unlikely analogous ground:

It would require a serious stretch of the imagination to find that *persons moving to Quebec less than six months before a referendum date* are analogous to persons suffering discrimination on the basis of race, religion or gender. People moving to Quebec less than six months before a referendum date do not suffer from stereotyping, or social prejudice. Though its members were unable to cast a ballot in the Quebec referendum, the group is not one which has suffered historical disadvantage, or political prejudice. Nor does the group appear to be "discrete and insular". Membership in the group is highly fluid, with people constantly flowing in or out once they meet Quebec's residency requirements. [emphasis in original]

Although the Court in *Haig* left it open for residence to be established as an analogous ground in the appropriate case, I share the trial judge's view here that this is not such a case. Nothing suggests that Winkler residents are historically disadvantaged or that they suffer from any sort of prejudice.

49 However, putting the appellants' case at its best and assuming that they could establish a distinction based on an analogous ground, the legislation does not discriminate against them in any substantive sense. It is not necessary to proceed through all the contextual factors listed by Iacobucci J. in *Law, supra*, because it is clear that the VLT Act directly corresponds to the circumstances of Winkler residents. The Town of Winkler was singled out in s. 16 of the VLT Act because it was the *only municipality* to have held a plebiscite on the issue of VLTs. The very purpose of that section was to respect the will of Winkler residents, as expressed in their 1998 plebiscite. Viewed in the context of that plebiscite, I am not convinced that any reasonable resident of Winkler would feel that he or she has been marginalized, devalued or ignored as a member of Canadian society (see *Law, supra*, at para. 53). There is no harm to dignity and no violation of s. 15(1).

50 It was noted above in the s. 2(b) claim that s. 15(1) might be implicated where the opportunity to vote in a plebiscite is extended to some and withheld from others based on a prohibited ground of discrimination. This would be the case if a law prohibited members of a certain race or religion from voting in a plebiscite. However, that is not the case in this appeal. First, as previously noted, the distinction in s. 16 of the VLT Act is not based on an analogous ground. Second,

the distinction does not affect the qualification and ability of Winkler residents to vote in a VLT plebiscite under the Act. They are free to initiate a plebiscite should they wish to reinstate VLTs in their community. Consequently, although s. 16 makes a distinction for Winkler residents, that distinction has nothing to do with the alleged right to vote.

## VII. Conclusion and Disposition

51 These reasons support the October 31, 2002, dismissal of this appeal. The respondents are entitled to costs, and the stated constitutional questions are answered as follows:

(1) Is *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44, in its entirety *ultra vires* the Legislature of the Province of Manitoba as it relates to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

*Answer:* No.

(2) Is s. 16(1) of *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44, *ultra vires* the Legislature of the Province of Manitoba as it relates to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

*Answer:* No.

(3) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

*Answer:* No.

(4) If the answer to question 3 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

*Answer:* It is unnecessary to answer this question.

(5) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?

*Answer:* No.

(6) If the answer to question 5 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

*Answer:* It is unnecessary to answer this question.

(7) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

*Answer:* No.

(8) If the answer to question 7 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

*Answer:* It is unnecessary to answer this question.

*Appeal dismissed.*

*Pourvoi rejeté.*

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**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** Morrison Estate v. Nova Scotia (Attorney General) | 2011 NSSC 479, 2011 CarswellNS 945, 985 A.P.R. 219, 311 N.S.R. (2d) 219, 211 A.C.W.S. (3d) 509, [2011] N.S.J. No. 697 | (N.S. S.C., Dec 22, 2011)

1997 CarswellQue 883  
Supreme Court of Canada

Godbout c. Longueuil (Ville)

1997 CarswellQue 883, 1997 CarswellQue 884, [1997] 3 S.C.R. 844, [1997] S.C.J. No. 95, 152 D.L.R. (4th) 577, 219 N.R. 1, 43 M.P.L.R. (2d) 1, 47 C.R.R. (2d) 1, 74 A.C.W.S. (3d) 767, 97 C.L.L.C. 210-031, J.E. 97-2082

**City of Longueuil, Appellant/Respondent on cross-appeal  
v. Michèle Godbout, Respondent/Appellant on cross-  
appeal and The Attorney General of Quebec, Mis en cause**

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

Heard: 28 mai 1997  
Judgment: 31 octobre 1997  
Docket: 24990

Proceedings: affirming (1995), 31 M.P.L.R. (2d) 130 (C.A. Que.) **Proceedings: additional reasons at (November 15, 1995), no. C.A. Montreal 500-09-000549-899 (C.A. Qué.); reversing 48 M.P.L.R. 307 (C.S. Qué.)**

Counsel: *Jean-Jacques Rainville* and *Réjean Rioux*, for the appellant/respondent on cross-appeal.  
*France Saint-Laurent* and *Richard Bertrand*, for the respondent/appellant on cross-appeal.  
*Isabelle Harnois*, for the mis en cause.

Subject: Public; Civil Practice and Procedure; Employment; Constitutional; Human Rights; Municipal

APPEAL from judgment reported at 31 M.P.L.R. (2d) 130, [1995] R.J.Q. 2561 (C.A.), additional reasons at (15 novembre 1995), no C.A. Montréal 500-09-000549-899 (C.A. Qué.), allowing employee's appeal from judgment reported at 48 M.P.L.R. 307, [1989] R.J.Q. 1511, 12 C.H.R.R. D/141 (C.S.), dismissing employee's action for reinstatement and damages.

POURVOI à l'encontre d'un jugement publié à 31 M.P.L.R. (2d) 130, [1995] R.J.Q. 2561 (C.A.), motifs supplémentaires à (15 novembre 1995), no C.A. Montréal 500-09-000549-899 (C.A. Qué.), accueillant le pourvoi d'une employée à l'encontre d'un jugement publié à 48 M.P.L.R. 307, [1989] R.J.Q. 1511, 12 C.H.R.R. D/141 (C.S.), rejetant l'action en réintégration de l'employée assortie de conclusions en dommages-intérêts.

**Major J. (Lamer C.J.C. and Sopinka J. concurring):**

1 I have read the reasons of my colleagues Justice La Forest and Justice Cory and I agree with Cory J. that the appeal should be dismissed on the basis that the residence requirement imposed by the appellant infringes the respondent's right to privacy under s. 5 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, and is not justified under s. 9.1. This is sufficient to dispose of the appeal. With respect to those of my colleagues who hold the contrary view, I agree with Cory J. that it is unnecessary and perhaps imprudent to consider whether the residence requirement infringes s. 7 of the *Canadian Charter of Rights and Freedoms* in the absence of submissions from interested parties and I too express no opinion on this issue.

2 Like Cory J., I agree with La Forest J. that s. 5 of the Quebec *Charter* protects the respondent's decision where to live as an aspect of her right to privacy, and that the residence requirement in this appeal is not justified under s. 9.1. I do not agree that the scope for justification of conditions of employment by municipalities should be as limited as that outlined by my colleagues.

3 This Court held in *Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712 (S.C.C.), at p. 770, that s. 9.1 of the Quebec *Charter* is a justificatory provision corresponding to s. 1 of the Canadian *Charter* and that it is to be interpreted and applied in the same manner. Therefore, a municipality that seeks to uphold a residence requirement that infringes s. 5 under s. 9.1 must demonstrate that the requirement is imposed to advance a legitimate and substantial objective, and that the requirement is proportional to this objective, in that it is both rationally connected to the objective and constitutes a minimal impairment of the right protected by s. 5.

4 These criteria must be applied flexibly and in a manner that is sensitive to the particular context and factual circumstances of each case. An objective which is sufficiently compelling in one case may not meet the standard in a different context. A particular residence requirement may be proportional to a stated objective in one context but not in another. In particular, whether an objective is sufficiently compelling and whether a residence requirement is proportional to this objective will depend on a number of factors, including the nature of the objective, the duties of the affected employee, the scope and duration of the residence requirement, and the size, population and characteristics of the municipality.

5 Broadly speaking, there appear to be three objectives which municipalities seek to advance by requiring municipal employees to reside within their boundaries. It may be useful to provide a brief outline of the circumstances in which an objective may be sufficiently compelling and a residence requirement may be sufficiently proportional to this objective to meet the standard imposed by s. 9.1.

6 The first objective invoked is improving the job performance of municipal employees and therefore the quality of the services they provide to residents. It is stated that the performance of municipal employees will be enhanced by requiring them to reside within the municipality for several reasons. One, as residents they will be better acquainted with the community's problems and needs. Also, as residents they will have a greater personal stake in the welfare of the community, and thereby a greater incentive to perform. Similarly, requiring municipal employees to reside within the community will instil in them a greater sense of pride, commitment and loyalty. Finally, requiring municipal employees to be residents promotes their identity within the community, which in turn bolsters the confidence of residents in their local government.

7 La Forest J. concludes that the objective of improving the quality of services by fostering greater loyalty will never be sufficiently compelling to justify a residence requirement under s. 9.1. With respect, I disagree.

8 In my opinion there can be cases in which this objective will be sufficient. It will depend on the circumstances. In this regard, several factors are relevant. An important consideration is the nature of the affected employee's duties. Fostering a sense of loyalty is more important for high level officials charged with making policy decisions, such as the mayor or municipal councillors, than for support staff or routine labour. It seems reasonable to require those who make policy decisions affecting a community to reside within that community. Other factors to consider include the size, population and characteristics of the community. This objective is more compelling in a small town or a rural area where municipal employees are more easily identifiable by other residents than in the anonymity of a large city.

9 La Forest J. concludes that, even if the objective of improving the quality of services were sufficiently compelling, it is unclear whether requiring employees to reside within the municipality would achieve this goal. In short, he doubts whether there is a rational connection between improving the quality of services and a residence requirement. He also concludes that a residence requirement will never be the least intrusive means of achieving this objective. With respect, I do not think that necessarily follows and doubt that such a proposition can be conclusively stated. The facts surrounding

the residency requirement will determine the result. The vagaries of life and particularly those of municipalities preclude such a generalization.

10 The objective of improving services and fostering loyalty by residential requirements suffers in this case from a lack of compelling evidence. The respondent was employed as a radio operator for the Longueuil police force. Given her duties, it is unlikely that requiring her to live within the City of Longueuil would improve the quality of her work or instill a greater pride among its residents. Furthermore, the City of Longueuil is an urban municipality with a sizeable population within the metropolitan region of Montreal. The boundaries of urban municipalities such as the City of Longueuil are not clearly identifiable, as one municipality overlaps the other. It is highly unlikely that a municipal employee in the respondent's position would be identifiable to members of the local community.

11 The second objective often invoked to justify a requirement that municipal employees live within the municipality is that of supporting the local economy. Municipal employees who reside within the municipality will contribute to the local economy as consumers and to the local municipal tax base either directly as taxpayers, or indirectly as tenants. In some measure, the taxpayers of the municipality will witness some of their taxes being returned to the benefit of the community. La Forest J. concludes that this will never be a sufficiently compelling objective to justify an infringement of s. 5 under s. 9.1. I disagree. The sensitivity of the community to this conclusion will also be a question of fact. There may be cases where this objective, on the facts, will be sufficiently important to justify an infringement of s. 5. Economic concerns and employee recognition may be of greater importance in a small town or rural community than in a large city. This objective was not supported by any evidence to give it a compelling quality in this case.

12 The third and final objective which is invoked to justify the imposition of a residence requirement is that of ensuring that certain employees who provide essential services are readily available. Again, whether this objective is sufficiently compelling will depend on the particular circumstances of the case. An important factor to consider is the nature of the duties of the affected employee. This objective will be sufficiently compelling for emergency personnel, such as police officers, firefighters and ambulance personnel, given the obvious importance of ensuring that they are able to respond promptly in times of urgent need. It also seems clear that requiring these employees to live within the municipality is rationally connected to the objective of ensuring they are readily available. It is impossible to speculate with accuracy, as even this requirement may not be the least intrusive means of achieving this objective as it may be obtained by simply requiring employees to live within a certain distance. This illustrates the need to support the objective with persuasive evidence.

13 I agree with La Forest J. that the evidence was insufficient to justify the residence requirement that was imposed on the respondent in this case on the basis of this third objective. As he points out, the residence requirement was imposed on all of the appellant's permanent employees. In view of the respondent's employment as a radio operator for the police force, and the absence of a justification for the residency requirement, the requirement in these circumstances is unreasonable.

14 In the particular circumstances of this case, none of the objectives referred to are sufficiently compelling to justify the infringement of the respondent's right to privacy under s. 5 of the Quebec *Charter*, and I would dismiss the appeal.

**La Forest J. (L'Heureux-Dubé and McLachlin JJ. concurring):**

15 In modern times, the ability of individuals to make decisions free from unwelcome external interference is increasingly under pressure. Whether that pressure finds its roots in changing patterns of social organisation, in technological advancements, in governmental action, or in some other source, its net effect has largely been to whittle down the scope of personal freedom. While the exigencies of community life clearly preclude the possibility that individuals could ever be guaranteed an untrammelled right to do as they please, the basic ability to make fundamentally private choices unfettered by undesired restrictions demands protection under law, such that it can only be overridden where other pressing concerns so dictate. The central issue raised in this appeal is whether the choice of where to establish one's home falls within that narrow sphere of personal decision-making deserving of the law's protection and whether,

even if it does, other important considerations might nevertheless take precedence over it. More specifically, the appeal raises the question whether, on pain of termination, the appellant municipality can legitimately require all its permanent employees — including the respondent — to live within the territorial limits of the city and to maintain their homes there for the duration of their employment. The main appeal also raises a threshold issue concerning the applicability of the *Canadian Charter of Rights and Freedoms* to municipalities. The cross-appeal concerns whether, for procedural reasons, the respondent is precluded from recovering a portion of the damages she suffered after being dismissed by the appellant for failing to abide by the terms of the residence requirement.

## I. Facts

16 The respondent, Michèle Godbout, was hired by the appellant municipality, the City of Longueuil, as a short-term employee on June 7, 1985. She initially held a position as an archivist, but later assumed a post as a radio operator for the Longueuil police force. As a condition of obtaining permanent employment, Ms. Godbout was required on February 17, 1986 to sign a declaration promising that she would establish her principal residence in Longueuil and that she would continue to live there for as long as she remained in the appellant's employ. The declaration also provided that if she moved out of Longueuil for any reason, she could be dismissed without notice. The document signed by Ms. Godbout read as follows:

[TRANSLATION]

### **Declaration of Place of Ordinary Residence**

I hereby undertake to establish my ordinary residence on the territory and within the limits of the City of Longueuil within a maximum of sixteen (16) months from the date on which I am hired.

I further undertake to maintain my ordinary residence on the territory and within the limits of the City of Longueuil for as long as I am employed by the City of Longueuil.

I understand and agree that failure to fulfill the above conditions will justify my dismissal, without further notice.

The residence requirement imposed by the declaration was based on Resolution CE 84-1491, which was passed by the Executive Committee of the appellant municipality on October 23, 1984. The relevant portions of that resolution provided as follows:

[TRANSLATION]

WHEREAS the Executive Committee has read the personnel adviser's report dated October 15, 1984;

IN VIEW OF the recommendations made by the director of personnel and the director general on October 15 and 18, 1984;

IT IS UNANIMOUSLY RESOLVED:

TO APPROVE the "Declaration of place of ordinary residence" form, which the Personnel Branch must have signed by every new employee hired to fill a regular position with a view to becoming permanent.

Resolution CE 84-1491 was later adopted by the Municipal Council through Resolution CM 84-1286, dated November 7, 1984.

17 On May 21, 1986, the respondent's position became permanent. Approximately one year later, and after she had informed her superiors of her intention to do so, the respondent purchased a house in the neighbouring municipality of Chambly and moved there with her boyfriend. On January 19, 1988, the head of the appellant's personnel department approached the respondent with the aim of persuading her to move back to Longueuil. The respondent refused, and

her employment was terminated by the appellant on February 17, 1988. The appellant admits that the only reason it dismissed the respondent was the fact that she moved out of Longueuil.

18 The respondent brought an action in the Superior Court of Quebec seeking damages and reinstatement in her position. The action was dismissed with costs on March 31, 1989: [1989] R.J.Q. 1151, 48 M.P.L.R. 307, 12 C.H.R.R. D/141. An appeal to the Court of Appeal was allowed on September 14, 1995 and damages in the amount of \$10,763.47 were awarded: [1995] R.J.Q. 2561, 31 M.P.L.R. (2d) 130, [1995] Q.J. No. 686 (Que. C.A.) (QL). The respondent then brought a motion for rectification in respect of the Court of Appeal's formal judgment order, alleging that the court did not make a conclusive finding with respect to certain aspects of the damages claim. The Court of Appeal granted the respondent's motion and amended its reasons on November 15, 1995: [1995] Q.J. No. 874 (QL). It did not, however, accede to the respondent's request to recover the damages that had not been awarded in the September 14 decision. On October 3, 1996, this Court granted the appellant's motion for leave to appeal on the substantive issues as well as the respondent's motion for leave to cross-appeal on the damages issue: [1996] 3 S.C.R. xiv.

## II. Judicial History

### A. Superior Court of Quebec, [1989] R.J.Q. 1511 (C.S. Que.)

19 The respondent raised two main issues before Turmel J.: (a) whether the resolutions implementing the residence requirement were properly adopted by the Municipal Council; and (b) whether, even if they were, the residence requirement was nevertheless void as violating either the Canadian *Charter* or the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, or both. While the appellant initially raised a number of subsidiary arguments, it later abandoned them, and the case proceeded on the basis that the only issues to be resolved were those raised by the respondent.

20 In respect of the first main issue, the respondent made two submissions. First, she alleged that under the *Charter of the City of Longueuil*, the Longueuil Municipal Council did not have the power to adopt a resolution restricting the place of residence of its employees. While Turmel J. accepted that the powers of municipalities are determined by the enabling statutes which govern them, he also found as follows, at pp. 1515-16:

[TRANSLATION]

Every municipal corporation ... has regulatory, administrative and ministerial powers.

In the absence of specific provisions, the hiring of employees is included in the exercise of administrative authority and as such, like any administrative act, is subject to individual discretion. The conditions and requirements for applying for employment fall within that discretion.

On this basis, Turmel J. reasoned that the power to impose a residence requirement falls within the competence of the Longueuil Municipal Council and, consequently, he found that the respondent's contrary submission could not succeed.

21 Secondly, the respondent alleged that Resolution CM 84-1286 had not been adopted in conformity with the proper procedure. That resolution reads, in relevant part, as follows:

[TRANSLATION]

WHEREAS the Council has read the minutes of the Executive Committee's 107th meeting. ...;

IT IS ... UNANIMOUSLY RESOLVED:

To take note of the minutes of the Executive Committee's 107th meeting on October 23, 1984, which contain its decisions. [Emphasis added.]

The procedure for adopting Municipal Council resolutions is set out in s. 52.2 of the *Charter of the City of Longueuil* (as amended by S.Q. 1982, c. 81, s. 3), which provides:

**52.2** Every demand, by-law or report submitted by the executive committee must, unless otherwise prescribed, be approved, rejected, amended or returned by the vote of the majority of the members of the council present at the sitting.

The respondent contended that by the terms of this provision, the Municipal Council was entitled only to "approve", "reject", "amend" or "return" a resolution from the Executive Committee and that the words [translation] "take note" in Resolution CM 84-1286 amounted to none of these dispositions. While he acknowledged that the phrase chosen by the Municipal Council was not as clear as it might have been, Turmel J. explained that according to s. 52.2, the Municipal Council "must" dispose of an Executive Committee resolution in one of the four prescribed manners. Finding that the words "take note" did not amount to a "rejection", "amendment" or "return", Turmel J. reasoned that they could constitute nothing other than an "approval" and he therefore rejected the respondent's claim.

22 Turning to the second of the respondent's main arguments, Turmel J. began by examining whether the residence requirement imposed by the appellant contravened ss. 1, 3, 5 or 6 of the Quebec *Charter*, which read as follows:

1. Every human being has a right to life, and to personal security, inviolability and freedom.

He also possesses juridical personality.

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

5. Every person has a right to respect for his private life.

6. Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

Without a lengthy analysis, Turmel J. found that none of these provisions was violated on the facts. While he noted that the respondent could have advanced an argument based on s. 10 of the Quebec *Charter* (dealing with equality and discrimination on the basis of, *inter alia*, "civil status"), he found that such an argument would not, in any event, have succeeded in this case.

23 Finally, Turmel J. examined the submissions made in respect of the Canadian *Charter*, and explained that before the respondent could allege that any of her *Charter* rights was violated, she would first have to establish that the *Charter* actually applied. While the judge recognized that municipalities may be analogized to Parliament or provincial legislatures inasmuch as they can act in a "governmental" capacity, he found that the analogy held up only insofar as the municipality exercised its "public", law-making function. Since, in his view, the appellant was acting in a "private" capacity (i.e., *qua* employer) in imposing the residence requirement, however, he held that the Canadian *Charter* did not apply here.

24 Notwithstanding this conclusion, Turmel J. proceeded in obiter to discuss the specific arguments raised under ss. 7 and 15 of the Canadian *Charter*. With respect to s. 7, he held that a "right to work" — which, in his view, was the right implicated in this case — did not fall within the scope of the rights to "life", "liberty" or "security of the person" and consequently, he found that s. 7 could not properly be relied upon by the respondent. As regards s. 15, Turmel J. followed the reasoning of Hoyt J.A. (as he then was) in *McDermott v. Nackawic (Town)* (1988), 53 D.L.R. (4th) 150 (N.B. C.A.), in holding both that the respondent did not belong to any identifiable group as required by that provision and that, even if she did, no discrimination existed on the facts. On this basis, he found that s. 15 did not apply here either. Having found no ground upon which to uphold the respondent's claims, Turmel J. dismissed the action with costs.

**B. Quebec Court of Appeal — September 14, 1995, [1995] R.J.Q. 2561 (C.A. Que.)**

(1) *Baudouin J.A.*

25 On the appeal to the Court of Appeal, Baudouin J.A., who wrote the central judgment, began by explaining that while the two main issues on appeal were the same as those raised by the parties in the court of first instance, a further issue also required consideration; namely, whether the residence requirement imposed by the appellant was contrary to [TRANSLATION]" judicial public order". He expressed himself on this point, at p. 2566, as follows:

[TRANSLATION]

The rather unusual length of time this Court's judgment was reserved was due first of all to the fact that a major point of law, namely the application of the standard of judicial public order to this case, was not elaborated on or discussed in depth by the parties in either their factums or their argument. This Court therefore had to raise it *proprio motu*.

Baudouin J.A. also noted that the matter of quantification of damages had not been fully canvassed by the parties and that the Court of Appeal was also obliged to consider this issue at length in disposing of the appeal. Before addressing these further issues, however, Baudouin J.A. examined the issues initially raised before Turmel J.

26 As regards the validity of the municipal resolutions, Baudouin J.A. agreed with Turmel J. that because the term [TRANSLATION]"take note" does not amount to a rejection, an amendment or a remand order, the Municipal Council must be taken to have approved the Executive Committee's resolution. Indeed, he held, at p. 2566, that

[TRANSLATION]

[i]t is clear in the case at bar that the Municipal Council's decision of November 7, 1984 can be interpreted only as an approval. The Council's approval does not have to be given in any set way, but can, on the contrary, be inferred from the context.

On this basis, Baudouin J.A. rejected the first of the respondent's main arguments.

27 Baudouin J.A. next examined whether the residence requirement violated the *Canadian Charter*. He explained, as had Turmel J., that the first question to be answered in this regard was whether the *Charter* even applied on the facts. Much like Turmel J., Baudouin J.A. found that because the municipality in this case was acting in a "private" capacity in imposing the residence requirement (i.e., as the respondent's employer), it would probably not be subject to *Charter* scrutiny. He found it unnecessary to make a specific finding on this point, however, since in his view, the respondent's submissions in respect of the *Canadian Charter* could not succeed anyway. At pp. 2567-68, he stated:

[TRANSLATION]

The [respondent] is relying on ss. 15 and 7 to support her arguments. What she is actually asserting is a right to work, which is not a right formally recognized by any provision of the *Canadian Charter*. The right to work is essentially economic in nature and, as such, does not come under the protection granted by s. 15 of the *Charter*. In addition, the courts have consistently held that this right cannot be based on s. 7 either, since obtaining or keeping a job does not involve the protection of life, liberty or security of the person.

Based on these considerations, Baudouin J.A. rejected the respondent's *Charter* arguments.

28 With respect to the *Quebec Charter*, Baudouin J.A. began by recognizing that no threshold issue of applicability arose because that document governs relations between private parties as well as those between the government and individuals. He then addressed each of the respondent's submissions in turn. He found first that the right to "freedom"

enshrined in s. 1 does not include within its ambit a "right to work". Since he understood this kind of right to form the basis of the respondent's claim, he found that s. 1 did not apply. Similarly, he found that s. 3 was inapplicable because he could see no way in which the freedoms guaranteed by that provision were implicated on the facts.

29 Even though he ultimately found that s. 5 of the Quebec *Charter* did not apply either, he undertook a more thorough analysis on this point, noting that the precise content of what falls within one's "private life" has yet to be fully determined. Recognizing that s. 5 may include within its ambit a right to a protected sphere of personal activity, he nevertheless found, at p. 2569, that s. 5 could not avail the respondent in this case:

[TRANSLATION]

In the case at bar, I therefore have difficulty seeing how the choice of a particular place of residence could fall within the content of one's private life in the context under consideration or how the mere fact of making one's place of residence known to third parties could amount to such interference. It seems to me that the concept of "private life" is intended much more ... to protect what is part of one's personal life, in short, what constitutes a minimum personal sphere that is safe from intrusion.

Baudouin J.A. further held that s. 6 did not apply, because the imposition of the residence requirement did not in any way interfere with the respondent's ability to enjoy or dispose freely of her property.

30 Having dealt with the issues raised by the parties, Baudouin J.A. turned next to the question of "public order" to which he alluded at the beginning of his reasons. He began his analysis by setting out two basic premises. The first was that a clause imposing a residence requirement is restrictive of basic liberties — and hence potentially contrary to public order — because it limits the ability of an employee to choose where he or she wishes to live. This premise, in Baudouin J.A.'s view, was simply a corollary of the proposition that, under normal circumstances (i.e., absent some pressing and overriding concern), citizens must be taken to have the right to live where they please. The second premise was that it must be permissible for an employee freely to waive his or her right to choose where to live through a contract of employment. Such "free" waiver did not inhere in the case at bar, Baudouin J.A. noted, because the declaration signed by the respondent amounted to a contract of adhesion, the terms of which were dictated entirely by the appellant.

31 Based on these two premises, Baudouin J.A. reasoned that a residence requirement will be contrary to public order unless a plausible justification for it can be advanced. In the case at bar, he found that all the interests suggested by the appellant were unpersuasive. Specifically, he rejected the argument that the respondent had to live in the municipality out of necessity or in case of emergency, on the basis that her position was not so essential as to justify such a requirement. Similarly, he could not agree with the submission that keeping employees within the municipality would improve city services by better acquainting those employees with the municipality itself since, to his mind, one employee could easily live within a municipality without taking any interest in it, while another could live outside the territorial limits but be in better touch with the community and its needs. Finally, he found that because a person living within a municipality cannot be assumed to spend his or her money in that municipality, the residence requirement could not be justified on the basis that it stimulated the local economy. Finding no justification advanced by the appellant to be satisfactory, Baudouin J.A. concluded that the residence requirement at issue was contrary to public order.

32 In disposing of the case, Baudouin J.A. allowed the appeal, declared Resolutions CE 84-1491 and CM 84-1286 null and void, and granted the respondent's request for reinstatement. He also granted her damages in the amount of \$10,763.47, representing the financial losses she suffered from the time of her dismissal until the time of trial. Baudouin J.A. noted, however, that since no evidence had been led in respect of the damages suffered during the period between the trial and the appeal, no calculation of quantum could be made in that regard. He noted further that while the applicable rules of civil procedure permitted plaintiffs to quantify their damages either at the time of an appeal or at any time before the appeal judgment is rendered, the respondent never availed herself of that possibility. He further found that no plausible justification existed either for allowing the respondent to make oral submissions on the damages issue during the appeal — a request for which had been denied during the hearing on the grounds that it would have been unfair to

the appellant — or for remanding the damages issue to the Superior Court. In the result, Baudouin J.A. made no order in respect of damages suffered by the respondent during the period between the trial and the appeal.

(2) *Gendreau J.A.*

33 Gendreau J.A. agreed with Baudouin J.A.'s disposition but held instead, citing his own majority judgment in *Villa c. John Labatt Ltée* (1994), [1995] R.J.Q. 73 (C.A. Que.), that the residence requirement infringed the right to respect for one's private life guaranteed by s. 5 of the Quebec *Charter*.

(3) *Fish J.A.*

34 Fish J.A. agreed substantially with the reasons of Baudouin J.A., subject only to the reservation that the arguments advanced under the Quebec *Charter* did not, in his opinion, need to be addressed at all.

### **C. Quebec Court of Appeal — November 15, 1995**

35 Following the release of the reasons of September 14, 1995, the respondent brought a motion for rectification of the formal judgment. Specifically, she claimed that the judgment itself made no specific order in respect of the damages she suffered between the time of the trial and the release of the appeal judgment — an amount to which, for convenience, I shall refer as the "interim damages" — and she sought an order granting those damages to her.

36 After considering the motion, the Court of Appeal found the respondent to be correct, *stricto sensu*, in contending that no formal order had been made in respect of the interim damages claim. It therefore granted the motion and ordered that its reasons of September 14 be amended to add the following conclusion:

[TRANSLATION]

DISMISSES, on the ground that it is unenforceable, the conclusion in the notice of appeal that reads as follows:

ORDER the defendant... to compensate the plaintiff... for all wages and other amounts lost from that date until the date on which she is reinstated, less any amounts she earned elsewhere. ...

As the wording of this addendum makes clear, the court refused to grant respondent the the interim damages she sought.

37 In its brief reasons, the Court of Appeal simply reiterated three findings made by Baudouin J.A. in the main appeal. First, it restated Baudouin J.A.'s observation that, while the respondent could easily have quantified her interim damages at any time before the release of the appeal judgment, she had failed to do so, and it explained that she should not, at such a late stage, be permitted to rectify the situation. Secondly, it repeated Baudouin J.A.'s finding that while the respondent had offered to make submissions in the appeal hearing itself (or through an affidavit) with respect to the quantification issue, such submissions could not properly have been permitted, since the appellant had received the documents relevant to those submissions only two days earlier and hence would have been unprepared to challenge the respondent's claims. Finally, the court reiterated its rejection of the respondent's request to have the damages matter remanded to the Superior Court, on the basis that the remand power is exercised in only very limited circumstances. In the Court of Appeal's view, all these findings were evident in the appeal reasons themselves, and their repetition served only to confirm its decision not to award the respondent the interim damages.

### **III. Issues**

38 The parties put forth a number of different arguments in this Court with respect to the validity of the appellant's residence requirement. To my mind, the main issues raised by those arguments — and the ones I propose to discuss in detail in these reasons — may be stated as follows:

(1)(a) Does the Canadian *Charter* apply in this case?

(1)(b) If so, does the residence requirement imposed by the appellant infringe the respondent's right to liberty under s. 7 the Canadian *Charter*?

(1)(c) If so, is the infringement in accordance with the principles of fundamental justice?

(2)(a) Does the residence requirement imposed by the appellant municipality violate the respondent's right to privacy under s. 5 of the Quebec *Charter*?

(2)(b) If so, can the violation be justified under s. 9.1 of the Quebec *Charter*?

39 The appellant also raised an issue in the main appeal with respect to whether the Court of Appeal erred in issuing its rectificatory judgment. For simplicity's sake, however, I have chosen to address this issue in the context of the cross-appeal. The issues I will examine in discussing the cross-appeal can thus be stated as follows:

(1) Did the Quebec Court of Appeal err in issuing its rectificatory judgment of November 15, 1995?

(2) Did the Quebec Court of Appeal err:

(a) in refusing to allow the respondent to adduce evidence during the appeal hearing with respect to the interim damages;

(b) in failing to request of the parties that they submit further argument in respect of the interim damages claim; or

(c) in failing to remand the matter of the interim damages to the Quebec Superior Court?

#### IV. Analysis

##### A. The Appeal

###### (1) Preliminary Matters

40 Before examining the issues I have set out above, I find it necessary to outline briefly two other issues raised by the parties, both of which were discussed at some length in the courts below. The first concerns whether or not the imposition of a residence requirement of the kind at issue here is within the competence of the appellant. The respondent contended that Resolutions CE 84-1491 and CM 84-1286 are *ultra vires* — and hence void — on the ground that no power to adopt a general residence requirement is conferred on the appellant either under the terms of its governing statute, the *Charter of the City of Longueuil* or under the *Cities and Towns Act*, L.R.Q., c. C-19. To buttress its submission, the respondent pointed out that a specific power to impose a residence requirement on officers of local police forces is conferred on municipalities by s. 65(d) of the *Police Act*, L.R.Q., c. P-13, and she argued that in light of this specific power, no analogous general power to impose a residence requirement on all municipal employees existed. In response, the appellant relied on s. 52.13 of the *Charter of the City of Longueuil* (as amended by S.Q. 1982, c. 81, s. 3), which reads as follows:

**52.13** The clerk, the treasurer and the heads of departments and their assistants, except the manager, shall be appointed by the council on report of the committee. Such report may be altered or rejected by the majority of all the members of the council. On report of the executive committee, the council may, by the majority vote of all its members, suspend such officers, reduce their salary or dismiss them.

The council shall also appoint, upon report of the committee, the other officers or permanent employees.

Temporary employees shall be appointed by the executive committee. [Emphasis added.]

Pointing to the fact that the municipal council has the power to hire permanent employees, the appellant argued that it must, by necessary implication, have the power to set the terms and conditions of permanent employment. In the appellant's submission, the residence requirement is simply a condition of the respondent's permanent employment and, consequently, its imposition falls within the municipality's sphere of competence.

41 The second preliminary issue concerns the notion of public order, first discussed by Baudouin J.A. in the Court of Appeal. The appellant argued that Baudouin J.A. erred in his treatment of public order inasmuch as he discussed the issue without any consideration of arts. 1379 and 1437 of the *Civil Code of Québec*, S.Q. 1991, c. 64, dealing respectively with adhesion contracts and abusive clauses. In the appellant's view, these provisions circumscribe the ambit of public order in the realm of contractual relations and, consequently, the notion of public order cannot be invoked apart from them. Moreover, the appellant argued that even if public order can properly be analysed apart from arts. 1379 and 1437 *C.C.Q.*, the matter at issue was one of "protective" (as opposed to "directive") public order and that, as a result, the respondent was free to renounce the protection afforded to her as she saw fit; see B. Lefebvre, "Quelques considérations sur la notion d'ordre public à la lumière du Code civil du Québec", in *Développements récents en droit civil (1994)* (1994), 149, at pp. 149-60. The respondent, by contrast, contended (a) that the notion of public order is not limited to the terms of arts. 1379 and 1437 *C.C.Q.*; and (b) that even if it were, the residence requirement at issue would nonetheless constitute an abusive clause within the meaning of art. 1437 *C.C.Q.* On this basis, the respondent argued, Baudouin J.A. was correct in finding that the residence requirement was contrary to public order and, therefore, void.

42 In their written submissions, the parties gave considerable attention to both these arguments. This is understandable given the reasons for judgment of the majority of the Court of Appeal. In light of my conclusions in respect of both the Canadian *Charter* and the Quebec *Charter*, however, I do not consider it necessary to address either the *ultra vires* issue or the public order issue on their merits, and I decline to express any opinion about them. Instead, I propose to turn directly to an examination of the issues earlier set out.

## **(2) Issue 1: Whether the Residence Requirement Violates Section 7 of the Canadian Charter**

### *(a) Applicability of the Canadian Charter*

43 In cases where a party seeks to invoke the protection of the Canadian *Charter*, it is, of course, important to ensure that the *Charter* actually applies on the facts. The scope of *Charter's* application is delineated by s. 32(1), which provides as follows:

#### **32. (1) This Charter applies**

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and the Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Referring to this provision and to the jurisprudence decided under it, the appellant restated in this Court the application argument it had made in the Superior Court and in the Court of Appeal. Essentially, it contended that while municipalities may be subject to *Charter* scrutiny in respect of the "public" or "governmental acts" they undertake — such as adopting by-laws — they will nevertheless not be subject to the *Charter* in respect of the "private acts" they perform — such as setting the terms and conditions of employment for their employees. Positing that the imposition of the residence requirement in this case amounted to setting a term of employment — and hence to a "private act" — the appellant contended that the Canadian *Charter* finds no application here at all. Despite the success this argument has enjoyed in the courts below, I am of the opinion that it is misguided. My reasons for taking this view can best be explained through a brief review of the pertinent jurisprudence of this Court dealing with the scope of application of the Canadian *Charter*.

44 Perhaps the fullest discussion of the issue of *Charter* application is found in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (S.C.C.), and in its companion cases, *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 (S.C.C.), *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 (S.C.C.), and *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 (S.C.C.). There, this Court was asked to decide, *inter alia*, whether mandatory retirement policies adopted by certain universities and colleges (in *McKinney*, *Harrison* and *Douglas*) and by a hospital (in *Stoffman*) could be subjected to *Charter* review. In reiterating and elaborating upon the view taken by McIntyre J. in the seminal case of *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 (S.C.C.), (*viz.*, that the Canadian *Charter* applies to Parliament, to the provincial legislatures, and to entities that carry out executive (or "administrative") functions of government, but not to private parties), the majority in *McKinney*, *Harrison* and *Stoffman* found that the *Charter* did not apply on the facts, since the institutions whose policies were impugned were not themselves governmental in nature; nor were they putting into place a government programme or acting in a governmental capacity in adopting those policies.

45 In *Douglas*, by contrast, the same majority found that the Canadian *Charter* did apply to the mandatory retirement policy at issue, on the ground that Douglas College was, in light of its constituent statute, simply an emanation of government. I described the differences between *McKinney* and *Harrison*, on the one hand, and *Douglas*, on the other, at pp. 584-85 of the latter case:

As its constituent Act makes clear, the college is a Crown agency established by the government to implement government policy. Though the government may choose to permit the college board to exercise a measure of discretion, the simple fact is that the board is not only appointed and removable at pleasure by the government; the government may at all times by law direct its operation. Briefly stated, it is simply part of the apparatus of government, both in form and in fact. In carrying out its functions, therefore, the college is performing acts of government, and I see no reason why this should not include its actions in dealing with persons it employs in performing these functions. Its status is wholly different from the universities in the companion cases of [*McKinney*] and [*Harrison*] which, though extensively regulated and funded by government, are essentially autonomous bodies. Accordingly, the actions of the college in the negotiation and administration of the collective agreement between the college and the association are those of the government for the purposes of s. 32 of the *Charter*. The *Charter*, therefore, applies to these activities.

46 Similar considerations to those underpinning the application analysis in *Douglas* arose in *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211 (S.C.C.). There, the principal issue was whether a provision of a collective agreement compelling the appellant to pay union dues despite his non-membership in the respondent union violated the *Charter* guarantees of freedom of expression and association, insofar as the dues were being used to pay for specific political purposes chosen by the union. In addressing whether the collective agreement provision at issue was subject to *Charter* scrutiny at all, I found for the majority that the appellant's employer, the Ontario Council of Regents for Colleges of Applied Arts and Technology, was, by virtue of the terms of its empowering Act, essentially governmental in nature. Drawing a parallel with *Douglas*, *supra*, I stated, at pp. 311-12:

[*Douglas*], like the present appeal, involved a collective agreement between the college and the Association (a union under the applicable legislation). There the Minister of Education by statute exercised a degree of control over the college that closely matched that exercised by the Ministry over the Council in the present case. It is true that in *Douglas* the college's constituent Act expressly described it as an agent of the Crown, whereas here the Act simply gives the Minister the power to conduct and govern the colleges and in this endeavour the Minister is to be "assisted" by the Council. But the reality is the same. The government, through the Minister, has the same power of "routine or regular control", to use the expression of the majority of this Court, in [*Harrison*, *supra* and *Stoffman*, *supra*], companion cases to *Douglas*.

On this basis, the majority found that the Council of Regents was subject to the *Charter*.

47 Comparing *McKinney*, *Harrison* and *Stoffman* on the one hand to *Douglas* and *Lavigne* on the other makes clear what I take to be an important idea governing the application of the Canadian *Charter* to entities other than Parliament, the provincial legislatures or the federal or provincial governments; namely, that where such entities are, in reality, "governmental" in nature — as evidenced by such things as the degree of government control exercised over them, or by the governmental quality of the functions they perform — they cannot escape *Charter* scrutiny. In other words, the ambit of s. 32 is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments. This is not to say, of course, that the *Charter* applies *only* to those entities (other than Parliament, the provincial legislatures and the federal and provincial governments) that are, *by their nature*, governmental. Indeed, it may be that particular entities will be subject to *Charter* scrutiny in respect of certain governmental *activities* they perform, even if the entities themselves cannot accurately be described as "governmental" *per se*; see, e.g., *Klein v. Law Society of Upper Canada* (1985), 50 O.R. (2d) 118 (Ont. Div. Ct.), at p. 157, where Callaghan J. held for the majority that even though the Law Society of Upper Canada is not itself governmental in nature, it may nevertheless be subject to the *Charter* in performing what amount to governmental functions. Rather, it is simply to say that where an entity *can* accurately be described as "governmental in nature", it will be subject in its activities to *Charter* review. Thus, the *Charter* applied to Douglas College (in *Douglas*) and to the Council of Regents (in *Lavigne*) because those bodies were wholly controlled by government and were, in essence, emanations of the provincial legislatures that created them. Since the same could not be said of the institutions under examination in *McKinney*, *Harrison* and *Stoffman* (and since none of those institutions was implementing a specific government policy or programme in adopting its mandatory retirement regulations), the *Charter* did not apply in those cases.

48 The possibility that the Canadian *Charter* might apply to entities other than Parliament, the provincial legislatures and the federal or provincial governments is, of course, explicitly contemplated by the language of s. 32(1) inasmuch as entities that are controlled by government or that perform truly governmental functions are themselves "matters falling within the authority" of the particular legislative body that created them. Moreover, interpreting s. 32 as including governmental entities other than those explicitly listed therein is entirely sensible from a practical perspective. Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are — as a simple matter of fact — governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other words, Parliament, the provincial legislatures and the federal and provincial executives could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the *Charter*. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, *Charter* rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender.

49 I pause here to reiterate an important observation made in the cases discussed earlier concerning how the notion of "government" is to be understood. The mere fact that an entity performs what may loosely be termed a "public function" will not by itself mean that the body under examination is "governmental" in nature. Thus, with specific reference to the distinction between the applicability of the *Charter*, on the one hand, and the susceptibility of public bodies to judicial review, on the other, I stated as follows, at p. 268 of *McKinney*:

It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, but this does not in itself make them part of government within the meaning of s. 32 of the *Charter*. ... In a word, the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision-makers. [Emphasis added.]

In order for the Canadian *Charter* to apply to institutions other than Parliament, the provincial legislature and the federal and provincial governments, then, an entity must truly be acting in what can accurately be described as a "governmental" — as opposed to a merely "public" — capacity. The factors that might serve to ground a finding that an institution

is performing "governmental functions" do not readily admit of any *a priori* elucidation. Nevertheless, and as I stated further on in *McKinney* (at p. 269), "[a] public purpose test is simply inadequate" and "is simply not the test mandated by s. 32."

50 Having set out what I take to be the guiding principles, I turn now to examine directly the *Charter* application issues in this appeal. The main issue concerns whether the Canadian *Charter* applies to municipalities — like the appellant — at all. To my mind, the analysis I have undertaken thus far leads inexorably to the conclusion that it does. While this Court has never before expressly endorsed that proposition, we have done so inferentially, inasmuch as we have already applied the *Charter* to municipal by-laws without specifically engaging in an analysis of the application issue; see *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 (S.C.C.). Moreover, the view that municipalities are subject to the *Charter* is not only sound, but also wholly consistent with the case law I have been discussing. Indeed, municipalities — though institutionally distinct from the provincial governments that create them — cannot but be described as "governmental entities". I base this finding on a number of considerations.

51 First, municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates they represent. To my mind, this itself is a highly significant (although perhaps not a decisive) indicium of "government" in the requisite sense. Secondly, municipalities possess a general taxing power that, for the purposes of determining whether they can rightfully be described as "government", is indistinguishable from the taxing powers of Parliament or the provinces. Thirdly, and importantly, municipalities are empowered to make laws, to administer them and to enforce them within a defined territorial jurisdiction. Thus, while I expressed no specific opinion in *McKinney* as to whether municipalities are, in fact, subject to the *Charter*, I nevertheless had this to say, at p. 270 of that case:

... I agree with the Court of Appeal that, if the *Charter* covers municipalities, it is because municipalities perform a quintessentially governmental function. They enact coercive laws binding on the public generally, for which offenders may be punished. ... [Emphasis added.]

Finally, and most significantly, municipalities derive their existence and law-making authority from the provinces; that is, they exercise powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves. Since the Canadian *Charter* clearly applies to the provincial legislatures and governments, it must, in my view, also apply to entities upon which they confer governmental powers within their authority. Otherwise, provinces could (in the manner outlined earlier) simply avoid the application of the *Charter* by devolving powers on municipal bodies.

52 This last point was discussed in some detail in *McCutcheon v. Toronto (City)* (1983), 41 O.R. (2d) 652 (Ont. H.C.), where, in considering the very question of whether municipalities are subject to the *Charter*, Linden J. (as he then was) stated, at p. 662:

Counsel for the respondents point out that there is no express mention of municipal governments and their by-laws in s. 32 which provides that the Charter applies to the Parliament and Government of Canada and the Legislatures and government of each province. Absent a specific reference to municipal governments in s. 32(1), it is contended, that [*sic*] the Charter does not apply to them. ...

This cannot be the case, for it would permit circumvention of the Charter through delegation to any body that is not classified as part of the Government of Canada or of a province. This is contrary to the tenor of s. 32(1), which provides that subordinates (the Governments of Canada and of each province) cannot do that which their principals (Parliament and the Legislatures) cannot do. It must be that more junior subordinates, like municipalities, are to be similarly bound by the Charter.

Further on, at p. 663, Linden J. continued:

Municipalities, though a distinct level of government for some purposes, have no constitutional status; they are merely "creatures of the legislatures", with no existence independent of the Legislature or government of the province. Hence, just as the provincial Legislatures and governments are bound by the Charter, so too are municipalities, whose by-laws and other actions must be considered, for the purposes of s. 32(1), as actions of the provincial government which gave them birth.

While I have some reservations with respect to characterizing the provinces as the "principals" of municipalities (inasmuch as municipalities have distinct political mandates and hence are not truly "agents" of the province) I am in general agreement with the thrust of Linden J.'s comments.

53 I would add one further thought at this point. This approach appears entirely consistent with the traditional legal status of municipalities as governmental bodies. Before the Canadian *Charter*, the courts had interpreted the powers conferred on municipalities by the provinces as being restricted to making by-laws that were "reasonable", the general effect of which was to limit municipalities from encroaching on individual rights; see *Fountainhead Fun Centre Ltd. v. Montreal (Ville)*, [1985] 1 S.C.R. 368 (S.C.C.); *R. v. Sharma*, [1993] 1 S.C.R. 650 (S.C.C.); and *R. v. Greenbaum*, [1993] 1 S.C.R. 674 (S.C.C.), where the by-laws at issue were declared *ultra vires* (in whole or in part) because they unreasonably discriminated between classes of persons. See also *Kruse v. Johnson* (1895), [1898] 2 Q.B. 91 (Eng. Div. Ct.), at pp. 99-100, *per* Lord Russell of Killowen C.J.; and *Halifax (City) v. Read*, [1928] S.C.R. 605 (S.C.C.), at pp. 612-13, *per* Newcombe J. While the by-laws at issue in the latter cases were upheld, the idea that the reasonableness doctrine serves to protect individual rights is apparent from the passages cited. In the *Charter* age, it seems wholly fitting that "reasonableness" should be read in light of what the *Charter* has to say about the rights of the individual. And an attempt by the legislature to so express a municipal statute as to permit a municipality to breach *Charter* rights would, it seems to me, itself be contrary to the *Charter* mandate.

54 The approach I have taken to the relation of municipalities to the provinces finds further support, I think, in the reasoning underlying this Court's decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.). There, we had to decide, *inter alia*, whether the Canadian *Charter* applied to the discretionary orders of a statutorily appointed arbitrator. Speaking for the Court on this issue, Lamer J. (as he then was) stated, at pp. 1077-78:

The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature; he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. ... Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the Charter ... [Emphasis added.]

While the application issues in *Slaight* and those in the present case are by no means identical, they can profitably be understood to share at least one salient feature; viz., both labour arbitrators (such as the one in *Slaight* itself) and municipalities (such as the appellant) exercise governmental powers conferred upon them by the appropriate legislative body. To be sure, the nature and scope of those powers is different. As regards the arbitrator in *Slaight*, the delegated power consisted in the discretion to make orders in the settlement of particular labour disputes. As regards municipalities, it consists in the much broader discretion to adopt and enforce coercive laws binding on a defined territory. In both cases, however, the ultimate source of authority is government *per se* and, consequently, the entity under scrutiny will be kept in check through the application of the *Charter*, just as government itself would be were it performing the functions conferred.

55 For all these reasons, then, I am firmly of the opinion that the Canadian *Charter* applies to municipalities. But what of the appellant's submission that the *Charter* should not apply because the activity in question — i.e., the imposition of

the residence requirement — is a "private" as opposed to a "governmental" act? As I have already suggested, I cannot accept this distinction. The particular modality a municipality chooses to adopt in advancing its policies cannot shield its activities from *Charter* scrutiny. All the municipality's powers are derived from statute and all are of a governmental character; see the cited passage from *Slaight, supra*. An act performed by an entity that is governmental in nature is, to my mind, necessarily "governmental" and cannot properly be viewed as "private" at all. I set out my reasons for taking this view in *Lavigne, supra*, where (as I noted earlier) I found for the majority that a provision of a collective agreement — i.e., a contractual term — was subject to *Charter* scrutiny on the basis that the body responsible for negotiating the agreement (the Council of Regents) was, itself, essentially governmental in nature. At p. 314 of the judgment, I stated:

It was also argued that the *Charter* does not apply to government when it engages in activities that are ... "private, commercial, contractual or non-public [in] nature". In my view, this argument must be rejected. In today's world it is unrealistic to think of the relationship between those who govern and those who are governed solely in terms of the traditional law maker and law subject model. We no longer expect government to be simply a law maker in the traditional sense; we expect government to stimulate and preserve the community's economic and social welfare. In such circumstances, government activities which are in form "commercial" or "private" transactions are in reality expressions of government policy, be it the support of a particular region or industry, or the enhancement of Canada's overall international competitiveness. In this context, one has to ask: why should our concern that government conform to the principles set out in the *Charter* not extend to these aspects of its contemporary mandate? To say that the *Charter* is only concerned with government as law maker is to interpret out Constitution in light of an understanding of government that was long outdated even before the *Charter* was enacted.

This rationale is as pertinent to municipalities like the appellant as to the Council of Regents in *Lavigne*. I therefore find that the Canadian *Charter* applies to the residence requirement at issue in this case.

56 One final point should be added. As I explained earlier, refusing to subject entities acting in a governmental capacity to *Charter* scrutiny would permit governments to avoid the *Charter* by conferring governmental powers on non-governmental bodies. It seems clear to me that the same situation could arise if entities that are governmental in nature (or, for that matter, governments themselves) were not subjected to *Charter* scrutiny in respect of *all* their activities, including those that could — if they had been performed by a non-governmental entity — plausibly be described as "private". Stated simply, a government or an entity acting in a governmental capacity could circumvent the *Charter* not simply by granting certain of its powers to other entities, but also by itself pursuing governmental initiatives through means other than the traditional mechanism of government action — i.e., the formal enactment of coercive laws. I discussed this issue in my reasons in *Douglas*, at p. 585:

The fact that the collective agreement was agreed to by the appellant association does not alter the fact that the agreement was entered into by government pursuant to statutory power and so constituted government action. To permit government to pursue policies violating *Charter* rights by means of contracts and agreements with other persons or bodies cannot be tolerated. The transparency of the device can be seen if one contemplates a government contract discriminating on the basis of race rather than age.

The same reasoning applies in the context of the present case. Were the *Charter* not to apply to *all* activities of governmental entities, the municipal resolutions pursuant to which the residence requirement was imposed on the appellant's permanent employees would not be subject to the *Charter*, while precisely the same requirement implemented through the formal mechanism of a by-law would be. The difficulties to which such an approach could give rise are sufficiently obvious as to require no further explanation.

57 The foregoing analysis, in my view, adequately disposes of the application question in this case. For the reasons I have given, the residence requirement imposed by the appellant — a requirement which might, if it had been implemented by a non-governmental body, properly be considered a "private" condition of employment — is susceptible to *Charter* scrutiny, inasmuch as the appellant municipality is governmental in nature and, as such, is subject in *all* its activities to *Charter* review. As I noted earlier, the substance of the respondent's *Charter* claim is that the residence requirement

infringes her right to liberty under s. 7 in a manner that fails to accord with the principles of fundamental justice. I turn now to an examination of the issues raised by that claim.

(b) *The Liberty Interest Under Section 7*

58 Before it is even possible to decide whether the respondent's s. 7 rights were infringed in a manner that contravenes fundamental justice, it is necessary to establish that the interest in respect of which she asserted her claim falls within the ambit of s. 7's protection. For convenience, I set out s. 7 here:

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.

The respondent took the position that the right to "liberty" enshrined in s. 7 includes within it a right to make fundamentally personal choices free from state interference and that choosing where to establish one's home falls within the scope of that right. The appellant, whose submissions were echoed by the *mis en cause* Attorney General of Quebec, tried to impugn this position in two ways. First, it contended that the right actually asserted by the respondent was not a right to choose where to establish her home at all, but rather an economic right in the nature of a "right to work", and that such a right did not fall within the ambit of s. 7 liberty guarantee. Alternatively, the appellant submitted that even if the right asserted by the respondent was a right to choose freely where to make her home, that right would similarly not be protected under s. 7. To my mind, neither of the appellant's arguments can succeed.

59 The appellant's first argument can, I think, be addressed relatively quickly. As should be clear, the success of the claim rests on the premise that the respondent has mischaracterized the nature of the right in respect of which she seeks the *Charter's* protection, an issue that is quite separate from the further question of whether economic rights are protected by the s. 7 liberty guarantee. Thus, if the appellant is to prevail on the s. 7 issue based on the contention that economic rights are not included within the ambit of the right to liberty, it must first establish that the right at issue is, as it claims, an economic right in the nature of a "right to work" and not, as the respondent asserts, a right to make an unfettered decision as to where to establish her home.

60 Admittedly, a certain degree of support for this line of argument can be garnered from some American case law dealing specifically with challenges to municipal residence requirements. In *Ector v. City of Torrance*, 514 P.2d 423 (U.S. Cal. Sup. Ct. 1973), for example, Mosk J. of the Supreme Court of California considered the constitutionality of a residence requirement imposed by the respondent city on the appellant, a municipally employed librarian. Affirming the decision of the Superior Court in which the appellant's petition was denied, he cited *Kennedy v. City of Newark*, 148 A.2d 473 (U.S. N.J. 1959), and stated as follows, at pp. 437-38:

[A]ppellant asks us in effect to declare a fundamental right to be "let alone" in the choice of his place of residence. We are not unsympathetic to that Thoreauvian goal, although we fear that in this day of land-use planning, zoning and environmental controls, it may be increasingly difficult to achieve. Nevertheless, as Chief Justice Weintraub of New Jersey explained, in this type of case "The question is not whether a man is free to live where he will. Rather the question is whether he may live where he wishes and at the same time insist upon employment by government." No such "fundamental right" is expressed or implied in the Constitution, and it is not the province of the courts to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. [Emphasis added; citations omitted.]

A similar view appears to have been taken by the United States Supreme Court in *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (U.S. Sup. Ct. 1976). There, that court had to decide whether a Philadelphia municipal regulation was unconstitutional as a violation of the plaintiff's right to interstate travel. In describing the plaintiff's position but rejecting his claim, the court found, at pp. 646-47, that he was trying to assert "a constitutional right to be employed by the city of Philadelphia while he is living elsewhere" (underlining added; italics in original).

61 In light of these comments, the argument advanced by the appellant might, at first, seem tenable. A closer analysis, however, reveals that the appellant's position — and, with respect, the position apparently taken in the American case law just cited — is flawed. In seeking to impugn the residence restriction imposed upon her, the respondent is not, as the appellant alleges, surreptitiously trying to assert a constitutionally protected "right to employment" with the City of Longueuil. She is, instead, claiming that her ability to take an unfettered decision as to where she wishes to live — an ability which, she argues, enjoys the status of a constitutionally protected right — ought not to be denied her simply because she has chosen to earn her living by working for the appellant municipality. **This is clear, I think, inasmuch as the respondent does not challenge the very fact of her termination as being contrary to her s. 7 liberty interest; rather, she seeks to impugn the basis upon which that termination was purportedly justified; viz., the residence restriction itself. Put another way, the respondent's real complaint is not simply that she was dismissed from the appellant's employ, but rather that she was dismissed because she exercised (what she claims is) a constitutionally protected right to choose her place of residence as she sees fit. In light of these considerations, I am satisfied that the respondent's Charter claim does not implicate any notion of a constitutional "right to employment" or any other "economic right", and I would reject the appellant's submission to the contrary.**

62 Having accepted the respondent's view that the right she seeks to invoke is, in fact, a right to choose where to establish her home, I must still address appellant's second contention; namely, that even a right of this nature — quite apart from any notion of economic rights — does not fall within the ambit of the liberty guarantee enshrined in s. 7. Once again, I am unable to agree with this submission. Indeed, in my view, a proper understanding of the scope of the s. 7 right to liberty militates strongly toward the opposite conclusion. Let me explain.

63 In the recent case of *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1994), [1995] 1 S.C.R. 315 (S.C.C.), this Court was called upon to decide, *inter alia*, whether the s. 7 right to liberty included within its scope a right of parents to take decisions respecting the medical care of their children. More specifically, and in addition to a claim raised under s. 2(a) of the Canadian *Charter*, we were asked to decide whether the appellant parents (who were Jehovah's Witnesses) could properly invoke a constitutional right to make definitive choices in respect of their daughter's medical treatment, in order to preclude health care officials from ordering — pursuant to powers granted to them by the *Child Welfare Act*, R.S.O. 1980, c. 66 — that the daughter undergo a blood transfusion. Writing for a plurality consisting of myself and L'Heureux-Dubé, Gonthier and McLachlin JJ., I undertook a detailed discussion of the various principles I think should guide the interpretation of s. 7, noting particularly that s. 7 must (as was first enunciated in *R. v. L. (T.P.)*, [1987] 2 S.C.R. 309 (S.C.C.), and repeatedly followed by this Court) be read in light of the values reflected in the *Charter as a whole*, and not just those embodied by the other provisions described as "legal rights". I then referred specifically to the decisions of Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), and *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), in which the meaning of the term "freedom" in ss. 1 and 2(a) was discussed, and found as follows, at p. 368:

The above-cited cases give us an important indication of the meaning of the concept of liberty. On the one hand, liberty does not mean unconstrained freedom. ... Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract *Charter* scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. [Emphasis added; citations omitted.]

On the facts of *B. (R.)* itself, I found that the right asserted by the appellant parents fell within this protected sphere of individual autonomy but that, in the circumstances, the deprivation of the right was in accordance with the principles of fundamental justice. As a consequence, I held that no violation of s. 7 occurred.

64 I note parenthetically that the joint reasons of Iacobucci and Major JJ. in *B. (R.)* (in which Cory J. concurred) do not, as I see it, appear to take issue with my view of the ambit of the s. 7 liberty guarantee. While, *on the facts of B. (R.)*, my colleagues disagreed with the finding that the appellant parents possessed a constitutional right to decide what

constitutes appropriate medical care for their child (since, in their view, the purview of such a right must be delineated with specific reference to the competing rights of the child to life and security of the person), they did not explicitly question the idea that the right to liberty in s. 7 goes beyond the notion of mere freedom from physical constraint and protects within its scope a narrow sphere of personal autonomy wherein the state is, in normal circumstances, precluded from entering. Indeed, at p. 431, they stated:

We note that La Forest J. holds that "liberty" encompasses the right of parents to have input into the education of their child. *In fact, "liberty" may very well permit parents to choose among equally effective types of medical treatment for their children*, but we do not find it necessary to determine this question in the instant case. We say this because, *assuming without deciding that "liberty" has such a reach*, it certainly does not extend to protect the appellants in the case at bar. There is simply no room within s. 7 for parents to override the child's right to life and security of the person. [Underlining in original; italics added.]

Sopinka J., too, did not explicitly disagree with my understanding of the scope of the liberty interest protected by s. 7. Rather, he took the position that the matter did not need to be addressed in *B. (R.)* since, on the facts, there was no violation of the principles of fundamental justice.

65 I should point out that the view I have expounded regarding the scope of the right to liberty draws considerable support from the reasons of Wilson J. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.). In that case, my former colleague succinctly expressed her opinion that the s. 7 liberty interest is concerned not only with physical liberty, but also with fundamental concepts of human dignity, individual autonomy, and privacy. Indeed, at p. 166, she stated:

[A]n aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in [*Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177], is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

Speaking for the plurality, I explicitly endorsed this passage in *B. (R.)*, at pp. 368-69, pointing out that I have long supported the views expressed in it. Indeed, shortly after *Morgentaler* was decided, I stated in *R. v. Beare*, [1988] 2 S.C.R. 387 (S.C.C.), at p. 412, that I had "considerable sympathy" for the proposition that s. 7 includes within it a right to privacy. Moreover, the view that the right to liberty encompasses more than just physical freedom is, as I explained in *B. (R.)*, supported by the vast preponderance of American case law dealing with the subject; see, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (U.S. Sup. Ct. 1923); and *Pierce v. Society of the Sisters of the Holy Name of Jesus & Mary*, 268 U.S. 510 (U.S. Sup. Ct. 1925).

66 The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in *B. (R.)* should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in *B. (R.)*, that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in *B. (R.)* that parental decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.

67 The soundness of this position can be appreciated most readily, I think, by reflecting upon some of the intensely personal considerations that often inform an individual's decision as to where to live. Some people choose to establish their home in a particular area because of its nearness to their place of work, while others might prefer a different neighbourhood because it is closer to the countryside, to the commercial district, to a particular religious institution with which they are affiliated, or to a medical centre whose services they require. Similarly, some people may, for reasons dearly important to them, value the historical significance or cultural make-up of a given locale, others again may want to ensure that they are physically proximate to family or to close friends, while others still might decide to reside in a particular place in order to minimize their cost of living, to care for an ailing relative or, as in the case at bar, to maintain a personal relationship. In my opinion, factors such as these vividly reflect the idea that choosing where to live is a fundamentally personal endeavour, implicating the very essence of what each individual values in ordering his or her private affairs; that is, the kinds of considerations I have mentioned here serve to highlight the inherently private character of deciding where to maintain one's home. In my view, the state ought not to be permitted to interfere in this private decision-making process, absent compelling reasons for doing so.

68 Moreover, not only is the choice of residence often *informed* by intimately personal considerations, but that choice may also have a determinative *effect* on the very quality of one's private life. The respondent put this point succinctly in her factum:

[TRANSLATION]

Residence determines the human and social environment in which an individual and his or her family evolve: the type of neighbourhood, the school the children attend, the living environment, services, etc. In this sense, therefore, residence affects the individual's entire life and development.

To my mind, the ability to determine the environment in which to live one's private life and, thereby, to make choices in respect of other highly individual matters (such as family life, education of children or care of loved ones) is inextricably bound up in the notion of personal autonomy I have been discussing. To put the point plainly, choosing where to live will be influenced in each individual case by the particular social and economic circumstances of the person making the choice and, even more significantly, by his or her aspirations, concerns, values and priorities. Based on all these considerations, then, I conclude that choosing where to establish one's home falls within that narrow class of decisions deserving of constitutional protection.

69 Support for this view is found in the fact that the right to choose where to establish one's home is afforded explicit protection in the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, to which Canada became a party in 1976. As the respondent informed us, Article 12(1) of that convention reads as follows:

#### Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

While subsection (3) of that provision provides that the right at issue can be limited by states for certain stipulated reasons, the fact remains that the right to choose where to reside is itself enshrined as one of the Covenant's fundamental guarantees. Given this Court's previous recognition of the persuasive value of international covenants in defining the scope of the rights guaranteed by the *Charter* (see, e.g., *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 (S.C.C.), at p. 348, *per* Dickson C.J. (dissenting), cited with approval in *Slaight, supra*, at pp. 1056-57), I regard Article 12 as strengthening my conclusion that the right to decide where to establish one's home forms part of the irreducible sphere of personal autonomy protected by the liberty guarantee in s. 7.

70 Having made clear why I find the right asserted by the respondent is indeed comprised within the right to liberty, all that remains to be considered as regards s. 7 of the Canadian *Charter* is whether the deprivation of the respondent's

right to choose where to live — through the imposition of the residence requirement — conforms to the principles of fundamental justice. I will examine this issue in detail in the next section of these reasons. Before doing so, however, I should state that I do regard the imposition of the residence requirement as a "deprivation", in the sense required by s. 7, despite an argument to the contrary raised by the appellant. While it did not frame its submission in precisely this manner, the appellant essentially contended that even if a right to choose where to establish one's home existed under s. 7, there could be no "deprivation" on the facts of this case because the respondent waived that right when she signed the residence declaration. Put another way, the imposition of the residence requirement did not, in the appellant's view, "deprive" the respondent of her right to decide where to live because she chose to sign the residence declaration and, thereby, renounced any right of that nature that she might otherwise have enjoyed.

71 If it could be sustained on the facts, the appellant's argument would raise the issue of whether it is even possible to waive a constitutional right to choose where to live, as an aspect of the right to liberty. Waiver of certain constitutional rights has, of course been recognized by this Court in other contexts; see, e.g., *R. v. Mills*, [1986] 1 S.C.R. 863 (S.C.C.), and *R. v. Rahey*, [1987] 1 S.C.R. 588 (S.C.C.), both dealing with s. 11(b); and *R. c. Richard*, [1996] 3 S.C.R. 525 (S.C.C.), dealing with s. 11(d). I do not consider it necessary to deal with that issue here, however, since even assuming that one can legitimately waive the right to choose where to live, I am of the view that a waiver argument cannot be upheld on the facts of this case.

72 Indeed, I find the appellant's contentions in respect of waiver to be entirely unpersuasive, inasmuch as they fail to recognize that the respondent had no alternative but to accept the residence requirement if she wanted to assume permanent employment with the municipality. By its very nature, waiver or renunciation of any right must be freely expressed if it is to be effective. Here, however, the appellant simply presented the respondent with two possible options — she could either relinquish her post entirely (or continue only in a temporary capacity), or she could assume a permanent position *as long as she undertook to maintain her home in Longueuil for the duration of her employment*. The difficulty presented by this situation was eloquently expressed by T.A. Hampton in his article entitled "An Intermediate Standard for Equal Protection Review of Municipal Residence Requirements" (1952), 43 *Ohio St. L.J.* 195, at p. 211:

What most likely lies at the heart of an employee's complaint is the imposition of an unfair choice: a municipal employee must decide whether he values more highly his job or his home. If he chooses to protect his job, he loses the right to continue residing not only in a particular house, but in a preferred neighborhood as well — often among friends and family, and close to a church, schools, and associations in whose affairs he is involved. If he chooses instead to protect his choice of community, he must forego an opportunity to seek or maintain preferred employment.

While these comments were made in the context of a discussion dealing with rights protected under the United States Constitution, I am of the view that they are equally apposite here. Stated simply, the respondent in this case had no opportunity to negotiate the mandatory residence stipulation and, consequently, she cannot in any meaningful sense be taken to have freely given up her right to choose where to live. In civilian parlance, her acquiescence in signing the residence declaration was (as Baudouin J.A. found in the course of his public order analysis) tantamount to accepting a contract of adhesion and, as such, it cannot properly be understood to constitute waiver.

73 As a subsidiary argument, the appellant contended that even if the respondent did not waive her right by signing the residence declaration in the first place, she waived it later on by failing to move back to Longueuil when given the option of doing so by a representative of the appellant. This argument, like the one just discussed, cannot succeed. Indeed, to accept it would be to find that the respondent's explicit attempt to *assert* her right to choose where to live by *refusing* to conform with the terms of the residence requirement amounted somehow to a *renunciation* of that right. It would, in other words, be to turn the facts of this case on their head. Having set out my reasons for rejecting the appellant's waiver arguments, then, I turn now to an examination of the final issue raised by the respondent's s. 7 claim.

(c) *The Principles of Fundamental Justice*

74 The text of s. 7 provides that a deprivation by the state of an individual's right to life, liberty or security of the person will not violate the Canadian *Charter* unless it contravenes "the principles of fundamental justice". Over the years since the *Charter's* inception, this Court has repeatedly been called upon to interpret that phrase, so as to determine in particular cases whether a *Charter* violation has, in fact, occurred. In the early days of *Charter* adjudication, questions arose as to whether the principles of fundamental justice included within their ambit a substantive element, in addition to the guarantees of natural justice or procedural fairness. That issue was conclusively settled by this Court in the *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), where all members of the panel seized of the case agreed that the principles of fundamental justice are not limited merely to rules of procedure but include as well a substantive component. This has meant that if deprivations of the rights to life, liberty and security of the person are to survive *Charter* scrutiny, they must be "fundamentally just" not only in terms of the process by which they are carried out but also in terms of the ends they seek to achieve, as measured against basic tenets of both our judicial system and our legal system more generally; see *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, *supra*, at p. 512; *Beare, supra*; and *L. (T.P.)*, *supra*.

75 The cases since *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)* have made clear that, particularly in light of the possibility of substantive review, the meaning of fundamental justice must depend in a given case on both the nature of the s. 7 right asserted and the character of the alleged violation; see *Pearlman v. Law Society (Manitoba)*, [1991] 2 S.C.R. 869 (S.C.C.), at p. 884. In taking this contextual approach, this Court has often considered it appropriate to elucidate a specific principle or set of principles governing the particular matter before it. Thus, in *Lyons, supra*, the accused challenged certain provisions authorizing the imposition of an indeterminate sentence on individuals designated as dangerous offenders, on the basis that they infringed the liberty guarantee in s. 7. Writing for the majority, I explained (at p. 327) that determining whether the provisions at issue infringed s. 7 in a manner that contravened the principles of fundamental justice necessitated an inquiry into "the basic principles of penal policy that have animated legislative and judicial practice in Canada and other common law jurisdictions". Similarly, in *Beare*, we considered whether mandatory fingerprinting of persons who have been accused of a crime, but not yet convicted, violated the s. 7 liberty interest. Writing this time on behalf of a unanimous Court, I found (at pp. 402-3) that the principles of fundamental justice pertinent to that context included "the applicable principles and policies that have animated legislative and judicial practice in the field" of crime prevention and law enforcement.

76 But just as this Court has relied on specific principles or policies to guide its analysis in particular cases, it has also acknowledged that looking to "the principles of fundamental justice" often involves the more general endeavour of balancing the constitutional right of the individual claimant against the countervailing interests of the state. In other words, deciding whether the principles of fundamental justice have been respected in a particular case has been understood not only as requiring that the infringement at issue be evaluated in light of a specific principle pertinent to the case, but also as permitting a broader inquiry into whether the right to life, liberty or security of the person asserted by the individual can, in the circumstances, justifiably be violated given the interests or purposes sought to be advanced in doing so. To my mind, performing this balancing test in considering the fundamental justice aspect of s. 7 is both eminently sensible and perfectly consistent with the aim and import of that provision, since the notion that individual rights may, in some circumstances, be subordinated to substantial and compelling collective interests is itself a basic tenet of our legal system lying at or very near the core of our most deeply rooted juridical convictions. We need look no further than the *Charter* itself to be satisfied of this. Expressed in the language of s. 7, the notion of balancing individual rights against collective interests itself reflects what may rightfully be termed a "principle of fundamental justice" which, if respected, can serve as the basis for justifying the state's infringement of an otherwise sacrosanct constitutional right.

77 That the balancing test to which I refer has gained acceptance as an aspect of the s. 7 inquiry into fundamental justice is, I think, apparent from a number of decisions of this Court. In *Beare, supra*, at p. 404, for example, the Court weighed the liberty interest of the individual accused against such state interests as the need "to arm the police with adequate and reasonable powers for the investigation of crime", and determined unanimously that the practice of fingerprinting persons who had been accused but not yet convicted of an offence did not violate the principles of fundamental justice.

In *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), Sopinka J. (writing for the majority) had this to say, at pp. 592-93:

I cannot subscribe to the opinion ... that the state interest is an inappropriate consideration in recognizing the principles of fundamental justice in this case. This Court has affirmed that in arriving at these principles, a balancing of the interest of the state and the individual is required. [Emphasis added.]

Similarly, in *Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research)*, [1990] 1 S.C.R. 425 (S.C.C.), L'Heureux-Dubé J. stated, at pp. 579 and 583:

[T]he *Charter* has not rendered obsolete society's interest in the enforcement of its laws. ... This is especially true of s. 7, where the collective interest in law enforcement finds expression in the principles of fundamental justice, and must be balanced against the deprivation of individual rights to life, liberty and security of the person, as these rights have come to be recognized in our judicial system.

Fundamental justice in our Canadian legal tradition ... is primarily designed to ensure that a fair balance be struck between the interests of society and those of its citizens. [Emphasis added.]

I echoed this sentiment in my own reasons in that case, finding, at p. 539, that "the interests of the individual and those of the state both ... play a part in assessing whether a particular law violates the principles of fundamental justice", and, at p. 541, that "the community's interest is one of the factors that must be taken into account in defining the content of the principles of fundamental justice". While both L'Heureux-Dubé J. and I wrote only for ourselves in *Thomson Newspapers*, we each concurred in the majority's disposition, and our views on this matter were not explicitly questioned by our colleagues. Moreover, the same view of fundamental justice has implicitly — and sometimes explicitly — underpinned a number of other decisions of this Court; see, e.g., *R. v. Jones*, [1986] 2 S.C.R. 284 (S.C.C.); *L. (T.P.)*, *supra*; *Chiarelli v. Canada (Minister of Employment & Immigration)*, [1992] 1 S.C.R. 711 (S.C.C.); *Cunningham v. Canada*, [1993] 2 S.C.R. 143 (S.C.C.), at pp. 151-52; and *B. (R.)*, *supra*; see also T. J. Singleton, "The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter" (1995), 74 *Can. Bar Rev.* 446, which, although questioning the balancing test, provides a useful summary of the pertinent case law.

78 From the foregoing discussion, it is clear that deciding whether the infringement of a s. 7 right is fundamentally just may, in certain cases, require that the right at issue be weighed against the interests pursued by the state in causing that infringement. This balancing process will necessarily be contextual, insofar as the particular right asserted, the extent of its infringement, and the state interests implicated in each particular case will depend largely on the facts. As discussed earlier, the right infringed in this case is that of the respondent to choose where to establish and maintain her home, a right which I found enures to her as an aspect of that narrow sphere of personal autonomy protected by the liberty guarantee. For its part, the appellant pointed to three "public interests" that, in its view, justified the imposition of the residence requirement. I propose to deal with each of them in turn.

79 Before doing so, however, it is important to highlight two salient features of the particular residence requirement at issue here. First, the municipal resolutions adopted by the appellant provide that a declaration of the kind signed by the respondent must be signed by *all* permanent employees of the municipality who were hired after the date the resolution was adopted, *regardless of their status or function*. Secondly, the residence requirement does not stipulate simply that permanent employees must reside in Longueuil *when they are hired*, or for a certain period before they are hired. Rather, it provides that they must maintain their residence in Longueuil *for the duration of their employment*, on pain of termination. In my view, these features must be borne in mind in determining whether the particular residence requirement at issue contravenes fundamental justice.

80 I turn now to examine the "public interests" relied upon by the appellant as justifications for the residence requirement. The first focused on the idea that residents who lived within the territorial limits of the municipality would be better acquainted with the city, more in touch with the community's needs and desires and, therefore, better able to

serve the community through their employment. This argument amounted essentially to the claim that, by compelling its employees to live in the municipality, the appellant could ensure to the best of its ability that the residents of Longueuil were provided with a high quality of local services. While this is doubtless a laudable goal, I cannot accept that it justifies invading the personal autonomy of individual employees by depriving them of their constitutional right to choose where they wish to have their homes; that is, I am not convinced that the appellant's interest in providing the best services possible warrants so significant an intrusion into its employees' private life. Moreover, even assuming that this aim were sufficiently compelling to warrant infringing the respondent's rights, it nevertheless suffers from two further difficulties.

81 First, it is by no means clear that requiring employees to maintain their homes within the municipality's territorial limits will necessarily have the effect of instilling in them the sense of pride and commitment to their city suggested by the appellant. It is, after all, perfectly conceivable that employees living outside the municipality might have just as strong a sense of loyalty to their employer and to the citizens they serve as those who reside within the city limits. Likewise, there is no guarantee that those residing within the municipality will take as active an interest in their surroundings as the appellant would have us believe. This seems particularly likely of those employees who, against their wishes, would be compelled by the residence requirement to live within the municipal limits in order to keep their jobs.

82 Secondly, it appears to me that the goal of providing a high standard of municipal services could easily be pursued through means less drastic than demanding that all permanent employees arrange one of the most fundamental aspects of their private lives in conformity with the municipality's wishes. In other words, the desire to provide the best possible local services does not necessitate constraining an employee's inherently personal choice as to where he or she wishes to live. I would conclude on this basis that the first "public interest" relied upon by the appellant does not justify the imposition on the respondent of the residence requirement at issue.

83 The second "public interest" invoked by the appellant concerns the various economic benefits that might enure to the municipality from having its employees live within its territory. Essentially, the appellant contended both (a) that the economy of Longueuil would be supported by a steady stream of income from resident employees; and (b) that municipal revenues themselves would be bolstered through taxation of those employees. While there was some disagreement in the oral hearing as to whether the taxation aspect of this claim was properly raised before this Court, I do not consider it necessary to pronounce on that issue. Even assuming this rationale can appropriately be considered, the appellant's position suffers from the same difficulties as those raised by the first justification it invoked. Stated simply, I cannot see how the fact that the City of Longueuil might benefit fiscally or economically from having its permanent employees live within its territory can provide a sufficiently compelling basis upon which to override the respondent's right to decide where she wishes to live — the mere possibility of stimulating local business or of augmenting the funds in the municipal purse does not, in my view, provide an adequate reason for overriding the constitutional guarantee at issue. I find, therefore, that this second "public interest" is insufficient to vindicate the appellant's position.

84 The final "public interest" relied upon by the appellant merits a somewhat fuller discussion. Unlike the first two justifications it invoked, this one concerns not only the benefits that may enure to the municipality from imposing the residence requirement, but also the particular type of work performed by the employees upon whom it is imposed. Specifically, the appellant contended that residence requirements are justified whenever the functions performed by the employees subject to them are themselves of public importance and, as regards the case at bar, it argued that the services performed by the respondent in her capacity as a police radio operator were sufficiently important as to justify requiring her to reside in Longueuil for as long as she held that post.

85 In contrast to the views I have taken with respect to the other justifications relied on by the appellant, I have some sympathy for the general proposition underlying this one. Indeed, it seems to me that, in certain circumstances, a municipality (or, for that matter, another government actor) might well be justified in imposing a residence requirement on employees occupying certain essential positions. For example, it may be that a residence requirement imposed on emergency workers such as police officers, firefighters or ambulance personnel would conform to the principles of fundamental justice inasmuch as the public interest in ensuring that such persons are readily available in times of urgent need is plainly apparent. While considerations such as "distance from the workplace" or "time needed to get to work"

may, in some cases, constitute more cogent criteria upon which to structure such a requirement than "city limits", the basic idea of imposing a residence requirement seems, at least *prima facie*, to be justifiable in such a context. Though addressing the issue under the rubric of public order, Baudouin J.A. agreed with this view. He stated, at p. 2571:

[TRANSLATION]

[B]ecause of the demands of their occupations, such persons as police officers, firefighters and ambulance workers may be required to live in the municipality that employs them, or possibly within a specific area inside or outside the municipality, so that they can be reached quickly and be immediately available in an emergency.

Analogous arguments might be possible with respect to persons engaged in other forms of municipal employment. Thus, a requirement that the municipal councillors of a given city reside within a specified area, for example, might well be justified on the ground that the very nature of their occupation demands that they be intimately acquainted with the constituencies they represent. Each case of this kind will, of course, have to be decided on its own facts; I offer the foregoing comments only as examples that might, in an appropriate case, survive constitutional scrutiny. I should also note that, in certain cases, factors other than the nature of the employee's position may also suffice to justify the imposition of a residence requirement.

86 It is worth noting that treating different occupations differently as regards the justifiability of residence requirements is supported by a certain line of American case law. While much of the reasoning in those cases is specific to the American constitutional context (insofar as it focuses on the appropriate level of "constitutional scrutiny" — as it is known — to be applied in a given case), it is nevertheless apposite here insofar as it lends support to the view that the main premise underlying the appellant's third "public interest" is sound. Thus, in *Fraternal Order of Police, Youngstown Lodge No. 28 v. Hunter*, 360 N.E.2d 708 (U.S. Ohio Ct. App. 1975), *certiorari* denied, 424 U.S. 977 (U.S. Sup. Ct. 1976), for example, the Ohio Court of Appeals found that a residence requirement imposed on municipal employees of the city of Youngstown was constitutionally valid as regards policemen, but invalid as regards the plaintiff, who was a maintenance worker at the local airport. Similarly, in *Detroit Police Officers Ass'n v City of Detroit*, 190 N.W.2d 97 (U.S. Mich. S.C. 1971), appeal dismissed for want of substantial federal question, 405 U.S. 950 (U.S. Sup. Ct. 1972), a majority of the Supreme Court of Michigan upheld a municipal residence requirement imposed on officers of the Detroit police force, finding expressly that by virtue of their position as emergency workers, police officers can be distinguished from other kinds of employees; see also *Hanson v. Unified School Dist. No. 500, Wyandotte County, Kan.*, 364 F. Supp. 330 (U.S. Kan. 1973), wherein a residence requirement imposed on schoolteachers was held invalid as not resting on any "reasonable basis". While it is true that a significant number of American cases have upheld residence requirements even in respect of non-emergency employees, they have largely done so not on the basis that the requirements constituted justified violations of rights, but rather on the ground that the particular right asserted by the plaintiff — normally a "right to travel" or a "right to equal protection" — was not violated at all; see, e.g., *Ector, supra*; *Andre v. Board of Trustees of Village of Maywood*, 561 F.2d 48 (U.S. 7th Cir. Ill. 1977); and *Salem Blue Collar Workers Ass'n. v. City of Salem*, 33 F.3d 265 (U.S. 3rd Cir. N.J. 1994); see also Hampton, *supra*; R. S. Myers, "The Constitutionality of Continuing Residency Requirements for Local Government Employees: A Second Look" (1986), 23 *Cal. W. L. Rev.* 24; and Note, "Municipal Employee Residency Requirements and Equal Protection" (1974-1975), 84 *Yale L.J.* 1684.

87 Having accepted that residence requirements related to specific occupations might, in some cases, be justified, the question here becomes whether the requirement imposed on the respondent can be upheld on that ground. In my view, it cannot, and this for two reasons. The first has to do with the ambit of the requirement itself. As noted earlier, the residence requirement at issue here applies not only to employees whose functions, for one reason or another, require that they be proximate to their place of work. Rather, it applies to *all* permanent employees of the municipality hired after October 23, 1984. In my view, this renders the requirement too broad to be justified on the basis of the third "public interest" relied on by the appellant. The concerns underlying this finding were well expressed by the New Hampshire Supreme Court in *Donnelly v. City of Manchester*, 274 A.2d 789 (U.S. N.H. S.C. 1971). There, that court expressly recognized that a municipal ordinance imposed by the defendant city upon the plaintiff schoolteacher violated the latter's right to choose where to live, and had this to say, at p. 791:

[T]he ordinance can be upheld only if the requirement that the employees live within the city serves a public interest which is important enough to justify the restriction on the private right. There is nothing in the record before us nor have any reasons been advanced which would justify the broad restrictions of this ordinance. We do not say that there are no employees whose residence near their place of duty may not be important enough to justify a restriction upon their place of residence but if such restrictions are permissible as to some this does not justify the broad and all inclusive requirement that all employees live within the city limits. Nothing has been brought to our attention ... which would justify the application of the restriction to schoolteachers. [Emphasis added.]

88 The second reason I cannot accept the appellant's submissions is that even if the residence requirement were restricted, say, to emergency workers, the respondent would not, in my view, fall within that class of employees. Indeed, while the tasks performed by a police radio operator are undoubtedly important in the day to day administration of law enforcement, they do not seem to me to fall within the same class of essential services as, for example, the tasks performed by firefighters, ambulance workers, or police officers themselves. Consequently, I would reject the appellant's contentions in this regard.

89 Two final points should be made. First, as I mentioned briefly earlier, the residence requirement at issue stipulates not only that the respondent must be a resident of Longueuil at the time she is hired, but also that she must *remain* a resident for the duration of her employment. While it is not necessary to decide the matter (and I do not do so), it seems to me that a residence requirement that intruded to a lesser degree on an employee's right to choose where to live — say, by requiring only that she be a local resident at the time she is hired — might stand a better chance of surviving a s. 7 review, even in respect of an employee whose job does not by its nature provide any justification for imposing a residence requirement. This is because where the violation of the right at issue is less severe, the state interests required to justify it may, generally speaking, be commensurately less pressing.

90 Secondly, I have no doubt that certain kinds of municipal activities that have the effect of impinging upon the individual's right to choose where to live will, in the normal run of cases, nevertheless be justified on the basis of compelling public interests. For example, municipal zoning by-laws that designate certain areas of a city as "commercial" and other areas as "residential" undoubtedly have the effect of constraining the ability of individuals to choose where they wish to establish their homes. It would appear to me, however, that in most — if not all — such cases, zoning by-laws (and other similar measures) will survive s. 7 scrutiny of the kind undertaken in these reasons on the ground that they intrude upon personal autonomy to only a very limited degree, while promoting a highly significant collective goal; namely, maintaining social and commercial order at the local level. No similar goal is advanced by the imposition of the residence requirement in this case.

91 Having found that none of the "public interests" suggested by the appellant suffices on the facts of this case to justify infringing the respondent's right to choose where to live, I conclude that the residence requirement at issue here violates the respondent's right to liberty in a manner that does not conform to the principles of fundamental justice and, therefore, that it contravenes one of the constitutional guarantees enshrined in s. 7 of the *Canadian Charter*. I should explain that I see no need to examine the issues in this appeal under the rubric of s. 1 of the *Charter*, given that all the considerations pertinent to such an inquiry have, I think, already been canvassed in the discussion dealing with fundamental justice. Moreover, and as this Court has previously held, a violation of s. 7 will normally only be justified under s. 1 in the most exceptional of circumstances, if at all; see *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, *supra*, at p. 518, *per* Lamer J. (as he then was), and at pp. 523-24, *per* Wilson J. Such circumstances do not exist here.

92 **My conclusion that the residence requirement at issue violates s. 7 of the Canadian Charter is of course sufficient, in and of itself, to dispose of the appeal in favour of the respondent. Nonetheless, I propose to undertake an analysis of the claim asserted under s. 5 of the Quebec Charter for, in my opinion, the residence requirement at issue here is equally violative of that provision and cannot be saved by the limitation provision found in s. 9.1. I turn to an examination of those matters.**

**(3) Issue 2: Whether the Residence Requirement Violates Section 5 of the Quebec Charter and Whether, if it Does, it Can Be Saved by Section 9.1**

*(a) The Right to Privacy in Section 5*

93 Unlike the Canadian *Charter*, the scope of the Quebec *Charter* is not restricted to "government action". Consequently, no issues of application need be discussed. Furthermore, given that I have already addressed the nature of the right asserted by the respondent in my discussion of s. 7 of the Canadian *Charter* (i.e., by finding that it is a "right to choose where to live" and not a "right to work" as contended by the appellant), it is unnecessary to revisit that question here. Nor do I consider it necessary to make any further comments with respect to the issue of waiver, for while the appellant pointed out that this Court's decision in *Métropolitaine, cie d'assurance-vie c. Frenette*, [1992] 1 S.C.R. 647 (S.C.C.), establishes the *possibility* of waiving rights to privacy under s. 5 of the Quebec *Charter in some circumstances*, those circumstances do not exist in this case for the reasons given earlier in relation to waiver under the Canadian *Charter*. In light of these considerations, I propose to move directly to an examination of whether the appellant's imposition of the residence requirement violated the Quebec *Charter* by depriving the respondent of the ability to choose where to establish her home.

94 I should first mention in this regard that the respondent raised arguments in this Court not only in respect of s. 5 of the Quebec *Charter*, but also in respect of s. 1. For convenience, I repeat those provisions here, in French and English:

1. Tout être humain a droit à la vie ainsi qu'à la sûreté, à l'intégrité et à la liberté de sa personne.

Il possède également la personnalité juridique.

5. Tout personne a droit au respect de sa vie privée.

1. Every human being has a right to life, and to personal security, inviolability and freedom.

He also possesses juridical personality.

5. Every person has a right to respect for his private life.

As regards s. 5, the respondent contended that choosing where to live is a fundamentally personal decision, falling within the ambit of the "private life" protected by that provision. As regards s. 1, the respondent similarly alleged that the right to choose where to establish one's home falls within the scope of the right to "freedom".

95 Were there not another provision of the Quebec *Charter* aimed more directly at guaranteeing protection for individuals' private spheres of life, I would have had considerable sympathy for the respondent's s. 1 argument. It seems to me, however, that in enacting s. 5 in addition to s. 1, the Quebec legislator expressly contemplated the importance of protecting matters of a fundamentally private or personal nature, and deemed it appropriate to provide specific protection for them. In light of this, I am of the view that matters involving personal autonomy and privacy — such as choosing where to establish one's home — will normally be more appropriately addressed under s. 5. This is not necessarily to say that s. 1 does not protect personal autonomy at all; rather, it is simply to say that since s. 5 is, by its very terms, aimed directly at protecting individuals' private lives, matters that implicate privacy and personal autonomy will generally be better dealt with there. Since I am of the view that the right asserted by the respondent in this case is protected by s. 5, I find it unnecessary to address the arguments made in respect of s. 1.

96 I turn, then, to the parties' submissions in respect of s. 5. The appellant, along with the *mis en cause*, argued that s. 5 found no application in the present case because it protects only (a) a very limited class of interests related directly to the individual himself or herself (such as physical image) and (b) certain kinds of confidential information (such as medical records or health status), but that it does not protect what I have described as a narrow sphere of personal autonomy. The respondent, by contrast, argued that the notion of "private life" ("*vie privée*") implicated by s. 5 has yet

to be fully determined, that it should be found to include a limited sphere of personal autonomy with respect to personal decision-making, and that that sphere of autonomy should, in turn, be found to include the right to choose where to establish one's home.

97 The Quebec courts have clearly recognized that, in appropriate cases, such things as confidential or personal information will be found to enjoy the protection of s. 5 of the Quebec *Charter*; see, e.g., *Reid c. Belzile*, [1980] C.S. 717 (C.S. Que.), and *Centre local de services communautaires de l'Érable c. Lambert*, [1981] C.S. 1077 (C.S. Que.) (both dealing with medical records); *Cohen c. Queenswear International Ltd.*, [1989] R.R.A. 570 (Que. C.S.) (dealing with photographic image); and *Valiquette c. Gazette (The)* (1996), [1997] R.J.Q. 30 (C.A. Que.) (protecting personal information concerning state of health from becoming public); see also P. A. Molinari and P. Trudel, "Le droit au respect de l'honneur, de la réputation et de la vie privée: aspects généraux et applications", in *Formation permanente du Barreau du Québec, Application des Chartes des droits et libertés en matière civile* (1988), 197. I have no doubt that the decisions mentioned, so far as they go, accurately express part of what is captured within the scope of a right to "respect for one's private life". In my view, however, the respondent is correct in claiming that the ambit of the right to privacy has not yet been fully delineated and that other aspects of "private life" may, as cases arise, be found to enjoy the protection of s. 5. In my view, one of those other aspects is that narrow sphere of personal autonomy within which inherently private choices are made.

98 This view finds confirmation, *inter alia*, in *Gazette (The)*, *supra*, at p. 36, where Michaud C.J.Q. (speaking for a unanimous panel of the Quebec Court of Appeal) stated:

[TRANSLATION]

The right to one's private life, which is considered one of the most fundamental of the personality rights ... has still not been formally defined.

It is possible, however, to identify the components of the right to respect for one's private life, which are fairly specific. What is involved is a right to anonymity and privacy, a right to autonomy in structuring one's personal and family life and a right to secrecy and confidentiality. ... [Emphasis added; citations omitted.]

I endorse the views expressed by Michaud C.J.Q. and find, accordingly, that s. 5 of the Quebec *Charter* protects, among other things, the right to take fundamentally personal decisions free from unjustified external interference. But as in the case of the Canadian *Charter*, where I found that the sphere of autonomy protected by the liberty interest in s. 7 is narrowly circumscribed, I am of the view that the scope of decisions falling within the sphere of autonomy protected by s. 5 is similarly limited; viz., only those choices that are of a fundamentally private or inherently personal nature will be protected.

99 Having found that the right to make fundamentally personal decisions is protected by s. 5, the next question is whether choosing where to live qualifies as one of those decisions. For the reasons expressed in relation to s. 7 of the Canadian *Charter*, I am of the view that it does, and I do not propose to repeat my earlier comments here. Suffice it to say that by virtue of both the intimately personal considerations that factor into one's choice as to where to live and the very significant effects that choice inevitably has on one's personal affairs, the right to be free from unjustified interference in making a decision as to where to establish and maintain one's home seems to me to fall squarely within the scope of the Quebec *Charter's* guarantee of "respect for one's private life". Since the residence requirement imposed by the appellant essentially precluded the respondent from making that choice freely, it violates s. 5.

100 This conclusion draws significant support from the majority decision of Gendreau J.A. in *John Labatt, supra*, upon which Gendreau J.A. himself relied in rendering his judgment in the present case. There, the respondent was required to move with his family from Quebec City to Montreal as a term of a promotion he was given within the management of the appellant brewery. While the respondent himself moved to Montreal, his family did not join him and, after a number of months, he was fired on the ground that he had failed to comply with the residence requirement in his contract. Gendreau

J.A. held that the residence requirement was both contrary to public policy and violative of s. 5 of the Quebec *Charter*. In making his findings in respect of the latter ground, he stated, at p. 79:

[TRANSLATION]

I do not believe that the right to one's private life set out in the Charter cannot include protection of the type and degree of cohabitation chosen by spouses and their children. In other words, where an employer imposes the location of the conjugal home and requires spouses and their children to live together more or less all of the time out of a concern for image and greater efficiency, it seems to me that this interferes with the protection of private life as defined in the Charter, in relation to the employee, the employee's spouse and each of the employee's children, and is therefore prohibited.

101 Baudouin J.A. found that *John Labatt* could be distinguished from this case on the basis that, unlike the residence requirement at issue there, the residence requirement here does not apply to anyone other than the respondent. With respect, I disagree. While the residence requirement at issue in *John Labatt* did apply explicitly to the respondent's family (and, in that sense, differed from the one at issue here), the gist of the respondent's claim in that case was, nonetheless, exactly the same as that of the respondent's here; namely, that by imposing a residence requirement, the respective employers in each case have invaded a sphere of personal autonomy within which individuals must be left to make their own fundamentally private choices. Indeed, to find as Baudouin J.A. did that the respondent in *John Labatt* could benefit from s. 5 but that the respondent in this case cannot would, in my view, amount to finding that residence requirements imposed only on employees themselves do not violate the "right to choose where to live" while those imposed on the employee and his or her family do. Again, with respect, I see no basis for this distinction.

102 For all these reasons, I am of the view that the residence requirement imposed by the appellant violates the respondent's right to respect for her private life, enshrined in s. 5 of the Quebec *Charter*. I will now examine whether that violation can be justified under s. 9.1.

(b) Section 9.1

103 Section 9.1 of the Quebec *Charter* reads as follows in French and English:

**9.1** Les libertés et droits fondamentaux s'exercent dans le respect des valeurs démocratiques, de l'ordre public et du bien-être général des citoyens du Québec.

La loi peut, à cet égard, en fixer la portée et en aménager l'exercice.

**9.1** In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

As is evident from its very terms, s. 9.1 allows for the possibility that the "fundamental freedoms and rights" enshrined in the Quebec *Charter* may be subject to limits fixed by law. While it might be argued — I do not say how successfully — that the residence requirement at issue would not constitute a "law" for the purposes of s. 9.1, and while there appears to be some uncertainty in the academic literature as to whether the first paragraph of s. 9.1 can ever apply to limit rights even where no applicable "law" does so (see, e.g., F. Chevrette, "La disposition limitative de la Charte des droits et libertés de la personne: le dit et le non-dit", in *De la Charte québécoise des droits et libertés: origine, nature et défis* (1989), 71), I do not consider it necessary to pronounce specifically upon either of those issues. I take this view for the following reasons.

104 First, neither issue was explicitly addressed by the parties and, consequently, the Court has not had the benefit of counsel's submissions on the questions they raise. Putting that matter aside, however, and operating on the assumption that s. 9.1 properly applies here, I am of the opinion that it would not, in any event, avail the appellant in this case. As this Court unanimously held in *Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712 (S.C.C.), s. 9.1 of the Quebec *Charter*

is to be interpreted and applied in the same manner as s. 1 of the Canadian *Charter*. Thus, as the Court explained in *Ford*, the party seeking to justify a limitation on a plaintiff's Quebec *Charter* rights under s. 9.1 must bear the burden of proving both that such a limitation is imposed in furtherance of a legitimate and substantial objective and that the limitation is proportional to the end sought, inasmuch as (a) it is rationally connected to that end, and (b) the right is impaired as little as possible; see *Oakes, supra*; and *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.). Essentially for the reasons I gave in my discussion of fundamental justice in the context of s. 7 of the Canadian *Charter*, I am of the opinion that two of the objectives suggested by the appellant as the basis for imposing the residence requirement on the respondent in this case — namely, (i) the maintenance of a high standard of municipal services and (ii) the stimulation of local business and municipal taxation revenue — are not so significant or pressing as to justify overriding the respondent's s. 5 right to respect for her private life. As regards the third objective advanced by the appellant — i.e., ensuring that workers performing essential public services are physically proximate to their place of work — I am unable to conclude that the very broad residence requirement at issue is either rationally connected to the end sought to be achieved, or that it is proportional to it. Moreover, the specific evidence advanced by the appellant in respect of the justifications it offered was scant at best and, in my view, is incapable of permitting the appellant to discharge its burden of proof. I conclude, therefore, that the infringement of the respondent's right to choose where she wishes to live has not been justified under s. 9.1. Just as I found that the appeal should be dismissed on the basis that the residence requirement violates s. 7 of the Canadian *Charter*, then, I also find that it should be dismissed on the basis that that requirement unjustifiably violates the respondent's right to respect for her private life under s. 5 of the Quebec *Charter*. I turn now to consider the respondent's cross-appeal on the issue of what I have called the "interim damages".

## B. The Cross-Appeal

105 Before setting out my findings on this aspect of the case, it will be useful to restate briefly the pertinent facts and the issues they raise. On September 14, 1995, the Court of Appeal released its reasons for judgment and found, in addition to its holdings on the substantive issues, that because they had not been properly quantified, damages in respect of the income lost by the respondent during the period between the trial and the appeal should not be awarded. No specific holding to this effect was included in the formal judgment, however, and the respondent brought a motion for rectification, asking that the court amend its formal judgment and award the "interim damages". For its part, the Court of Appeal granted the motion on November 15, 1995 but amended its reasons in the manner set out earlier. In this Court, the appellant alleges that the Court of Appeal erred in issuing the rectificatory judgment in the first place, inasmuch as that judgment amounted to pronouncing upon a matter that was already *res judicata*, while the respondent claims that the Court of Appeal erred in three ways: (a) in refusing to allow her to introduce evidence at the appeal hearing in respect of the interim damages; (b) in failing to request that the parties submit additional argument in respect of the interim damages claim; and (c) in failing to remand the matter to the Superior Court to be decided there.

106 To my mind, the issues raised in the cross-appeal can be addressed relatively quickly. I begin with the appellant's submission in respect of whether the issuance of the rectificatory judgment itself constituted an error. As I mentioned when setting out the issues, this claim is, technically speaking, a part of the main appeal but, for convenience, I have chosen to address it here. The crux of the argument was that because the reasons of September 14 made sufficiently clear that no interim damages would be awarded, the Court of Appeal ought not to have issued its November 15 judgment at all. While I agree that Baudouin J.A.'s September 14 reasons make plainly clear the Court of Appeal's refusal to award the interim damages, I do not find that the rectificatory judgment of November 15 amounted to re-examining a matter that was already *res judicata*. As I see it, the November 15 reasons constituted nothing more than an attempt by the Court of Appeal to formalize with precision the conclusion it had reached some two months earlier. They did not reopen the matters at issue; nor did they alter in any way the substance of the judgment that had already been rendered. Consequently, I cannot conclude, as the appellant urges, that the issuance of the rectificatory judgment constituted reversible error.

107 I should note in this regard that what appeared to concern the appellant most about the November 15 reasons was the following passage from the addendum that the Court of Appeal sought to include in its September 14 judgment:

[TRANSLATION]

DISMISSES, on the ground that it is unenforceable, the conclusion in the notice of appeal...

without prejudice to any of the [respondent's] rights or remedies arising from this judgment. [Emphasis added.]

The respondent treated this passage as conferring upon her a right to pursue further recourses to recover the interim damages and, in this respect, the appellant viewed the rectificatory judgment as depriving it of a decision that had already been rendered in its favour. For my part, I do not read this passage in the manner advanced by the respondent. Indeed, to my mind, it simply serves to confirm that in formalizing its refusal to award the interim damages, the Court of Appeal did not want to be taken as having altered any findings it had made in its September 14 reasons. Read in this manner, the issuance of the rectificatory judgment did not have any detrimental effect on the legal position of the appellant.

108 As regards the respondent's submissions concerning how the Court of Appeal dealt with the interim damages issue — which are the matters truly raised in the cross-appeal itself — I am similarly unable to find any reversible error. In respect of the first claim (concerning the refusal of the Court of Appeal to admit the respondent's interim damages evidence during the appeal hearing itself), the Court of Appeal pointed out that the respondent could, in the course of the appeal proceedings, easily have presented evidence with respect to the quantum of the interim damages had she followed the proper procedures. Instead of doing so, however, the respondent simply attempted to introduce such evidence during the oral hearing itself, and then only after questions with respect to quantification had been raised by members of the court. As both the Court of Appeal and the appellant pointed out, allowing this evidence to be introduced at that stage would not have given the appellant ample opportunity to verify the figures the respondent claimed represented her losses. I cannot see how the Court of Appeal's refusal to permit the respondent to proceed in this manner could constitute reversible error.

109 Moreover, as the Court of Appeal itself explained in its September 14 reasons (*per* Baudouin J.A.), the respondent could have presented evidence in respect of the interim damages claim not only as part of the appeal itself but also at any time before judgment, pursuant to art. 199 of the *Code of Civil Procedure*, R.S.Q., c. C-25. Nearly a whole year elapsed between the oral hearing and the handing down of judgment — a period during which the respondent would, of course, have been on notice that the Court of Appeal lacked sufficient evidence upon which to calculate any interim damages award — and still no attempt to quantify the interim damages in accordance with the appropriate procedure was made. In light of these considerations, I cannot accept that the Court of Appeal's refusal to grant the interim damages was based on some procedural error on its part. Rather, it was based simply on the fact that no evidence as to quantum had ever been properly placed before it.

110 In respect of the second and third claims (concerning whether the Court of Appeal should either have requested submissions on the interim damages issue or remanded the matter to the Superior Court), the respondent relied largely on art. 523 *C.C.P.* which reads in relevant part as follows:

**523.** The Court of Appeal may, if the ends of justice so require, permit a party to amend his written proceedings, to implead a person whose presence is necessary, or even, in exceptional circumstances, to adduce, in such manner as it directs, indispensable new evidence.

It has all the powers necessary for the exercise of its jurisdiction and may make any order necessary to safeguard the rights of the parties. ...

The very wording of art. 523 *C.C.P.* makes clear that it confers a *discretion* on the Court of Appeal to act in the interests of justice and to make whatever orders it deems necessary in order to safeguard the rights of the parties; see *Construction Gilles Paquette Ltée c. Entreprises Végo Ltée*, [1997] 2 S.C.R. 299 (S.C.C.). In the present case, the Court of Appeal simply chose not to exercise that discretion. Particularly given the clear opportunities the respondent had to present evidence in respect of her interim damages, I am not persuaded this Court would be justified in interfering with that decision.

## V. Conclusions

111 Based on my findings that the residence requirement at issue unjustifiably violates both s. 7 of the Canadian Charter and s. 5 of the Quebec Charter, I would dismiss the appeal with costs. I would also dismiss the cross-appeal, but make no order as to costs.

**Cory J. (Gonthier and Iacobucci JJ. concurring):**

112 In his carefully considered reasons, Justice La Forest rests his decision primarily upon his conclusion that the resolution of the City of Longueuil requiring employees of the city to reside within its boundaries unjustifiably infringes s. 7 of the *Canadian Charter of Rights and Freedoms*.

113 Although I agree with the conclusion reached by La Forest J. to dismiss the appeal, I would not base it upon an infringement of the *Canadian Charter*.

114 In the Quebec Court of Appeal, [1995] R.J.Q. 2561, 31 M.P.L.R. (2d) 130 (C.A. Que.), the judges were unanimous in their conclusion that the residence requirement was invalid but arrived at the result in different ways. Baudouin J.A. found that there was no infringement of a right protected by the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, and that s. 7 of the *Canadian Charter* was not applicable. He concluded nevertheless that, under the general law as a matter of public order, in the absence of some pressing and overriding concern persons must have the right to live where they wish. The residence requirement was not justified and contravened public order by restricting employees in choosing their place of residence. It was on this basis that he found the residential requirement to be invalid.

115 Fish J.A. was in substantial agreement with the reasons of Baudouin J.A. but determined that the Quebec Charter did not need to be considered.

116 Gendreau J.A. based his decision upon s. 5 of the Quebec Charter which provides:

5. Every person has a right to respect for his private life.

117 Gendreau J.A., correctly in my view, relied upon his reasons given on behalf of the majority in *Villa c. John Labatt Ltée* (1994), [1995] R.J.Q. 73 (C.A. Que.), in concluding that the residence requirement infringed s. 5 of the Quebec Charter. Similarly, La Forest J., in the course of his scholarly reasons, found that the resolution of the City of Longueuil was invalid because it violated s. 5 of the Quebec Charter. I am in complete agreement with his reasoning on this issue. For me the infringement of s. 5 of the Quebec Charter provides a good and sufficient basis for dismissing this appeal and I would not consider the application of s. 7 of the *Canadian Charter*.

118 Although I would not consider s. 7 of the *Canadian Charter*, I cannot adopt the conclusion of the Court of Appeal that it is simply not applicable. This Court has recognized that the Charter can be applicable to municipal by-laws. See for example *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 (S.C.C.). Yet I would prefer to withhold consideration of the application of s. 7 to a situation such as that presented in this case. The case raises important questions as to the scope of s. 7. Further, its application may have a significant effect upon municipalities. Before reaching a conclusion on an issue that need not be considered in determining this appeal I would like to hear further argument with regard to it including the submissions of interested parties and intervening Attorneys General of the provinces and Territories. Those submissions might well serve to change, vary or modify the approach the Court will take on this issue. Without hearing further argument on this question I would prefer not to hazard an opinion upon it.

119 Like La Forest J. I would dismiss the cross-appeal and make no order as to costs.

*Order accordingly.*

*Ordonnance en conséquence.*

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**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** *Birak v. Canada* (Minister of Citizenship and Immigration) | 2015 FC 1227, 2015 CF 1227, 2015 CarswellNat 5667, 2015 CarswellNat 9626, 260 A.C.W.S. (3d) 218 | (F.C., Oct 29, 2015)

1999 CarswellNat 1124  
Supreme Court of Canada

*Baker v. Canada* (Minister of Citizenship & Immigration)

1999 CarswellNat 1124, 1999 CarswellNat 1125, [1999] 2 S.C.R. 817, [1999] F.C.J. No. 39, [1999] S.C.J. No. 39, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1 Imm. L.R. (3d) 1, 243 N.R. 22, 89 A.C.W.S. (3d) 777, J.E. 99-1412

**Mavis Baker, Appellant v. Minister of Citizenship and Immigration, Respondent and The Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees and the Charter Committee on Poverty Issues, Interveners**

L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache, Binnie, JJ.A.

Heard: November 4, 1998

Judgment: July 9, 1999

Docket: 25823

Proceedings: reversing *Baker v. Canada (Minister of Citizenship & Immigration)* (1996), [1996] F.C.J. No. 1726, [1996] F.C.J. No. 1570, 1996 CarswellNat 2693, 1996 CarswellNat 2052, [1997] 2 F.C. 127, 122 F.T.R. 320 (note), 207 N.R. 57, 142 D.L.R. (4th) 554 (Fed. C.A.); affirming *Baker v. Canada (Minister of Citizenship & Immigration)* (1995), [1995] F.C.J. No. 1441, 1995 CarswellNat 1244, 101 F.T.R. 110, 31 Imm. L.R. (2d) 150 (Fed. T.D.)

Counsel: *Roger Rowe* and *Rocco Galanti*, for Appellant.

*Urszula Kaczmarczyk* and *Cheryl D. Mitchell*, for Respondent.

*Sheena Scott* and *Sharryn Aiken*, for Interveners The Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees.

*John Terry* and *Craig Scott*, for Intervener the Charter Committee on Poverty Issues.

*Barbara Jackman* and *Marie Chen*, for Intervener the Canadian Council of Churches.

Subject: Immigration; Public; Human Rights

**Annotation**

There is a lot of clarification material resulting from this unusual decision. One article entitled the "Shame of Shah" is presently being engrossed by the editor. I say "shame" because of the extraordinary encroachment on the Canadian notion of fairness created by the Federal Court of Appeal in *Muliadi v. Canada (Minister of Employment & Immigration)*, 18 Admin. L.R. 243, 66 N.R. 8, [1986] 2 F.C. 205 (Fed. C.A.), and which was so casually proclaimed by the Court of Appeal in *Shah v. Canada (Minister of Employment & Immigration)* (1994), 29 Imm. L.R. (2d) 82, 170 N.R. 238, 81 F.T.R. 320 (note) (Fed. C.A.). It was for the Supreme Court of Canada in *Baker* to lead the way in disposing of this negative virus manifested in *Shah*. If we are going to have an *Immigration Act* inviting applications with signposts such as "Humanitarian and Compassionate," it follows that there is not a limited duty of fairness. The *Shah* dictum of the three Court of Appeal judges was unceremoniously and quickly dumped by the Supreme Court of Canada, but not before this backward looking case was approved without hardly a murmur of dissent in

more than a hundred cases that were to follow *Shah*. That is its shame. For if so noble a doctrine of fairness is said to exist by the Supreme Court, how is it that no one else could see it? What limitations were imposed on the juridical eyes and conscience of our jurists not to possess a similar vision that to the Supreme Court was so evident?

One of the corollary aspects of this case is that: where there is no fairness, it allows bias, prejudice and unfairness to creep in. Look at the findings of the Supreme Court of Canada in *Baker* at para. 48:

In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or the weighing of the particular circumstance of the case *free from stereotypes* . . . His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status.

[Emphasis mine]

The learned L'Heureux Dubé J. goes on to deal with the appropriate test of a choice of three when dealing with applications under s. 114(2) of the *Immigration Act*, and the test is reasonableness simpliciter.

She goes on to find that it must be reasonable to deal with the interests of the children of the applicant and that they are nowhere dealt with by the decision-makers. She states, at para. 65:

. . . I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer . . .

and later, at para. 76:

Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow the appeal.

Another matter arising out of *Baker* now being argued by justice lawyers is that the reasons and, indeed, the CAIPS notes can now be read in from the record as evidence. Justice lawyers are using any argument to avoid the making of an affidavit in judicial review applications and thus exposing immigration officers to cross-examination.

This matter was convincingly and clearly dealt with by the Court of Appeal in *Wang v. Canada (Minister of Employment & Immigration)*, 12 Imm. L.R. (2d) 178, 121 N.R. 243, [1991] 2 F.C. 165, 40 F.T.R. 239 (note) (Fed. C.A.).

However, since the notes of Lorenz and the CAIPS notes were read by the court in the *Baker* case, can it be said that the law in *Wang* is now being overruled? I would submit not.

In a judicial review application, under the rules, an applicant can call for the record, and indeed it is often so done. This is not unlike productions required by parties, which occur in a superior court of a province. In such cases, when called upon under the rules, a defendant, or indeed a plaintiff, must submit to production and make an affidavit that the documents produced are totally those that are within the possession and power of the litigant to produce.

However, the productions are not evidence for the party producing such documentation, as he must prove the documents that are produced by him and not otherwise admitted. But this does not prevent the other party from producing and putting such documents into evidence, as these productions from the opponents' point of view constitute an admission.

Therefore, an applicant can put in such record as he requires without proving anything, but this does not mean that the respondent can call up such record as he requires, as evidence of the contents therein. It must be provided by affidavit of one who has personal knowledge.

Moreover, if the document is one that is necessary for the respondent to call into evidence and he fails to do so, then there is an adverse inference to be taken that, had he called the evidence in the ordinary way, it would not have been in his favour.

### Commentaire

Cette décision particulière clarifie plusieurs éléments. Un article intitulé « La honte de Shah » est en voie de rédaction par l'éditeur. Je dis « honte » à cause de l'empiètement extraordinaire sur la notion canadienne d'équité créée par la Cour fédérale d'appel dans la cause *Muliadi c. Canada (Ministre de l'Emploi & de l'Immigration)*, 18 Admin. L.R. 243, 66 N.R. 8, [1986] 2 C.F. 205 (C.A. féd.) et qui fut suivie sans retenue par la Cour d'appel dans *Shah c. Canada (Ministre de l'Emploi & de l'Immigration)*, [1994] 29 Imm. L.R. (2d) 82, 170 N.R. 238, 81 F.T.R. 320 (note) (C.A. féd.). Il revenait à la Cour suprême du Canada, dans *Baker*, de disposer de ce virus négatif établi dans l'affaire *Shah*. Si nous avons une *Loi sur l'immigration* invitant les demandes en affichant des motifs « humanitaires et de compassion », il s'ensuit qu'il n'existe pas de limite à l'équité. La maxime de *Shah* établie par trois juges de la Cour d'appel fut écartée rapidement et sans cérémonie par la Cour suprême du Canada, mais pas avant que ce jugement, qui représentait un pas en arrière, n'ait été appliqué dans une centaine de cas, sans même provoquer un murmure de dissidence. C'est là sa honte. Puisque cette noble doctrine de l'équité fut reconnue par la Cour suprême du Canada, comment se fait-il que personne d'autre ne l'ait reconnue? Quelle limite fut imposée sur la perception et la conscience juridique de nos juristes pour qu'ils ne possèdent pas une vision qui semble si évidente à la Cour suprême du Canada?

Un des aspects corollaires de cette cause est : lorsqu'il n'y a pas d'équité, cela fait place aux préjugés, à l'arbitraire et à l'injustice. Lisons cet énoncé du par. 48 de l'arrêt *Baker* de la Cour suprême du Canada :

À mon avis, les membres bien informés de la communauté percevraient la partialité dans les commentaires de l'agent Lorenz. Ses notes, et la façon dont elles sont rédigées, ne témoignent ni d'un esprit ouvert ni d'une *absence de stéréotypes* dans l'évaluation des circonstances particulières de l'affaire. . . . L'utilisation de majuscules par l'agent pour souligner le nombre des enfants de Mme Baker peut également indiquer au lecteur que c'était là une raison de lui refuser sa demande.

[notre emphase]

La savante Juge L'Heureux-Dubé établit la règle de trois appropriée lorsque confrontée à l'application de l'art. 114(2) de la *Loi sur l'immigration* et cette règle est établie simplement sur l'aspect raisonnable de la décision.

Elle détermine qu'il est raisonnable de considérer l'intérêt des enfants de la requérante et que les décideurs ne traitaient pas de cet aspect. Elle énonce, au par. 65 :

. . . j'estime que le défaut d'accorder de l'importance et de la considération à l'intérêt des enfants constitue un exercice déraisonnable du pouvoir discrétionnaire conféré par l'article, même s'il faut exercer un degré élevé de retenue envers la décision de l'agent d'immigration. . . .

Plus loin, au para. 76 :

En conséquence, parce qu'il y a eu manquement aux principes d'équité procédurale en raison d'une crainte raisonnable de partialité, et parce que l'exercice du pouvoir en matière humanitaire était déraisonnable, je suis d'avis d'accueillir le présent pourvoi.

Un autre aspect émanant de l'affaire *Baker* est maintenant plaidé par les avocats du ministère de la justice est à l'effet que les motifs, et bien sûr les notes des CAIPS, peuvent être présentées à titre de preuve. Les avocats du ministère utilisent tous les arguments pour éviter le dépôt d'affidavits lors des demandes de contrôle judiciaire pour ainsi éviter de soumettre les officiers à un contre-interrogatoire.

Cette question fut réglée de façon claire et convaincante par la Cour d'appel dans l'affaire *Wang c. Canada (Ministre de l'Emploi & de l'Immigration)*, 12 Imm. L.R. (2d) 178, 121 N.R. 243, [1991] 2 C.F. 165, 40 F.T.R. 239 (note) (C.A. féd.).

Par contre, pouvons-nous prétendre que la règle établie dans *Wang* est maintenant renversée puisque les notes de Lorenz et des CAIPS furent lues par la Cour dans l'affaire *Baker*? Je soumets que non.

Selon les règles, le requérant peut demander le dépôt du dossier lors d'une demande de contrôle judiciaire et ceci se fait fréquemment. Cet aspect est similaire à la production de documents par les parties lors de procédures devant la Cour supérieure d'une province. Dans ce cas, selon les règles, le défendeur ou le demandeur doit déposer un affidavit à l'effet que les documents produits représentent la totalité des pièces qu'il a en sa possession et qu'il peut produire.

Par ailleurs, le dépôt de documents ne constitue pas de la preuve pour la partie qui les produit puisqu'elle doit en établir la preuve s'ils ne sont pas autrement admis. Cela n'empêche pas l'autre partie au litige de produire ces documents en preuve puisque leur dépôt par l'adversaire constitue une admission.

En conséquence, un requérant peut déposer un tel dossier sans prouver quoi que ce soit. Mais cela ne veut pas dire que l'intimé peut invoquer ce dossier, s'il le désire, pour en établir le contenu. Ceci doit être fait par voie d'affidavit de la part de la personne qui a la connaissance personnelle des faits.

Cecil L. Rotenberg, Q.C.

APPEAL by applicant from judgment reported at *Baker v. Canada (Minister of Citizenship & Immigration)* (1996), [1996] F.C.J. No. 1726, [1996] F.C.J. No. 1570, 1996 CarswellNat 2693, 1996 CarswellNat 2052, [1997] 2 F.C. 127, 122 F.T.R. 320 (note), 207 N.R. 57, 142 D.L.R. (4th) 554 (Fed. C.A.), dismissing applicant's appeal from judgment dismissing application for judicial review of immigration officer's refusal of application under s. 114(2) of *Immigration Act* for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada.

POURVOI de la requérante à l'encontre du jugement publié à (1996), 142 D.L.R. (4th) 554, 207 N.R. 57, 122 F.T.R. 320 (note), [1997] 2 F.C. 127 (C.A. Féd.), rejetant l'appel de la requérante du jugement publié à (1995), 31 Imm. L.R. (2d) 150, 101 F.T.R. 110 (C.Féd. (1re inst.)), rejetant sa demande de contrôle judiciaire du refus, par l'agent d'immigration, d'exercer son pouvoir discrétionnaire en vertu du par. 114(2) de la *Loi sur l'immigration* pour des motifs d'ordre humanitaire.

***L'Heureux-Dubé J. (Gonthier, McLachlin, Bastarache and Binnie JJ. concurring):***

1 Regulations made pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2, empower the respondent Minister to facilitate the admission to Canada of a person where the Minister is satisfied, owing to humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted. At the centre of this appeal is the approach to be taken by a court to judicial review of such decisions, both on procedural and substantive grounds. It also raises issues of reasonable apprehension of bias, the provision of written reasons as part of the duty of fairness, and the role of children's interests in reviewing decisions made pursuant to s. 114(2).

**I. Factual Background**

2 Mavis Baker is a citizen of Jamaica who entered Canada as a visitor in August of 1981 and has remained in Canada since then. She never received permanent resident status, but supported herself illegally as a live-in domestic worker for 11 years. She has had four children (who are all Canadian citizens) while living in Canada: Paul Brown, born in 1985, twins Patricia and Peter Robinson, born in 1989, and Desmond Robinson, born in 1992. After Desmond was born, Ms.

Baker suffered from post-partum psychosis and was diagnosed with paranoid schizophrenia. She applied for welfare at that time. When she was first diagnosed with mental illness, two of her children were placed in the care of their natural father, and the other two were placed in foster care. The two who were in foster care are now again under her care, since her condition has improved.

3 The appellant was ordered deported in December 1992, after it was determined that she had worked illegally in Canada and had overstayed her visitor's visa. In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residence outside Canada, based upon humanitarian and compassionate considerations, pursuant to s. 114(2) of the *Immigration Act*. She had the assistance of counsel in filing this application, and included, among other documentation, submissions from her lawyer, a letter from her doctor, and a letter from a social worker with the Children's Aid Society. The documentation provided indicated that although she was still experiencing psychiatric problems, she was making progress. It also stated that she might become ill again if she were forced to return to Jamaica, since treatment might not be available for her there. Ms. Baker's submissions also clearly indicated that she was the sole caregiver for two of her Canadian-born children, and that the other two depended on her for emotional support and were in regular contact with her. The documentation suggested that she too would suffer emotional hardship if she were separated from them.

4 The response to this request was contained in a letter, dated April 18, 1994, and signed by Immigration Officer M. Caden, stating that a decision had been made that there were insufficient humanitarian and compassionate grounds to warrant processing Ms. Baker's application for permanent residence within Canada. This letter contained no reasons for the decision.

5 Upon request of the appellant's counsel, she was provided with the notes made by Immigration Officer G. Lorenz, which were used by Officer Caden when making his decision. After a summary of the history of the case, Lorenz's notes read as follows:

PC is unemployed - on Welfare. No income shown - no assets. Has four Cdn.-born children- four other children in Jamaica- HAS A TOTAL OF EIGHT CHILDREN

Says only two children are in her "direct custody". (No info on who has ghe [*sic*] other two).

There is nothing for her in Jamaica - hasn't been there in a long time - no longer close to her children there - no jobs there - she has no skills other than as a domestic - children would suffer - can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 - is now an outpatient and is improving. If sent back will have a relapse.

Letter from Children's Aid - they say PC has been diagnosed as a paranoid schizophrenic. - children would suffer if returned -

Letter of Aug. '93 from psychiatrist from Ont. Govm't. Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well - deportation would be an extremely stressful experience.

Lawyer says PS [*sic*] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc.

This case is a catastrophe [*sic*]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her

FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.

There is also a potential for violence - see charge of " assault with a weapon" [Capitalization in original.]

6 Following the refusal of her application, Ms. Baker was served, on May 27, 1994, with a direction to report to Pearson Airport on June 17 for removal from Canada. Her deportation has been stayed pending the result of this appeal.

## II. Relevant Statutory Provisions and Provisions of International Treaties

7 *Immigration Act*, R.S.C., 1985, c. I-2

**82.1** (1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court — Trial Division.

**83.** (1) A judgment of the Federal Court — Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court — Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.

**114.** ...

(2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

*Immigration Regulations, 1978, SOR/78-172, as amended by SOR/93-44*

2.1 The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

*Convention on the Rights of the Child, Can. T.S. 1992 No. 3*

### Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

.....

### Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular

case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

### Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

### III. Judgments

#### *A. Federal Court -- Trial Division (1995), 101 F.T.R. 110 (Fed. T.D.)*

8 Simpson J. delivered oral reasons dismissing the appellant's judicial review application. She held that since there were no reasons given by Officer Caden for his decision, no affidavit was provided, and no reasons were required, she would assume, in the absence of evidence to the contrary, that he acted in good faith and made a decision based on correct principles. She rejected the appellant's argument that the statement in Officer Lorenz's notes that Ms. Baker would be a strain on the welfare system was not supported by the evidence, holding that it was reasonable to conclude from the reports provided that Ms. Baker would not be able to return to work. She held that the language of Officer Lorenz did not raise a reasonable apprehension of bias, and also found that the views expressed in his notes were unimportant, because they were not those of the decision-maker, Officer Caden. She rejected the appellant's argument that the *Convention on the Rights of the Child* mandated that the appellant's interests be given priority in s. 114(2) decisions, holding that the Convention did not apply to this situation, and was not part of domestic law. She also held that the evidence showed the children were a significant factor in the decision-making process. She rejected the appellant's submission that the Convention gave rise to a legitimate expectation that the children's interests would be a primary consideration in the decision.

9 Simpson J. certified the following as a serious question of general importance under s. 83(1) of the *Immigration Act*: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the Immigration Act?"

#### *B. Federal Court of Appeal (1996), [1997] 2 F.C. 127 (Fed. C.A.)*

10 The reasons of the Court of Appeal were delivered by Strayer J.A. He held that pursuant to s. 83(1) of the *Immigration Act*, the appeal was limited to the question certified by Simpson J. He also rejected the appellant's request to challenge the constitutional validity of s. 83(1). Strayer J.A. noted that a treaty cannot have legal effect in Canada unless implemented through domestic legislation, and that the Convention had not been adopted in either federal or provincial legislation. He held that although legislation should be interpreted, where possible, to avoid conflicts with Canada's international obligations, interpreting s. 114(2) to require that the discretion it provides for must be exercised in accordance with the Convention would interfere with the separation of powers between the executive and legislature. He held that such a principle could also alter rights and obligations within the jurisdiction of provincial legislatures. Strayer J.A. also rejected the argument that any articles of the Convention could be interpreted to impose an obligation upon the government to give primacy to the interests of the children in a proceeding such as deportation. He held that the deportation of a parent was not a decision "concerning" children within the meaning of article 3. Finally, Strayer J.A. considered the appellant's argument based on the doctrine of legitimate expectations. He noted that because the doctrine does not create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) would be to create a substantive right, the doctrine did not apply.

### III. Issues

11 Because, in my view, the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised by the appellant and the interveners who supported her position. The issues raised by this appeal are therefore as follows:

- (1) What is the legal effect of a stated question under s. 83(1) of the *Immigration Act* on the scope of appellate review?
- (2) Were the principles of procedural fairness violated in this case?
  - (i) Were the participatory rights accorded consistent with the duty of procedural fairness?
  - (ii) Did the failure of Officer Caden to provide his own reasons violate the principles of procedural fairness?
  - (iii) Was there a reasonable apprehension of bias in the making of this decision?
- (3) Was this discretion improperly exercised because of the approach taken to the interests of Ms. Baker's children?

I note that it is the third issue that raises directly the issues contained in the certified question of general importance stated by Simpson J.

### IV. Analysis

#### A. Stated Questions Under s. 83(1) of the *Immigration Act*

12 The Court of Appeal held, in accordance with its decision in *Liyanagamage v. Canada (Secretary of State)* (1994), 176 N.R. 4 (Fed. C.A.), that the requirement, in s. 83(1), that a serious question of general importance be certified for an appeal to be permitted restricts an appeal court to addressing the issues raised by the certified question. However, in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) at para. 25, this Court held that s. 83(1) does not require that the Court of Appeal address only the stated question and issues related to it:

The certification of a "question of general importance" is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not the certified question.

Rothstein J. noted in *Ramoutar v. Canada (Minister of Employment & Immigration)*, [1993] 3 F.C. 370 (Fed. T.D.), that once a question has been certified, all aspects of the appeal may be considered by the Court of Appeal, within its jurisdiction. I agree. The wording of s. 83(1) suggests, and *Pushpanathan* confirms, that if a question of general importance has been certified, this allows for an appeal from the judgment of the Trial Division which would otherwise not be permitted, but does not confine the Court of Appeal or this Court to answering the stated question or issues directly related to it. All issues raised by the appeal may therefore be considered here.

### ***B. The Statutory Scheme and the Nature of the Decision***

13 Before examining the various grounds for judicial review, it is appropriate to discuss briefly the nature of the decision made under s. 114(2) of the *Immigration Act*, the role of this decision in the statutory scheme, and the guidelines given by the Minister to immigration officers in relation to it.

14 Section 114(2) itself authorizes the Governor in Council to authorize the Minister to exempt a person from a regulation made under the *Act*, or to facilitate the admission to Canada of any person. The Minister's power to grant an exemption based on humanitarian and compassionate (H & C) considerations arises from s. 2.1 of the *Immigration Regulations*, which I reproduce for convenience:

The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

For the purpose of clarity, I will refer throughout these reasons to decisions made pursuant to the combination of s. 114(2) of the Act and s. 2.1 of the Regulations as "H & C decisions".

15 Applications for permanent residence must, as a general rule, be made from outside Canada, pursuant to s. 9(1) of the Act. One of the exceptions to this is when admission is facilitated owing to the existence of compassionate or humanitarian considerations. In law, pursuant to the *Act* and the regulations, an H & C decision is made by the Minister, though in practice, this decision is dealt with in the name of the Minister by immigration officers: see, for example, *Jimenez-Perez v. Canada (Minister of Employment & Immigration)*, [1984] 2 S.C.R. 565 (S.C.C.), at p. 569. In addition, while in law, the H & C decision is one that provides for an *exemption* from regulations or from the *Act*, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections.

16 Immigration officers who make H & C decisions are provided with a set of guidelines, contained in chapter 9 of the *Immigration Manual: Examination and Enforcement*. The guidelines constitute instructions to immigration officers about how to exercise the discretion delegated to them. These guidelines are also available to the public. A number of statements in the guidelines are relevant to Ms. Baker's application. Guideline 9.05 emphasizes that officers have a duty to decide which cases should be given a favourable recommendation, by carefully considering all aspects of the case, using their best judgment and asking themselves what a reasonable person would do in such a situation. It also states that although officers are not expected to "delve into areas which are not presented during examination or interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated".

17 The guidelines also set out the bases upon which the discretion conferred by s. 114(2) and the regulations should be exercised. Two different types of criteria that may lead to a positive s. 114(2) decision are outlined -- public policy

considerations and humanitarian and compassionate grounds. Immigration officers are instructed, under guideline 9.07, to assure themselves, first, whether a public policy consideration is present, and if there is none, whether humanitarian and compassionate circumstances exist. Public policy reasons include marriage to a Canadian resident, the fact that the person has lived in Canada, become established, and has become an "illegal de facto resident", and the fact that the person may be a long-term holder of employment authorization or has worked as a foreign domestic. Guideline 9.07 states that humanitarian and compassionate grounds will exist if "unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada". The guidelines also directly address situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person's home country should also be considered.

### ***C. Procedural Fairness***

18 The first ground upon which the appellant challenges the decision made by Officer Caden is the allegation that she was not accorded procedural fairness. She suggests that the following procedures are required by the duty of fairness when parents have Canadian children and they make an H & C application: an oral interview before the decision-maker, notice to her children and the other parent of that interview, a right for the children and the other parent to make submissions at that interview, and notice to the other parent of the interview and of that person's right to have counsel present. She also alleges that procedural fairness requires the provision of reasons by the decision-maker, Officer Caden, and that the notes of Officer Lorenz give rise to a reasonable apprehension of bias.

19 In addressing the fairness issues, I will consider first the principles relevant to the determination of the content of the duty of procedural fairness, and then address Ms. Baker's arguments that she was accorded insufficient participatory rights, that a duty to give reasons existed, and that there was a reasonable apprehension of bias.

20 Both parties agree that a duty of procedural fairness applies to H & C decisions. The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.) at p. 653. Clearly, the determination of whether an applicant will be exempted from the requirements of the Act falls within this category, and it has been long recognized that the duty of fairness applies to H& C decisions: *Sobrie v. Canada (Minister of Employment & Immigration)* (1987), 3 Imm. L.R. (2d) 81 (Fed. T.D.) at p. 88; *Said v. Canada (Minister of Employment & Immigration)* (1992), 6 Admin. L.R. (2d) 23 (Fed. T.D.); *Shah v. Canada (Minister of Employment & Immigration)* (1994), 170 N.R. 238 (Fed. C.A.).

#### *(1) Factors Affecting the Content of the Duty of Fairness*

21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.) at p. 682, "the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight* at pp. 682-83; *Cardinal, supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (S.C.C.), *per Sopinka J.*

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight, supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface, supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (Eng. C.A.) at p. 118; *Syndicat des employés de production du Québec & de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 (S.C.C.) at p. 896, *per Sopinka J.*

24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface, supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.) at p. 1113:

A high standard of justice is required when the right to continue in one's profession or employment is at stake.... A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council* (1993), [1994] 1 All E.R. 651 (Eng. Q.B.), at p. 667:

In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin*, [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface, supra*, at p. 1204; *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.) at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship & Immigration)* (1995), 33 Imm. L.R. (2d) 57 (Fed. T.D.); *Mercier-Néron v. Canada (Minister of National Health & Welfare)* (1995), 98 F.T.R. 36 (Fed. T.D.); *Bendahmane v. Canada (Minister of Employment & Immigration)*, [1989] 3 F.C. 16 (Fed. C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive

procedural rights than would otherwise be accorded: D.J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Soc. Pol'y* 282, at p. 297; *Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994), 76 F.T.R. 1 (Fed. T.D.). Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: *Brown and Evans, supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *I.W.A. Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 (S.C.C.), *per* Gonthier J.

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

### (2) *Legitimate Expectations*

29 I turn now to an application of these principles to the circumstances of this case, to determine whether the procedures followed respected the duty of procedural fairness. I will first determine whether the duty of procedural fairness that would otherwise be applicable is affected, as the appellant argues, by the existence of a legitimate expectation based upon the text of the articles of the Convention and the fact that Canada has ratified it. In my view, however, the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms. Baker that when the decision on her H& C application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. This Convention is not, in my view, the equivalent of a government representation about how H& C applications will be decided, nor does it suggest that any rights beyond the participatory rights discussed below will be accorded. Therefore, in this case there is no legitimate expectation affecting the content of the duty of fairness, and the fourth factor outlined above therefore does not affect the analysis. It is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation.

### (3) *Participatory Rights*

30 The next issue is whether, taking into account the other factors related to the determination of the content of the duty of fairness, the failure to accord an oral hearing and give notice to Ms. Baker or her children was inconsistent with the participatory rights required by the duty of fairness in these circumstances. At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly. The procedure in this case consisted of a written application with supporting documentation, which was summarized by the junior officer (Lorenz), with a recommendation being made by that officer. The summary, recommendation, and material was then considered by the senior officer (Caden), who made the decision.

31 Several of the factors described above enter into the determination of the type of participatory rights the duty of procedural fairness requires in the circumstances. First, an H & C decision is very different from a judicial decision, since it involves the exercise of considerable discretion and requires the consideration of multiple factors. Second, its

role is also, within the statutory scheme, as an exception to the general principles of Canadian immigration law. These factors militate in favour of more relaxed requirements under the duty of fairness. On the other hand, there is no appeal procedure, although judicial review may be applied for with leave of the Federal Court — Trial Division. In addition, considering the third factor, this is a decision that in practice has exceptional importance to the lives of those with an interest in its result — the claimant and his or her close family members — and this leads to the content of the duty of fairness being more extensive. Finally, applying the fifth factor described above, the statute accords considerable flexibility to the Minister to decide on the proper procedure, and immigration officers, as a matter of practice, do not conduct interviews in all cases. The institutional practices and choices made by the Minister are significant, though of course not determinative factors to be considered in the analysis. Thus, it can be seen that although some of the factors suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model.

32 Balancing these factors, I disagree with the holding of the Federal Court of Appeal in *Shah, supra*, at p. 239, that the duty of fairness owed in these circumstances is simply "minimal". Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

33 However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said, supra*, at p. 30.

34 I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H& C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children's Aid Society and from her psychiatrist. These documents were before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

#### (4) *The Provision of Reasons*

35 The appellant also submits that the duty of fairness, in these circumstances, requires that reasons be given by the decision-maker. She argues either that the notes of Officer Lorenz should be considered the reasons for the decision, or that it should be held that the failure of Officer Caden to give written reasons for his decision or a subsequent affidavit explaining them should be taken to be a breach of the principles of fairness.

36 This issue has been addressed in several cases of judicial review of humanitarian and compassionate applications. The Federal Court of Appeal has held that reasons are unnecessary: *Shah, supra*, at pp. 239-40. It has also been held that the case history notes prepared by a subordinate officer are not to be considered the decision-maker's reasons: see *Tylo v. Canada (Minister of Employment & Immigration)* (1995), 90 F.T.R. 157 (Fed. T.D.) at pp. 159-60. In *Gheorlan v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 170 (Fed. T.D.), and *Chan v. Canada (Minister of Citizenship & Immigration)* (1994), 87 F.T.R. 62 (Fed. T.D.), it was held that the notes of the reviewing officer should not be taken to be the reasons for decision, but may help in determining whether a reviewable error exists. In *Marques v. Canada*

(*Minister of Citizenship & Immigration*) (1995), 116 F.T.R. 241 (Fed. T.D.), an H & C decision was set aside because the decision making officer failed to provide reasons or an affidavit explaining the reasons for his decision.

37 More generally, the traditional position at common law has been that the duty of fairness does not require, as a general rule, that reasons be provided for administrative decisions: *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1 S.C.R. 684 (S.C.C.); *Supermarchés Jean Labrecque Inc. v. Québec (Tribunal du travail)*, [1987] 2 S.C.R. 219 (S.C.C.) at p. 233; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656 (Australia H.C.) at pp. 665-66.

38 Courts and commentators have, however, often emphasized the usefulness of reasons in ensuring fair and transparent decision-making. Though *Northwestern Utilities* dealt with a statutory obligation to give reasons, Estey J. held as follows, at p. 706, referring to the desirability of a common law reasons requirement:

This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal....

The importance of reasons was recently reemphasized by this Court in *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) at pp. 109-10.

39 Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: R.A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 146; *Williams v. Canada (Minister of Citizenship & Immigration)*, [1997] 2 F.C. 646 (Fed. C.A.) at para. 38 Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given: de Smith, Woolf, & Jowell, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. I agree that these are significant benefits of written reasons.

40 Others have expressed concerns about the desirability of a written reasons requirement at common law. In *Osmond*, *supra*, Gibbs C.J. articulated, at p. 668, the concern that a reasons requirement may lead to an inappropriate burden being imposed on administrative decision-makers, that it may lead to increased cost and delay, and that it "might in some cases induce a lack of candour on the part of the administrative officers concerned". Macdonald and Lametti, *supra*, though they agree that fairness should require the provision of reasons in certain circumstances, caution against a requirement of "archival" reasons associated with court judgments, and note that the special nature of agency decision-making in different contexts should be considered in evaluating reasons requirements. In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.

41 In England, a common law right to reasons in certain circumstances has developed in the case law: see M.H. Morris, "Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate" (1997), 11 *C.J.A.L.P.* 155, at pp. 164-168; de Smith, Woolf & Jowell, *supra*, at pp. 462-65. In *R. v. Civil Service Appeal Board*, [1991] 4 All E.R. 310 (Eng. C.A.), reasons were required of a board deciding the appeal of the dismissal of a prison official. The House of Lords, in *R. v. Secretary of State for the Home Department* (1993), [1994] 1 A.C. 531 (U.K. H.L.), imposed a reasons requirement on the Home Secretary when exercising the statutory discretion to decide on the period of imprisonment that a prisoner who had been imposed a life sentence should serve before being entitled to a review. Lord Mustill, speaking for all the law lords on the case, held that although there was no general duty to give reasons at common law, in those circumstances a failure to give reasons was unfair. Other English cases have held that reasons are required at common law when there is a statutory right of appeal: see *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45 (N.I.R.C.) at p. 49; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120 (N.I.R.C.).

42 Some Canadian courts have imposed, in certain circumstances, a common law obligation on administrative decision-makers to provide reasons, while others have been more reluctant. In *Orlowski v. British Columbia (Attorney General)* (1992), 94 D.L.R. (4th) 541 (B.C. C.A.) at pp. 551-52, it was held that reasons would generally be required for decisions of a review board under Part XX.1 of the *Criminal Code*, based in part on the existence of a statutory right of appeal from that decision, and also on the importance of the interests affected by the decision. In *R.D.R. Construction Ltd. v. Nova Scotia (Rent Review Commission)* (1982), 55 N.S.R. (2d) 71 (N.S. T.D.), the court also held that because of the existence of a statutory right of appeal, there was an implied duty to give reasons. Smith D.J., in *Taabea v. Canada (Refugee Status Advisory Committee)* (1979), [1980] 2 F.C. 316 (Fed. T.D.), imposed a reasons requirement on a Ministerial decision relating to refugee status, based upon the right to apply to the Immigration Appeal Board for redetermination. Similarly, in the context of evaluating whether a statutory reasons requirement had been adequately fulfilled in *Boyle v. New Brunswick (Workplace Health, Safety & Compensation Commission)* (1996), 179 N.B.R. (2d) 43 (N.B. C.A.), Bastarache J.A. (as he then was) emphasized, at p. 55, the importance of adequate reasons when appealing a decision. However, the Federal Court of Appeal recently rejected the submission that reasons were required in relation to a decision to declare a permanent resident a danger to the public under s. 70(5) of the *Immigration Act*: *Williams, supra*.

43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H& C decision to those affected, as with those at issue in *Orlowski, R. v. Civil Service Appeal Board*, and *R. v. Secretary of State for the Home Department*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

44 In my view, however, the reasons requirement was fulfilled in this case, since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, *supra*, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision.

#### (5) Reasonable Apprehension of Bias

45 Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. The respondent argues that Simpson J. was correct to find that the notes of Officer Lorenz cannot be considered to give rise to a reasonable apprehension of bias because it was Officer Caden who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition, as discussed in the previous section, the notes of Officer Lorenz constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

46 The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.) at p. 394:

...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

This expression of the test has often been endorsed by this Court, most recently in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at para. 11, *per* Major J.; at para. 31, *per* L'Heureux-Dubé and McLachlin JJ.; and at para. 111, *per* Cory J.

47 It has been held that the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.); *Old St. Boniface, supra*, at p. 1192. The context here is one where immigration officers must regularly make decisions that have great importance to the individuals affected by them, but are also often critical to the interests of Canada as a country. They are individualized, rather than decisions of a general nature. They also require special sensitivity. Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.

48 In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. Most unfortunate is the fact that they seem to make a link between Ms. Baker's mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would therefore be a strain on our social welfare system for the rest of her life. In addition, the conclusion drawn was contrary to the psychiatrist's letter, which stated that, with treatment, Ms. Baker could remain well and return to being a productive member of society. Whether they were intended in this manner or not, these statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness. His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status. Reading his comments, I do not believe that a reasonable and well-informed member of the community would conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer. It would appear to a reasonable observer that his own frustration with the "system" interfered with his duty to consider impartially whether the appellant's admission should be facilitated owing to humanitarian or compassionate considerations. I conclude that the notes of Officer Lorenz demonstrate a reasonable apprehension of bias.

#### ***D. Review of the Exercise of the Minister's Discretion***

49 Although the finding of reasonable apprehension of bias is sufficient to dispose of this appeal, it does not address the issues contained in the "serious question of general importance" which was certified by Simpson J. relating to the approach to be taken to children's interests when reviewing the exercise of the discretion conferred by the Act and the regulations. Since it is important to address the central questions which led to this appeal, I will also consider whether, as a substantive matter, the H & C decision was improperly made in this case.

50 The appellant argues that the notes provided to Ms. Baker show that, as a matter of law, the decision should be overturned on judicial review. She submits that the decision should be held to a standard of review of correctness,

that principles of administrative law require this discretion to be exercised in accordance with the Convention, and that the Minister should apply the best interests of the child as a primary consideration in H & C decisions. The respondent submits that the Convention has not been implemented in Canadian law, and that to require that s. 114(2) and the regulations made under it be interpreted in accordance with the Convention would be improper, since it would interfere with the broad discretion granted by Parliament, and with the division of powers between the federal and provincial governments.

(1) *The Approach to Review of Discretionary Decision-Making*

51 As stated earlier, the legislation and regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The regulations state that "[t]he Minister is ... authorized to" grant an exemption or otherwise facilitate the admission to Canada of any person "where the Minister is satisfied that" this should be done "owing to the existence of compassionate or humanitarian considerations". This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.

52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K.C. Davis wrote in *Discretionary Justice* (1969), at p. 4:

A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

It is necessary in this case to consider the approach to judicial review of administrative discretion, taking into account the "pragmatic and functional" approach to judicial review that was first articulated in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. Union des employés de service, local 298*, [1988] 2 S.C.R. 1048 (S.C.C.) and has been applied in subsequent cases including *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.) at pp. 601-7, per L'Heureux-Dubé J., dissenting, but not on this issue; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.); *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.); and *Pushpanathan, supra*.

53 Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.) at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 (S.C.C.). A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* (1947), [1948] 1 K.B. 223 (Eng. C.A.). In my opinion, these doctrines incorporate two central ideas — that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manœuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.)), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.)).

54 It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To

give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:

The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as "structured" discretion.

55 The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim, supra*, at pp. 589-90; *Southam, supra*, at para. 30; *Pushpanathan, supra*, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is "polycentric" and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament. Finally, I would note that this Court has already applied this framework to statutory provisions that confer significant choices on administrative bodies, for example, in reviewing the exercise of the remedial powers conferred by the statute at issue in *Southam, supra*.

56 Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the "proper purposes" or "relevant considerations" involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

## (2) *The Standard of Review in This Case*

57 I turn now to an application of the pragmatic and functional approach to determine the appropriate standard of review for decisions made under s. 114(2) and Regulation 2.1, and the factors affecting the determination of that standard outlined in *Pushpanathan, supra*. It was held in that case that the decision, which related to the determination of a question of law by the Immigration and Refugee Board, was subject to a standard of review of correctness. Although that decision was also one made under the *Immigration Act*, the type of decision at issue was very different, as was the decision-maker. The appropriate standard of review must, therefore, be considered separately in the present case.

58 The first factor to be examined is the presence or absence of a privative clause, and, in appropriate cases, the wording of that clause: *Pushpanathan*, at para. 30. There is no privative clause contained in the *Immigration Act*, although judicial review cannot be commenced without leave of the Federal Court — Trial Division under s. 82.1. As mentioned above, s. 83(1) requires the certification of a serious question of general importance by the Federal Court — Trial Division before that decision may be appealed to the Court of Appeal. *Pushpanathan* shows that the existence of this provision means

there should be a lower level of deference on issues related to the certified question itself. However, this is only one of the factors involved in determining the standard of review, and the others must also be considered.

59 The second factor is the expertise of the decision-maker. The decision-maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.

60 The third factor is the purpose of the provision in particular, and of the Act as a whole. This decision involves considerable choice on the part of the Minister in determining when humanitarian and compassionate considerations warrant an exemption from the requirements of the Act. The decision also involves applying relatively "open-textured" legal principles, a factor militating in favour of greater deference: *Pushpanathan, supra*, at para. 36. The purpose of the provision in question is also to *exempt* applicants, in certain circumstances, from the requirements of the Act or its regulations. This factor, too, is a signal that greater deference should be given to the Minister. However, it should also be noted, in favour of a stricter standard, that this decision relates directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them. Its purpose is to decide whether the admission to Canada of a particular individual, in a given set of circumstances, should be facilitated.

61 The fourth factor outlined in *Pushpanathan* considers the nature of the problem in question, especially whether it relates to determination of law or facts. The decision about whether to grant an H & C exemption involves a considerable appreciation of the facts of that person's case, and is not one which involves the application or interpretation of definitive legal rules. Given the highly discretionary and fact-based nature of this decision, this is a factor militating in favour of deference.

62 These factors must be balanced to arrive at the appropriate standard of review. I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court — Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

(3) *Was this Decision Unreasonable?*

63 I will next examine whether the decision in this case, and the immigration officer's interpretation of the scope of the discretion conferred upon him, was unreasonable in the sense contemplated in the judgment of Iacobucci J. in *Southam, supra*, at para. 56:

An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.

In particular, the examination of this question should focus on the issues arising from the serious question of general importance stated by Simpson J.: the question of the approach to be taken to the interests of children when reviewing an H & C decision.

64 The notes of Officer Lorenz, in relation to the consideration of "H&C factors", read as follows:

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. So we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity.

65 In my opinion, the approach taken to the children's interests shows that this decision was unreasonable in the sense contemplated in *Southam, supra*. The officer was completely dismissive of the interests of Ms. Baker's children. As I will outline in detail in the paragraphs that follow, I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer. Professor Dyzenhaus has articulated the concept of "deference as respect" as follows:

Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision...

(D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.)

The reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.

66 The wording of s. 114(2) and of regulation 2.1 requires that a decision-maker exercise the power based upon "compassionate or humanitarian considerations" (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider an H & C request when an application is made: *Jiminez-Perez, supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.

67 Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally: see *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.); *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at paras. 20-23. In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H& C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

(a) *The Objectives of the Act*

68 The objectives of the Act include, in s. 3(c):

to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;

Although this provision speaks of Parliament's objective of *reuniting* citizens and permanent residents with their close relatives from abroad, it is consistent, in my opinion, with a large and liberal interpretation of the values underlying this legislation and its purposes to presume that Parliament also placed a high value on keeping citizens and permanent

residents together with their close relatives who are already in Canada. The obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members is suggested by the objective articulated in s. 3(c).

(b) *International Law*

69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. R.*, [1956] S.C.R. 618 (S.C.C.) at p. 621; *Capital Cities Communications Inc. v. Canada (Radio-Television & Telecommunications Commission)* (1977), [1978] 2 S.C.R. 141 (S.C.C.) at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

70 Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in *R. Sullivan, Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

[T]he legislature is presumed to respect the values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (New Zealand C.A.) at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India) at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter: Slaight Communications, supra; R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.).

71 The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the Universal Declaration of Human Rights, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

(c) *The Ministerial Guidelines*

72 Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention. As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable. They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. The guidelines are a useful indicator of what constitutes a reasonable

interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

73 The above factors indicate that emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the "humanitarian" and "compassionate" considerations that guide the exercise of the discretion. I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause Ms. Baker, given the fact that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from at least some of her children.

74 It follows that I disagree with the Federal Court of Appeal's holding in *Shah, supra*, at p. 239, that a s. 114(2) decision is "wholly a matter of judgment and discretion" (emphasis added). The wording of s. 114(2) and of the regulations shows that the discretion granted is confined within certain boundaries. While I agree with the Court of Appeal that the Act gives the applicant no right to a particular outcome or to the application of a particular legal test, and that the doctrine of legitimate expectations does not mandate a result consistent with the wording of any international instruments, the decision must be made following an approach that respects humanitarian and compassionate values. Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines themselves reflect this approach. However, the decision here was inconsistent with it.

75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

### ***E. Conclusions and Disposition***

76 Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow this appeal.

77 The appellant requested that solicitor-client costs be awarded to her if she were successful in her appeal. The majority of this Court held as follows in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at p. 134:

Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

There has been no such conduct on the part of the Minister shown during this litigation, and I do not believe that this is one of the exceptional cases where solicitor-client costs should be awarded. I would allow the appeal, and set aside the decision of Officer Caden of April 18, 1994, with party-and-party costs throughout. The matter will be returned to the Minister for redetermination by a different immigration officer.

***Iacobucci J. (Cory J. concurring):***

78 I agree with L'Heureux-Dubé J.'s reasons and disposition of this appeal, except to the extent that my colleague addresses the effect of international law on the exercise of Ministerial discretion pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2. The certified question at issue in this appeal concerns whether federal immigration authorities must treat the best interests of the child as a primary consideration in assessing an application for humanitarian and compassionate consideration under s. 114(2) of the Act, given that the legislation does not implement the provisions contained in the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, a multilateral convention to which Canada is party. In my opinion, the certified question should be answered in the negative.

79 It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc. v. Canada (Radio-Television & Telecommunications Commission)* (1977), [1978] 2 S.C.R. 141 (S.C.C.). I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system

80 In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch. I do not share my colleague's confidence that the Court's precedent in *Capital Cities, supra*, survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. Instead, the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament

81 The primacy accorded to the rights of children in the Convention, assuming for the sake of argument that the factual circumstances of this appeal are included within the scope of the relevant provisions, is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament. In answering the certified question in the negative, I am mindful that the result may well have been different had my colleague concluded that the appellant's claim fell within the ambit of rights protected by the *Canadian Charter of Rights and Freedoms*. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption, established by the Court's decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), and confirmed in subsequent jurisprudence, that administrative discretion involving *Charter* rights be exercised in accordance with similar international human rights norms.

*Appeal allowed.*

*Pourvoi accueilli.*

25

**Louise Gosselin** *Appellant*

v.

**The Attorney General of Quebec** *Respondent*

and

**The Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Alberta, Rights and Democracy (also known as International Centre for Human Rights and Democratic Development), Commission des droits de la personne et des droits de la jeunesse, the National Association of Women and the Law (NAWL), the Charter Committee on Poverty Issues (CCPI) and the Canadian Association of Statutory Human Rights Agencies (CASHRA)** *Interveners*

**INDEXED AS: GOSSELIN v. QUEBEC (ATTORNEY GENERAL)**

**Neutral citation: 2002 SCC 84.**

File No.: 27418.

2001: October 29; 2002: December 19.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Constitutional law — Charter of Rights — Equality — Welfare — Regulation providing for reduced welfare benefits for individuals under 30 not participating in training or work experience employment programs — Whether Regulation infringed right to equality — Canadian Charter of Rights and Freedoms, s. 15 — Regulation respecting social aid, R.R.Q. 1981, c. A-16, r. 1, s. 29(a).*

**Louise Gosselin** *Appelante*

c.

**Le procureur général du Québec** *Intimé*

et

**Le procureur général de l'Ontario, le procureur général du Nouveau-Brunswick, le procureur général de la Colombie-Britannique, le procureur général de l'Alberta, Droits et Démocratie (aussi appelé le Centre international des droits de la personne et du développement démocratique), la Commission des droits de la personne et des droits de la jeunesse, l'Association nationale de la femme et du droit (ANFD), le Comité de la Charte et des questions de pauvreté (CCQP) et l'Association canadienne des commissions et conseil des droits de la personne (ACCCDP)** *Intervenants*

**RÉPERTORIÉ : GOSSELIN c. QUÉBEC (PROCUREUR GÉNÉRAL)**

**Référence neutre : 2002 CSC 84.**

N° du greffe : 27418.

2001 : 29 octobre; 2002 : 19 décembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

*Droit constitutionnel — Charte des droits — Égalité — Aide sociale — Règlement prescrivant une réduction du montant des prestations d'aide sociale versées aux personnes de moins de 30 ans qui ne participaient pas à des programmes de formation ou de stages en milieu de travail — Le règlement portait-il atteinte au droit à l'égalité? — Charte canadienne des droits et libertés, art. 15 — Règlement sur l'aide sociale, R.R.Q. 1981, ch. A-16, r. 1, art. 29a).*

*Constitutional law — Charter of Rights — Fundamental justice — Security of person — Welfare — Regulation providing for reduced welfare benefits for individuals under 30 not participating in training or work experience employment programs — Whether Regulation infringed right to security of person — Canadian Charter of Rights and Freedoms, s. 7 — Regulation respecting social aid, R.R.Q. 1981, c. A-16, r. 1, s. 29(a).*

*Civil rights — Economic and social rights — Financial assistance — Regulation providing for reduced welfare benefits for individuals under 30 not participating in training or work experience employment programs — Whether Regulation infringed right to measures of financial assistance — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 45 — Regulation respecting social aid, R.R.Q. 1981, c. A-16, r. 1, s. 29(a).*

In 1984 the Quebec government created a new social assistance scheme. Section 29(a) of the *Regulation respecting social aid*, made under the 1984 *Social Aid Act*, set the base amount of welfare payable to persons under the age of 30 at roughly one third of the base amount payable to those 30 and over. Under the new scheme, participation in one of three education or work experience programs allowed people under 30 to increase their welfare payments to either the same as, or within \$100 of, the base amount payable to those 30 and over. In 1989 this scheme was replaced by legislation that no longer made this age-based distinction.

The appellant, a welfare recipient, brought a class action challenging the 1984 social assistance scheme on behalf of all welfare recipients under 30 subject to the differential regime from 1985 to 1989. The appellant argued that the 1984 social assistance regime violated ss. 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* and s. 45 of the *Quebec Charter of Human Rights and Freedoms*. She requested that s. 29(a) of the Regulation be declared to have been invalid from 1987 (when it lost the protection of the notwithstanding clause) to 1989, and that the government of Quebec be ordered to reimburse all affected welfare recipients for the difference between what they actually received and what they would have received had they been 30 years of age or over, for a total of

*Droit constitutionnel — Charte des droits — Justice fondamentale — Sécurité de la personne — Aide sociale — Règlement prescrivant une réduction du montant des prestations d'aide sociale versées aux personnes de moins de 30 ans qui ne participaient pas à des programmes de formation ou de stages en milieu de travail — Le règlement portait-il atteinte au droit à la sécurité de la personne? — Charte canadienne des droits et libertés, art. 7 — Règlement sur l'aide sociale, R.R.Q. 1981, ch. A-16, r. 1, art. 29a).*

*Libertés publiques — Droits économiques et sociaux — Aide financière — Règlement prescrivant une réduction du montant des prestations d'aide sociale versées aux personnes de moins de 30 ans qui ne participaient pas à des programmes de formation ou de stages en milieu de travail — Le règlement portait-il atteinte au droit à des mesures d'assistance financière? — Charte des droits et libertés de la personne, L.R.Q., ch. C-12, art. 45 — Règlement sur l'aide sociale, R.R.Q. 1981, ch. A-16, r. 1, art. 29a).*

En 1984, le gouvernement du Québec a créé un nouveau régime d'aide sociale. L'alinéa 29a) du *Règlement sur l'aide sociale* pris en application de la *Loi sur l'aide sociale* de 1984 fixait le montant des prestations de base payables aux personnes de moins de 30 ans au tiers environ de celui des prestations de base versées aux 30 ans et plus. En participant à l'un des trois programmes de formation et de stages en milieu de travail prévus par le nouveau régime, les bénéficiaires de moins de 30 ans étaient en mesure de hausser leurs prestations à une somme égale ou inférieure de 100 \$, selon le cas, aux prestations de base versées aux 30 ans et plus. En 1989, ce régime a été remplacé par une mesure législative qui n'appliquait plus la distinction fondée sur l'âge.

L'appelante, une bénéficiaire d'aide sociale, a intenté un recours collectif dans lequel elle conteste le régime d'aide sociale de 1984, au nom de tous les bénéficiaires d'aide sociale de moins de 30 ans qui ont été assujettis au traitement différent de 1985 à 1989. L'appelante plaide que le régime d'aide sociale en vigueur en 1984 contrevient à l'art. 7 et au par. 15(1) de la *Charte canadienne des droits et libertés* et à l'art. 45 de la *Charte des droits et libertés de la personne* du Québec. Elle demande un jugement déclarant invalide l'al. 29a) du règlement pour la période de 1987 (lorsqu'a pris fin la protection offerte par la disposition d'exemption) à 1989, et ordonnant au gouvernement du Québec de rembourser à tous les bénéficiaires d'aide sociale visés une somme égale à la différence entre les prestations qu'ils ont reçues et celles

roughly \$389 million, plus interest. The Superior Court dismissed the class action. The Court of Appeal upheld the decision.

*Held* (L'Heureux-Dubé, Bastarache, Arbour and LeBel JJ. dissenting): The appeal should be dismissed. Section 29(a) of the Regulation was constitutional.

- (1) *Per* McLachlin C.J. and Gonthier, Iacobucci, Major and Binnie JJ.: Section 29(a) of the Regulation did not infringe s. 15 of the Canadian *Charter*.

*Per* L'Heureux-Dubé, Bastarache, Arbour and LeBel JJ. (dissenting): Section 29(a) of the Regulation infringed s. 15 of the Canadian *Charter* and the infringement was not justifiable under s. 1 of the *Charter*.

- (2) *Per* McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and LeBel JJ.: Section 29(a) of the Regulation did not infringe s. 7 of the Canadian *Charter*.

*Per* L'Heureux-Dubé and Arbour JJ. (dissenting): Section 29(a) of the Regulation infringed s. 7 of the Canadian *Charter* and the infringement was not justifiable under s. 1 of the *Charter*.

- (3) *Per* McLachlin C.J. and Gonthier, Iacobucci, Major, Binnie and LeBel JJ.: Section 29(a) of the Regulation did not violate s. 45 of the Quebec *Charter*.

*Per* Bastarache and Arbour JJ.: There is no need to determine whether s. 29(a) of the Regulation violated s. 45 of the Quebec *Charter* since the s. 45 right is unenforceable in the circumstances of this case.

*Per* L'Heureux-Dubé J. (dissenting): Section 29(a) of the Regulation violated s. 45 of the Quebec *Charter*.

*Per* McLachlin C.J. and Gonthier, Iacobucci, Major and Binnie JJ.: The differential welfare scheme did not breach s. 15 of the *Charter*. The appellant has failed to discharge her burden of proof on the third branch of the *Law* test, as she has not demonstrated that the government treated her as less worthy than older welfare recipients, simply because it conditioned increased payments on her participation in programs designed specifically to integrate her into the workforce and to promote her long-term self-sufficiency.

qu'ils auraient touchées s'ils avaient eu 30 ans ou plus, soit une somme totale d'environ 389 millions de dollars, plus les intérêts. La Cour supérieure a rejeté le recours collectif et la Cour d'appel a confirmé cette décision.

*Arrêt* (les juges L'Heureux-Dubé, Bastarache, Arbour et LeBel sont dissidents) : Le pourvoi est rejeté. L'alinéa 29a) du règlement était constitutionnel.

- (1) *Le* juge en chef McLachlin et les juges Gonthier, Iacobucci, Major et Binnie : L'alinéa 29a) du règlement ne violait pas l'art. 15 de la *Charte canadienne*.

*Les* juges L'Heureux-Dubé, Bastarache, Arbour et LeBel (dissidents) : L'alinéa 29a) du règlement violait l'art. 15 de la *Charte canadienne* et la violation n'était pas justifiable au sens de l'article premier de la *Charte*.

- (2) *Le* juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie et LeBel : L'alinéa 29a) du règlement ne violait pas l'art. 7 de la *Charte canadienne*.

*Les* juges L'Heureux-Dubé et Arbour (dissidentes) : L'alinéa 29a) du règlement violait l'art. 7 de la *Charte canadienne* et la violation n'était pas justifiable au sens de l'article premier de la *Charte*.

- (3) *Le* juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Binnie et LeBel : L'alinéa 29a) du règlement ne violait pas l'art. 45 de la *Charte québécoise*.

*Les* juges Bastarache et Arbour : Il n'est pas nécessaire de décider si l'al. 29a) du règlement violait l'art. 45 de la *Charte québécoise*, étant donné que le respect du droit prévu par cet article ne peut être imposé dans les circonstances du présent pourvoi.

*Le* juge L'Heureux-Dubé (dissidente) : L'alinéa 29a) du règlement violait l'art. 45 de la *Charte québécoise*.

*Le* juge en chef McLachlin et les juges Gonthier, Iacobucci, Major et Binnie : Le régime d'aide sociale établissant une différence de traitement ne contrevenait pas à l'art. 15 de la *Charte*. L'appelante ne s'est pas acquittée de la preuve qui lui incombait à la troisième étape du test de l'arrêt *Law*, car elle n'a pas démontré que le gouvernement l'a traitée comme une personne de moindre valeur que les bénéficiaires d'aide sociale plus âgés, simplement parce qu'il a assujéti le versement de prestations accrues à sa participation à des programmes conçus expressément pour l'intégrer dans la population active et promouvoir son autonomie à long terme.

An examination of the four contextual factors set out in *Law* does not support a finding of discrimination and denial of human dignity. First, this is not a case where members of the complainant group suffered from pre-existing disadvantage and stigmatisation on the basis of their age. Age-based distinctions are a common and necessary way of ordering our society, and do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization. Unlike people of very advanced age who may be presumed to lack abilities that they in fact possess, young people do not have a similar history of being undervalued.

Second, the record in this case does not establish a lack of correspondence between the scheme and the actual circumstances of welfare recipients under 30. The evidence indicates that the purpose of the challenged distinction, far from being stereotypical or arbitrary, corresponded to the actual needs and circumstances of individuals under 30. The deep recession in the early 1980s, tightened eligibility requirements for federal unemployment insurance benefits, and a surge in the number of young people entering the job market caused an unprecedented increase in the number of people capable of working who ended up on the welfare rolls. The situation of young adults was particularly dire. The government's short-term purpose in adopting the scheme at issue was to get recipients under 30 into work and training programs that would make up for the lower base amount they received while teaching them valuable skills to get permanent jobs. The government's longer-term purpose was to provide young welfare recipients with precisely the kind of remedial education and skills training they lacked and needed in order to integrate into the workforce and become self-sufficient. The regime constituted an affirmation of young people's potential rather than a denial of their dignity. From the perspective of a reasonable person in the claimant's position, the legislature's decision to structure its social assistance programs to give young people the incentive to participate in programs specifically designed to provide them with training and experience was supported by logic and common sense. The allegation that there were not enough places in the programs to meet the needs of all welfare recipients under 30 who wanted to participate was rejected by the trial judge as unsubstantiated by the evidence. Absent demonstrated error, it is not open to this Court to revisit the trial judge's conclusion. Likewise, we cannot infer disparity between the purpose and effect of the scheme and the situation of those affected from the mere failure of government to prove that the assumptions upon which it proceeded were correct. Provided they are not based on arbitrary and demeaning stereotypes,

À partir de l'examen des quatre facteurs contextuels énoncés dans *Law*, il est impossible de conclure à la discrimination et à l'existence d'une atteinte à la dignité humaine. Premièrement, il ne s'agit pas d'un cas où le groupe de la demanderesse a souffert d'un désavantage préexistant et de stigmates en raison de l'âge. Les distinctions fondées sur l'âge sont courantes et nécessaires pour maintenir l'ordre dans notre société et elles n'évoquent pas automatiquement le contexte d'un désavantage préexistant qui donne à croire à l'existence d'une discrimination et d'une marginalisation. Contrairement aux personnes d'âge avancé, qui peuvent être présumées dépourvues de certaines aptitudes qu'elles possèdent en réalité, les jeunes adultes n'ont pas été sous-estimés de la même manière par le passé.

Deuxièmement, le dossier en l'espèce n'établit pas l'absence de lien entre le régime et la situation réelle des bénéficiaires d'aide sociale de moins de 30 ans. La preuve démontre que, loin d'être stéréotypé ou arbitraire, l'objet de la distinction contestée correspondait aux besoins et à la situation véritables des moins de 30 ans. La profonde récession du début des années 80, le resserrement des conditions d'admissibilité aux prestations fédérales d'assurance-chômage et la forte augmentation du nombre de jeunes intégrant le marché du travail ont provoqué un accroissement sans précédent du nombre de personnes aptes au travail qui ont néanmoins joint les rangs des prestataires d'aide sociale. La situation des jeunes adultes était particulièrement difficile. À court terme, l'objectif que visait le gouvernement en instaurant le régime contesté était de faire participer les bénéficiaires de moins de 30 ans à des programmes de travail et de formation qui complèteraient l'allocation de base inférieure qu'ils recevaient, tout en leur faisant acquérir des compétences utiles pour trouver des emplois permanents. À plus long terme, le gouvernement visait à offrir aux jeunes bénéficiaires précisément les cours de rattrapage et les compétences qui leur manquaient et dont ils avaient besoin pour réussir à s'intégrer dans la population active et à devenir autonomes. Le régime ne constituait pas une négation de la dignité des jeunes adultes, mais la reconnaissance de leur potentiel. Dans la perspective d'une personne raisonnable placée dans la situation de la demanderesse, la décision du législateur de structurer ses programmes d'aide sociale de façon à inciter les jeunes adultes à participer à des programmes spécialement conçus pour leur permettre d'acquérir formation et expérience prenait appui sur la logique et le sens commun. La prétention qu'il n'existait pas suffisamment de places disponibles dans les programmes pour répondre aux besoins de tous les bénéficiaires d'aide sociale de moins de 30 ans qui voulaient y participer a été rejetée par le juge du procès parce qu'il estimait la preuve à cet égard insuffisante. Il n'appartient pas à la Cour de réexaminer la conclusion du

the legislator is entitled to proceed on informed general assumptions that correspond, even if not perfectly, to the actual circumstances of the affected group. These considerations figure in assessing whether a reasonable person in the claimant's position would experience the legislation as a harm to her dignity.

Third, the “ameliorative purpose” contextual factor is neutral in the present case, since the scheme was not designed to improve the condition of another group. As a general contextual matter, a reasonable person in the appellant's position would take the fact that the Regulation was aimed at ameliorating the situation of welfare recipients under 30 into account in determining whether the scheme treated under-30s as less worthy of respect and consideration than those 30 and over.

Finally, the findings of the trial judge and the evidence do not support the view that the overall impact on the affected individuals undermined their human dignity and their right to be recognized as fully participating members of society notwithstanding their membership in the class affected by the distinction. Despite possible short-term negative impacts on the economic circumstances of some welfare recipients under 30 as compared to those 30 and over, the regime sought to improve the situation of people in this group and enhance their dignity and capacity for long-term self-reliance. This points not to discrimination but to concern for the situation of welfare recipients under 30.

The factual record is insufficient to support the appellant's claim that the state deprived her of her s. 7 right to security of the person by providing her with a lower base amount of welfare benefits, in a way that violated the principles of fundamental justice. The dominant strand of jurisprudence on s. 7 sees its purpose as protecting life, liberty and security of the person from deprivations that occur as a result of an individual's interaction with the justice system and its administration. The administration of justice can be implicated in a variety of circumstances and does not refer exclusively to processes operating in the criminal law. The meaning of the administration of

juge de première instance en l'absence d'une erreur établie. De même, le simple fait que le gouvernement n'ait pas prouvé l'exactitude des hypothèses sur lesquelles il s'est fondé ne permet pas d'inférer qu'il y a disparité entre, d'une part, l'objet et l'effet du régime et, d'autre part, la situation des personnes touchées. Le législateur peut s'appuyer sur des hypothèses générales documentées qui correspondent, bien qu'imparfaitement, à la situation véritable du groupe touché, à la condition que ces hypothèses ne soient pas fondées sur des stéréotypes arbitraires et dégradants. Ces considérations sont prises en compte pour déterminer si une personne raisonnable placée dans la situation de la demanderesse aurait perçu la mesure législative comme attentatoire à sa dignité.

Troisièmement, le facteur contextuel de « l'objectif d'amélioration » est neutre en l'espèce, car le régime n'a pas été conçu pour améliorer la situation d'un autre groupe. De façon générale, sur le plan contextuel, une personne raisonnable placée dans la situation de l'appellante tiendrait compte du fait que le Règlement visait à améliorer la situation des bénéficiaires d'aide sociale de moins de 30 ans pour déterminer si le régime traitait les moins de 30 ans comme moins dignes de respect et de considération que les 30 ans et plus.

Enfin, les conclusions du juge de première instance et les éléments de preuve n'appuient pas la prétention que l'incidence globale du régime sur les personnes touchées a porté atteinte à leur dignité humaine et à leur droit d'être reconnues comme membres à part entière de la société, même si elles font partie de la catégorie touchée par la distinction. Malgré la possibilité de conséquences négatives à court terme sur la situation économique de certains bénéficiaires d'aide sociale de moins de 30 ans comparativement à leurs aînés, le régime visait à améliorer la situation des personnes appartenant à ce groupe et à renforcer leur dignité et leur capacité de subvenir à leurs besoins à long terme. Ces éléments tendent à révéler l'existence non pas d'une discrimination, mais d'une préoccupation pour la situation des bénéficiaires d'aide sociale de moins de 30 ans.

Le dossier factuel n'est pas suffisant pour étayer la prétention de l'appellante que l'État a porté atteinte à son droit à la sécurité de sa personne en lui versant un montant de base inférieur de prestations d'aide sociale, de façon non conforme aux principes de justice fondamentale. Selon le courant jurisprudentiel dominant concernant l'art. 7, cette disposition a pour objet d'empêcher les atteintes à la vie, à la liberté et à la sécurité de la personne qui résultent d'une interaction de l'individu avec le système judiciaire et l'administration de la justice. Tout un éventail de situations peuvent faire entrer en jeu l'administration de la justice et celle-ci ne s'entend pas

justice and s. 7 should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration. It is thus premature to conclude that s. 7 applies only in an adjudicative context. In the present case, the issue is whether s. 7 ought to apply despite the fact that the administration of justice is plainly not implicated. Thus far, the jurisprudence does not suggest that s. 7 places positive obligations on the state. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of their right to life, liberty and security of the person. Such a deprivation does not exist here and the circumstances of this case do not warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

There is no breach of the right to measures of financial assistance and to social measures provided for by law, susceptible of ensuring an acceptable standard of living as protected by s. 45 of the Quebec *Charter of Human Rights and Freedoms*. Although s. 45 requires the government to provide social assistance measures, it places the adequacy of the particular measures adopted beyond the reach of judicial review. The language of s. 45 mandates only that the government be able to point to measures susceptible of ensuring an acceptable standard of living, without having to defend the wisdom of its enactments.

*Per* Bastarache J. (dissenting): Section 29(a) of the Regulation did not infringe s. 7 of the *Charter*. The threat to the appellant's security of the person was not related to the administration of justice, nor was it caused by any state action, nor did the underinclusive nature of the legislation substantially prevent or inhibit the appellant from protecting her own security. The right to security of the person is protected by s. 7 only insofar as the claimant is deprived of this right by the state, in a manner contrary to the principles of fundamental justice. The strong relationship between s. 7 and the role of the judiciary leads to the conclusion that some relationship to the judicial system or its administration must be engaged before s. 7 may be applied. In this case, there is no link between the harm to the appellant's security of the person and the judicial system or its administration. Although the required link to the judicial system does not mean that s. 7 is limited to purely criminal or penal matters, it signifies, at the very least, that some determinative state action, analogous to a judicial or administrative process, must be shown to exist in order for one to be deprived of a s. 7 right. The threat to the appellant's security was brought upon her by the vagaries of a weak economy, not by the legislature's

exclusivement des procédures criminelles. Il faut laisser le sens de la notion d'administration de la justice et la portée de l'art. 7 évoluer graduellement, au fur et à mesure que surgiront des questions jusqu'ici imprévues. Il est donc prématuré de conclure que l'art. 7 s'applique exclusivement dans un contexte juridictionnel. En l'espèce, la question est de savoir si la Cour doit appliquer l'art. 7 malgré le fait que l'administration de la justice n'est manifestement pas en jeu. Jusqu'à maintenant, rien dans la jurisprudence ne tend à indiquer que l'art. 7 impose une obligation positive à l'État. On a plutôt considéré que l'art. 7 restreint la capacité de l'État de porter atteinte au droit à la vie, à la liberté et à la sécurité de la personne. Il n'y a pas d'atteinte de cette nature en l'espèce et les circonstances ne justifient pas une application nouvelle de l'art. 7, selon laquelle il imposerait à l'État l'obligation positive de garantir un niveau de vie adéquat.

Il n'a pas été porté atteinte au droit à des mesures d'assistance financière et à des mesures sociales, prévues par la loi, susceptibles d'assurer un niveau de vie décent, lequel est garanti par l'art. 45 de la *Charte des droits et libertés de la personne* du Québec. Bien que l'art. 45 oblige le gouvernement à établir des mesures d'aide sociale, il soustrait au pouvoir de contrôle des tribunaux la question de savoir si ces mesures sont adéquates. Le libellé de l'art. 45 exige seulement que le gouvernement puisse établir l'existence de mesures susceptibles d'assurer un niveau de vie décent, sans l'obliger à défendre la sagesse de ces mesures.

*Le juge Bastarache (dissident) : L'alinéa 29a) du règlement ne violait pas l'art. 7 de la Charte. La menace au droit à la sécurité de l'appelante n'était pas liée à l'administration de la justice et ne résultait pas d'une mesure de l'État; de plus, le caractère non inclusif du texte de loi n'a pas empêché concrètement l'appelante de protéger sa propre sécurité. Le droit à la sécurité de la personne n'est protégé par l'art. 7 que dans la mesure où c'est l'État qui, d'une façon non conforme aux principes de justice fondamentale, prive l'individu du droit à la sécurité de sa personne. Le lien solide qui existe entre l'art. 7 et le rôle de l'appareil judiciaire amène à conclure que, pour que puisse s'appliquer l'art. 7, il est nécessaire qu'il existe un certain rapport entre cette disposition et le système judiciaire ou son administration. En l'espèce, il n'existe pas de lien entre le préjudice causé à la sécurité de la personne de l'appelante et le système judiciaire ou son administration. Quoique le lien requis avec l'appareil judiciaire ne signifie pas que l'art. 7 se limite nécessairement aux affaires pénales, il signifie à tout le moins que, pour qu'une personne se trouve privée d'un droit que lui garantit l'art. 7, il faut établir l'existence d'une mesure de l'État — analogue à une instance judiciaire ou*

decision not to accord her more financial assistance or to require her to participate in several programs in order to receive more assistance. While underinclusive legislation may, in unique circumstances, substantially impact the exercise of a constitutional freedom, the exclusion of people under 30 from the full, unconditional benefit package did not render them substantially incapable of exercising their right to security of the person without government intervention. The appellant failed to demonstrate that there existed an inherent difficulty for young people under 30 to protect their right to security of the person without government intervention. Nor has the existence of a higher base benefit for recipients 30 and over been shown to reduce the potential of young people to exercise their right to security of the person. It has not been demonstrated that the legislation, by excluding young people, reduced their security any more than it would have already been given market conditions.

Section 29(a) of the Regulation infringed s. 15 of the *Charter*. Although age-based distinctions are often justified due to the fact that at different ages people are capable of different things, age is included as a prohibited ground of discrimination. Age, although constantly changing, is a personal characteristic that at any given moment one can do nothing to alter. Age falls squarely within the concern of the equality provision that people not be penalized for characteristics they either cannot change or should not be asked to change. The grounds of discrimination enumerated in s. 15 function as legislative markers of suspect grounds associated with stereotypical or otherwise, discriminatory decision making. Legislation that draws a distinction on such grounds — including age — is suspect because it often leads to discrimination and denial of substantive equality.

Applying the *Law* test, the fundamental question that needs to be dealt with here is whether the distinction created by s. 29(a) is indicative that the government treated social assistance recipients under 30 in a way that is respectful of their dignity as members of society. This question is to be assessed from the perspective of a reasonable person in the claimant's circumstances having regard to four non-exhaustive contextual factors. While it is not enough for the appellant simply to claim that her

administrative — emportant des conséquences juridiques pour cette personne. La menace à la sécurité de l'appelante découlait des aléas d'une économie chancelante, et non de la décision du législateur de ne pas lui accorder une aide financière plus élevée ou de l'obliger à participer à plusieurs programmes pour recevoir une aide accrue. Bien qu'une mesure législative n'ayant pas un caractère suffisamment inclusif puisse, dans des circonstances exceptionnelles, entraver substantiellement l'exercice d'une liberté constitutionnelle, l'exclusion des personnes de moins de 30 ans du champ d'application du régime d'avantages complets et inconditionnels ne les rendait pas essentiellement incapables d'exercer leur droit à la sécurité de leur personne en l'absence d'intervention gouvernementale. L'appelante n'a pas démontré que les jeunes de moins de 30 ans éprouvent intrinsèquement de la difficulté à exercer leur droit à la sécurité de leur personne en l'absence d'intervention gouvernementale. Elle n'a pas non plus établi que l'existence de prestations de base plus élevées pour les prestataires de 30 ans et plus réduisait la possibilité pour les moins de 30 ans d'exercer leur droit à la sécurité de leur personne. Il n'a pas été démontré que, en excluant les jeunes, le texte de loi avait réduit leur sécurité à un niveau inférieur à ce qu'elle était déjà, compte tenu de la situation économique.

L'alinéa 29a) du règlement violait l'art. 15 de la *Charte*. Bien que les distinctions fondées sur l'âge soient souvent justifiées par le fait que des personnes d'âge différent sont capables d'accomplir des choses différentes, l'âge fait partie des motifs de discrimination illicite. Quoiqu'on vieillisse sans cesse, l'âge est une caractéristique personnelle à l'égard de laquelle il est impossible de faire quoi que ce soit, et ce à quelque moment que ce soit. L'âge est nettement visé par l'aspect de la disposition relative à l'égalité qui demande qu'on ne pénalise pas un individu pour une caractéristique qu'il ne peut changer ou qu'on ne devrait pas le requérir de changer. Les motifs de discrimination énumérés à l'art. 15 sont des indicateurs législatifs de l'existence de motifs suspects, associés à des processus décisionnels discriminatoires et fondés sur des stéréotypes. Une loi qui établit une distinction fondée sur de tels motifs — notamment l'âge — est suspecte parce qu'elle entraîne souvent de la discrimination et aboutit au déni du droit à l'égalité réelle.

Si on applique le critère de l'arrêt *Law*, la question fondamentale qu'il faut examiner en l'espèce est celle de savoir si la distinction établie à l'al. 29a) indique que le gouvernement a traité les bénéficiaires d'aide sociale de moins de 30 ans d'une façon qui respectait leur dignité en tant que membres de notre société. Il faut examiner cette question avec les yeux d'une personne raisonnable se trouvant dans la situation du demandeur, en tenant compte de quatre facteurs contextuels non exhaustifs.

dignity has been violated, a demonstration that there is a rational foundation for her experience of discrimination will be sufficient to ground the s. 15 claim.

First, with respect to the pre-existing disadvantage factor, we are not dealing in this case with a general age distinction but rather with one applicable within a particular social group, welfare recipients. Within this group the record makes it clear that it was not easier for persons under 30 to get jobs as opposed to their elders. The distinction was based on the stereotypical view that young welfare recipients suffer no special economic disadvantages. This view was not grounded in fact and was based on old assumptions regarding the employability of young people. Although there is no compelling evidence that younger welfare recipients, as compared to all welfare recipients, have been traditionally marginalized by reason of their age, a contextual analysis requires us to recognize that the precarious, vulnerable position of welfare recipients in general lends weight to the argument that a distinction that affects them negatively may pose a greater threat to their human dignity.

Second, there was a lack of correspondence between the differential welfare scheme and the actual needs, capacities and circumstances of welfare recipients under the age of 30. Based on the unverifiable presumption that people under 30 had better chances of employment and lesser needs, the program delivered to those people two-thirds less than what the government viewed as the basic survival amount, drawing its distinction on a characteristic over which those people had no control. Substantive equality permits differential treatment only where there is a genuine difference. The bright line drawn at 30 appears to have had little, if any, relationship to the real situation of younger people. The dietary and housing costs of people under 30 are no different from those of people 30 and over. The presumption adopted by the government that all persons under 30 received assistance from their family was unfounded. By relying on a distinction that had existed decades earlier and that did not take into account the actual circumstances of welfare recipients under 30, the legislation appears to have shown little respect for the value of those recipients as individual human beings. It created substandard living conditions for them on the sole basis of their age. Where persons experience serious detriment as a result of a distinction and the evidence shows that the presumptions guiding the legislature were factually unsupported, it is not necessary

Bien que l'appelante ne puisse se contenter de plaider qu'on a porté atteinte à sa dignité, pour justifier une allégation formulée en vertu de l'art. 15 il lui suffira d'établir le fondement rationnel de sa perception subjective qu'elle a été victime de discrimination.

Premièrement, en ce qui concerne le facteur du désavantage préexistant, nous ne sommes pas ici en présence d'une distinction d'application générale fondée sur l'âge, mais plutôt d'une distinction applicable à un groupe particulier de la société, les bénéficiaires d'aide sociale. Il ressort clairement du dossier que, dans les faits, au sein de ce groupe, il n'était pas plus facile pour les jeunes prestataires de trouver du travail que ce ne l'était pour leurs aînés. La distinction était fondée sur le stéréotype selon lequel les jeunes prestataires ne souffrent d'aucun désavantage économique particulier. Elle reposait non pas sur des faits, mais plutôt sur de vieilles prémisses relatives à l'aptitude des jeunes au travail. Bien qu'il n'existe aucune preuve décisive indiquant que, comparativement à l'ensemble des bénéficiaires d'aide sociale, les jeunes prestataires ont de tout temps été marginalisés en raison de leur âge, une analyse contextuelle nous oblige à reconnaître que la situation précaire et vulnérable dans laquelle se trouvent les bénéficiaires d'aide sociale renforce l'argument selon lequel toute distinction les affectant peut faire peser une menace plus grande sur leur dignité humaine.

Deuxièmement, il n'y avait aucune correspondance entre le régime d'aide sociale différent et les besoins, les aptitudes et la situation véritables des bénéficiaires d'aide sociale de moins de 30 ans. Basé sur l'hypothèse invérifiable selon laquelle les personnes de moins de 30 ans ont des besoins moins grands que leurs aînés et de meilleures chances que ceux-ci de se trouver un emploi, le programme accordait aux premières une somme inférieure des deux tiers à celle que le gouvernement considérait comme le strict nécessaire, et il fondait cette différence de traitement sur une caractéristique indépendante de la volonté de ces personnes. L'égalité réelle ne permet un traitement différent que s'il existe une différence réelle. La ligne de démarcation nette fixée à 30 ans paraît n'avoir que peu de rapports, voire aucun, avec la situation véritable des adultes de moins de 30 ans. Les dépenses au titre de l'alimentation et du logement des personnes de moins de 30 ans ne diffèrent pas de celles des personnes de 30 ans et plus. La présomption du gouvernement que les personnes de moins de 30 ans recevaient toutes de l'aide de leur famille n'était pas fondée. En se fondant sur une distinction qu'on avait faite plusieurs décennies auparavant et qui ne tenait même pas compte de la situation véritable des bénéficiaires d'aide sociale de moins de 30 ans, on semble avoir fait preuve de peu de respect dans le texte de loi pour la valeur de ces personnes en

to demonstrate actual stereotyping, prejudice or other discriminatory intention. Moreover, a positive intention cannot save the regulation. At this stage of the *Law* analysis, the legislature's intention is much less important than the real effects of the scheme on the claimant. Treatment of legislative purpose under s. 15 must not undermine or replace the analysis that will be undertaken when applying s. 1 of the *Charter*.

Third, the ameliorative purpose factor is not useful in determining whether the differential treatment in this appeal was discriminatory. The legislature has differentiated between the appellant's group and other welfare recipients based on what it claims is an effort to ameliorate the situation of the very group in question. Groups that are the subject of an inferior differential treatment based on an enumerated or analogous ground are not treated with dignity just because the government claims that the detrimental provisions are for their own good.

Finally, the differential treatment had a severe effect on an extremely important interest. The effect of the distinction in this case is that the appellant and others like her had their income set at only one third of what the government deemed to be the bare minimum for the sustainment of life. The government's argument that it was offering skills to allow young persons to enter into the workforce, thereby reinforcing their dignity and self-worth, neglects the fact that the reason why these young people were not in the labour force was not exclusively that their skills were too low, or that they were undereducated, but that there were no jobs to be had. The appellant has shown that in certain circumstances, and in her circumstances in particular, there were occasions when the effect of the differential treatment was such that beneficiaries under 30 could objectively be said to have experienced government treatment that failed to respect them as full persons. Any reading of the evidence indicates that it was highly improbable that a person under 30 could at all times be registered in a program and therefore receive the full subsistence amount. When between programs, individuals like the appellant were forced to survive on far less than the recognized minimum necessary for basic subsistence received by those 30 and over. Even when

tant qu'êtres humains. Sur le seul fondement de l'âge, le texte de loi créait pour ces personnes des conditions de vie inférieures aux conditions minimales. Dans les cas où des personnes subissent un grave désavantage dû à une distinction et où la preuve démontre que les hypothèses ayant guidé le législateur n'étaient pas étayées par les faits, il n'est pas nécessaire de prouver l'existence concrète de stéréotype, préjugé ou autre intention discriminatoire. L'existence d'une intention positive ne préserve pas davantage la validité de la mesure réglementaire litigieuse. À cette étape-ci de l'analyse prescrite dans l'arrêt *Law*, l'intention du législateur revêt beaucoup moins d'importance que les effets concrets du régime sur l'appelante. L'examen de l'objet du texte de loi effectué en vertu de l'art. 15 ne doit pas rendre inutile ou remplacer l'analyse qui doit être faite ultérieurement en application de l'article premier de la *Charte*.

Troisièmement, le facteur de l'objet améliorateur n'est pas utile pour décider si le traitement différent était discriminatoire en l'espèce. Le législateur a établi une distinction entre le groupe dont fait partie l'appelante et les autres bénéficiaires d'aide sociale en se fondant sur ce qu'elle affirme être un effort d'amélioration de la situation du groupe en question. Un groupe qui fait l'objet d'un traitement différent et moins favorable, fondé sur un motif énuméré ou un motif analogue, n'est pas traité avec dignité du seul fait que le gouvernement prétend avoir pris ses dispositions préjudiciables pour le bien du groupe.

Enfin, le traitement différent a un effet marqué sur un droit extrêmement important. L'effet de la distinction en l'espèce est que l'appelante et les autres personnes dans sa situation ont vu leur revenu fixé au tiers seulement de la somme que le gouvernement jugeait constituer le strict minimum dont a besoin une personne pour subvenir à ses besoins. L'argument du gouvernement, selon lequel il donnait aux jeunes la chance d'acquérir des compétences visant à leur permettre de s'intégrer dans la population active et ainsi de renforcer leur dignité et leur estime de soi ne tient pas compte du fait que la raison pour laquelle ces jeunes ne faisaient pas partie de la population active n'était pas exclusivement le fait qu'ils possédaient des compétences ou des études insuffisantes, mais aussi le fait qu'il n'y avait pas d'emplois disponibles. L'appelante a démontré que, dans certaines circonstances et particulièrement dans sa situation personnelle, il y a eu des occasions où l'effet du traitement différent était tel qu'on pourrait objectivement affirmer que les prestataires de moins de 30 ans ont été traités par le gouvernement d'une manière qui ne les respectait pas en tant que citoyens à part entière. Il ressort de la preuve, peu importe l'angle sous lequel on l'examine, qu'il était hautement improbable qu'une personne de moins de 30 ans aurait pu à tout

participating in a program, the fear of being returned to the reduced level of support dominated the appellant's life. Recipients 30 and over did not experience these consequences of the scheme. For the purposes of s. 15, what made the appellant's experience demeaning was the fact that she was placed in a position that the government itself admits is a precarious and unliveable one. The distinction in treatment was made simply on the basis of age, not of need, opportunity or personal circumstances, and was not respectful of the basic human dignity of welfare recipients under the age of 30.

The government has not discharged its burden of proving that the infringement of s. 15 is a reasonable limit that is demonstrably justifiable in a free and democratic society. Although a certain degree of deference should be accorded in reviewing social policy legislation of this type, the government does not have *carte blanche* to limit rights. The distinction created by s. 29(a) of the Regulation served two pressing and substantial objectives: (1) to avoid attracting young adults to social assistance, and (2) to facilitate integration into the workforce by encouraging participation in the employment programs. There is a rational connection between the different treatment of those under 30 and the objective of encouraging their integration into the workforce. It is logical and reasonable to suppose that young people are at a different stage in their lives than those 30 and over, that it is more important, and perhaps more fruitful, to encourage them to integrate into the workforce, and that in order to encourage such behaviour, a reduction in basic benefits could be expected to work. Even according the government a high degree of deference, however, the respondent has failed to demonstrate that the provision in question constituted a means of achieving the legislative objective that was reasonably minimally impairing of the appellant's equality rights. Other reasonable alternatives to achieve the objective were available. To begin with, the level of support provided to those under 30 could have been increased. There is no evidence to support the government's contention that such an approach would have prevented it from achieving the objective of integrating young people into the workforce. In addition, the 1989 reforms which made the programs universally conditional could have been implemented earlier. The programs themselves also suffered from several significant shortcomings and only 11 percent of social

moment être inscrite à un programme et recevoir le plein montant des prestations. Lorsqu'elles ne participaient pas à un programme, les personnes comme l'appelante étaient contraintes de subvenir à leurs besoins au moyen de ressources très inférieures au minimum vital reconnu, que recevaient par ailleurs les 30 ans et plus. Même lorsqu'elle participait à un programme, l'appelante vivait dans la crainte de voir ses prestations réduites. Les prestataires de 30 ans et plus ne subissaient pas ces conséquences du régime. Pour l'application de l'art. 15, ce qui a rendu humiliante l'expérience vécue par l'appelante est le fait qu'elle a été placée dans une situation que le gouvernement reconnaît lui-même comme précaire et invivable. Cette différence de traitement a été établie en fonction seulement de l'âge des personnes visées et non en fonction de leurs besoins, de leurs possibilités ou de leur situation personnelle, et elle ne respectait pas la dignité fondamentale des bénéficiaires d'aide sociale de moins de 30 ans.

Le gouvernement ne s'est pas acquitté de l'obligation qui lui incombait d'établir que la violation de l'art. 15 était une limite raisonnable et justifiée dans le cadre d'une société libre et démocratique. Bien qu'il faille faire montre d'une certaine retenue dans le contrôle de telles mesures législatives en matière de politique sociale, il reste que le gouvernement n'a pas carte blanche pour restreindre des droits. La distinction établie par l'al. 29a) du règlement visait deux objectifs urgents et réels : (1) éviter l'effet d'attraction du régime d'aide sociale sur les jeunes adultes; (2) favoriser l'intégration de ceux-ci dans la population active en encourageant leur participation aux programmes d'emploi. Il existe un lien rationnel entre le traitement différent réservé aux moins de 30 ans et l'objectif consistant à favoriser leur intégration dans la population active. Il est logique et raisonnable de supposer que ces personnes ne sont pas rendues au même stade de la vie que les 30 ans et plus, qu'il est plus important, voire plus utile, de les inciter à s'intégrer dans la population active et, enfin, qu'une réduction des prestations de base pourrait permettre de réaliser cet objectif. Toutefois, même en manifestant beaucoup de retenue envers la décision du gouvernement, l'intimé n'a pas su démontrer que la disposition litigieuse constituait un moyen de réaliser l'objectif législatif d'une manière qui portait aussi peu atteinte au droit à l'égalité de l'appelante qu'il était raisonnablement possible de le faire. Il existait des solutions de rechange raisonnables à celle choisie par le législateur en vue de réaliser son objectif. D'abord, les prestations accordées aux moins de 30 ans auraient pu être majorées. Aucun élément de preuve n'étaye la prétention du gouvernement selon laquelle une telle mesure l'aurait empêché d'atteindre l'objectif d'intégration des jeunes dans la population active. De plus, il aurait été possible d'instaurer plus tôt les réformes qui, en 1989, ont

assistance recipients under the age of 30 were in fact enrolled in the employment programs that allowed them to receive the base amount allocated to beneficiaries 30 years of age and over. One major branch of the scheme left participants \$100 short of the base benefit. Likewise, waiting periods, prioritizations and admissibility criteria signified that the programs were not designed in such a way as to ensure that there would always be programs available to those who wanted to participate. In addition to the problems with the design of the programs, hurdles in their implementation presented young recipients with further barriers. Delays flowing from meetings with aid workers, evaluation interviews and finding space within the appropriate program signified that young welfare recipients would most likely spend some time on the reduced benefit. Finally, even though 85 000 single people under 30 years of age were on social assistance, the government at first made only 30 000 program places available. While the government did not have to prove that it had 85 000 empty chairs waiting in classrooms and elsewhere, the very fact that it was expecting such low levels of participation brings into question the degree to which the distinction in s. 29(a) of the Regulation was geared towards improving the situation of those under 30, as opposed to simply saving money.

The differential treatment had severe deleterious effects on the equality and self-worth of the appellant and those in her group which outweighed the salutary effects of the scheme in achieving the stated government objective. The government failed to demonstrate that the reduction in benefits contributed or would reasonably be expected to contribute to the integration of young social assistance beneficiaries into the workplace. When the potential deleterious effects of the legislation are so apparent, it is not asking too much of the government to craft its legislation more carefully.

The appropriate remedy in this case is to declare s. 29(a) of the Regulation invalid under s. 52(1) of the *Constitution Act, 1982*. Had the legislation still been in force, suspension of the declaration of invalidity for a period of 18 months to allow the legislature to implement changes to the legislation would have been appropriate. The appellant's request for an order for damages pursuant to s. 24(1) of the *Charter* should be dismissed. Where

rendu les programmes conditionnels pour tous. Les programmes eux-mêmes comportaient également plusieurs lacunes importantes et seulement 11 p. 100 des bénéficiaires d'aide sociale de moins de 30 ans étaient dans les faits inscrits aux programmes qui leur permettaient de recevoir le montant de base accordé aux prestataires de 30 ans et plus. Les personnes qui participaient à un important volet du régime ne touchaient pas le plein montant des prestations, mais recevaient 100 \$ de moins que la prestation de base. De même, les critères d'admissibilité, les périodes d'attente et les préférences applicables au titre de la participation indiquent que les programmes n'étaient pas conçus d'une manière propre à garantir une place à toute personne désireuse d'y participer. Outre les problèmes qui affectaient la conception des programmes, la mise en œuvre de ceux-ci créait des obstacles supplémentaires, que les jeunes prestataires devaient également surmonter. En raison des délais résultant des rencontres avec des travailleurs sociaux, des entrevues d'évaluation et de la recherche de places libres dans le programme approprié, les jeunes bénéficiaires d'aide sociale touchaient vraisemblablement les prestations réduites pendant un certain temps. Enfin, même s'il y avait 85 000 personnes seules de moins de 30 ans recevant de l'aide sociale, le gouvernement n'avait créé initialement que 30 000 places dans ses programmes. Même si le gouvernement n'avait pas à établir qu'il disposait de 85 000 places disponibles en salle de classe et ailleurs, le fait même qu'il s'attendait à un taux de participation aussi faible incite à se demander dans quelle mesure la distinction prévue à l'al. 29a) du règlement visait vraiment à améliorer la situation des personnes de moins de 30 ans, et non pas simplement à réaliser des économies.

La différence de traitement a eu, sur l'égalité et l'estime de soi de l'appelante et des personnes de son groupe, des effets préjudiciables graves qui l'emportaient sur les effets bénéfiques qu'avait le régime sur la réalisation de l'objectif énoncé par le gouvernement. Le gouvernement n'a pas démontré que la réduction des prestations faciliterait l'intégration des jeunes prestataires dans la population active, ou qu'il était raisonnable de penser qu'elle le ferait. Lorsque les effets préjudiciables éventuels du texte législatif sont aussi évidents, ce n'est pas trop demander au gouvernement de préparer ses mesures législatives avec plus de soin.

La réparation qui convient en l'espèce consiste à déclarer l'al. 29a) du règlement inopérant en vertu du par. 52(1) de la *Loi constitutionnelle de 1982*. Si cette mesure législative avait été encore en vigueur, il aurait été opportun de suspendre l'effet de la déclaration d'invalidité pendant 18 mois afin de permettre au législateur d'apporter des modifications à cette mesure. Il y a lieu de rejeter la demande de dommages-intérêts présentée

a provision is struck down under s. 52, a retroactive s. 24(1) remedy will not generally be available. Moreover, the facts of this case do not allow for such a result. First, a s. 24(1) remedy is more difficult in this case because it involves a class action. It would be impossible for this Court to determine the precise amount that was owed to each individual in the class. Second, the significant costs that would be incurred by the government were it required to pay damages must be considered. While a consideration of expenses might not be relevant to the substantive *Charter* analysis, it is relevant to the determination of the remedy. Requiring the government to pay out nearly half a billion dollars would have a significant impact on the government's fiscal situation, and potentially on the general economy of the province.

Although on its face, s. 45 of the Quebec *Charter of Human Rights and Freedoms* creates some form of positive right to a minimal standard of living, in this case, that right is unenforceable. The supremacy provision in s. 52 of the Quebec *Charter* clearly indicates that the courts have no power to declare any portion of a law invalid due to a conflict with s. 45. Moreover, the appellant is not entitled to damages pursuant to s. 49 of the Quebec *Charter*. In order to substantiate a s. 49 claim against the government for having drafted legislation that violates a right guaranteed by the Quebec *Charter*, one would have to demonstrate that the legislature has breached a particular standard of care in drafting the legislation. It is unlikely that the government could, under s. 49, be held responsible for having simply drafted faulty legislation.

*Per* LeBel J. (dissenting): Section 29(a) of the Regulation, when taken in isolation or considered in light of all employability programs, discriminated against young adults. The distinction based on age did not reflect either the needs or the abilities of social aid recipients under 30 years of age. The ordinary needs of young people are not so different from the needs of their elders as to justify such a pronounced discrepancy between the two groups' benefits. Because the distinction made by the social aid scheme was justified by the fact that young people are able to survive a period of economic crisis better, this distinction perpetuated a stereotypical view of young people's situation on the labour market. By trying to combat the pull of social assistance, for the "good" of the young people themselves who depended on it, the distinction perpetuated another stereotypical view, that

par l'appelante en vertu du par. 24(1) de la *Charte*. Si une disposition est invalidée en application de l'art. 52, il n'y a généralement pas ouverture à réparation rétroactive en vertu du par. 24(1). De plus, les faits de l'espèce ne justifient pas un tel résultat. Premièrement, vu l'existence d'un recours collectif en l'espèce, il est plus difficile d'accorder une réparation en vertu du par. 24(1). Il serait impossible à notre Cour d'établir le montant exact dû à chaque membre du groupe. Deuxièmement, il faut tenir compte des dépenses importantes que ferait le gouvernement s'il devait verser des dommages-intérêts. Bien que la prise en compte de considérations budgétaires puisse ne pas être pertinente dans l'analyse de la question de fond touchant la *Charte*, elle l'est dans la détermination de la réparation. Obliger le gouvernement à verser pratiquement un demi-milliard de dollars aurait une incidence appréciable sur sa situation financière et peut-être même sur l'économie générale de la province.

Même si, à la lumière de son texte même, l'art. 45 de la *Charte des droits et libertés de la personne* du Québec crée une certaine forme de droit positif à un niveau de vie minimal, le respect de ce droit ne peut pas être obtenu en justice en l'espèce. La disposition énonçant la suprématie de la *Charte* québécoise, en l'occurrence l'art. 52 de celle-ci, indique nettement que les tribunaux n'ont pas le pouvoir de déclarer invalide tout ou partie d'un texte de loi pour cause d'incompatibilité avec l'art. 45. En outre, l'appelante n'a pas droit à des dommages-intérêts en vertu de l'art. 49 de la *Charte* québécoise. La personne qui, en vertu de l'art. 49, présente contre l'État une demande reprochant à celui-ci d'être l'auteur d'un texte de loi contrevenant à un droit garanti par la *Charte* québécoise doit démontrer que le législateur a manqué à une norme de diligence donnée dans la rédaction du texte de loi en question. Il est improbable que l'État puisse, par application de l'art. 49, être tenu responsable simplement parce qu'il aurait rédigé un texte de loi lacunaire.

*Le* juge LeBel (dissident) : L'alinéa 29a) du règlement, pris isolément ou considéré à la lumière des programmes d'employabilité, était discriminatoire à l'endroit des jeunes adultes. La distinction fondée sur l'âge ne correspondait ni aux besoins ni aux capacités des bénéficiaires de l'aide sociale de moins de 30 ans. Les besoins ordinaires des jeunes ne se différencient pas de ceux de leurs aînés au point de justifier un écart si prononcé entre leurs prestations. Dans la mesure où la distinction établie par le régime d'aide sociale était justifiée par la capacité des jeunes à mieux survivre une période de crise économique, cette distinction perpétuait une vision stéréotypée de la situation des jeunes sur le marché du travail. En cherchant à contrer un effet d'attraction à l'aide sociale pour le « bien » même des jeunes qui en dépendaient, la distinction perpétuait

a majority of young social assistance recipients choose to freeload off society permanently. Young social assistance recipients in the 1980s certainly did not latch onto social assistance out of laziness; they were stuck receiving welfare because there were no jobs available. Even if the government could validly encourage young people to work, the approach adopted discriminated between social aid recipients under 30 years of age and those 30 years of age and over, for no valid reason. The defects in the scheme, together with the preconceived ideas that underpinned it, lead to the conclusion that s. 29(a) of the Regulation infringed the equality right guaranteed by s. 15 of the *Charter*. For the reasons given by Bastarache J., s. 29(a) of the Regulation is not saved by s. 1 of the *Charter*.

Although the appellant failed to establish a violation of s. 7 of the *Charter* in this case, for the reasons stated by the majority, it is not appropriate, at this point, to rule out the possibility that s. 7 might be invoked in circumstances unrelated to the justice system.

Section 45 of the Quebec *Charter* does not confer an independent right to an acceptable standard of living. That section protects only a right of access to social measures for anyone in need. Although the incorporation of social and economic rights into the Quebec *Charter* gives them a new dimension, it does not make them legally binding. A majority of the provisions in the chapter on “Economic and Social Rights” contain a reservation indicating that the exercise of the rights they protect depends on the enactment of legislation. In the case of s. 45, the fact that anyone in need is entitled not to measures to ensure him or her an acceptable standard of living, but to measures susceptible of ensuring him or her that standard of living, suggests that the legislature did not intend to give the courts the power to review the adequacy of the measures adopted, or to usurp the role of the legislature in that regard. The expression “provided for by law”, when interpreted in light of the other provisions of the chapter on economic and social rights, confirms that the right in s. 45 is protected only to the extent provided for by law. Section 45 is not, however, without any obligational content. Because s. 10 of the Quebec *Charter* does not create an independent right to equality, the right of access to measures of financial assistance and social measures without discrimination would not be guaranteed by the Quebec *Charter* were it not for s. 45.

*Per* Arbour J. (dissenting): Section 29(a) of the Regulation infringed s. 7 of the *Charter* by depriving

une autre vision stéréotypée selon laquelle la majeure partie des jeunes assistés sociaux choisissent de vivre de façon permanente aux crochets de la société. Loin de se cramponner à l’aide sociale par paresse, les jeunes assistés sociaux des années 80 sont demeurés tributaires de l’aide sociale faute d’emplois disponibles. Même si le gouvernement pouvait valablement inciter les jeunes au travail, la solution retenue discriminait sans motif valable entre les bénéficiaires d’aide sociale de moins de 30 ans et ceux de 30 ans et plus. Les déficiences du régime, conjuguées aux idées préconçues le sous-tendant, mènent à la conclusion que l’al. 29a) du règlement portait atteinte au droit à l’égalité garanti par l’art. 15 de la *Charte*. Pour les motifs exposés par le juge Bastarache, l’al. 29a) du règlement n’est pas sauvegardé par l’article premier de la *Charte*.

Bien que l’appelante n’ait pas réussi à établir en l’espèce une violation de l’art. 7 de la *Charte*, pour les motifs exposés par la majorité, il ne convient pas à ce moment-ci de fermer la porte à une éventuelle possibilité que l’art. 7 puisse être invoqué dans des circonstances n’ayant aucun lien avec le système de justice.

L’article 45 de la *Charte* québécoise ne garantit pas un droit autonome à un niveau de vie décent. Cet article protège seulement un droit d’accès à des mesures sociales à toute personne dans le besoin. Bien que l’insertion des droits sociaux et économiques dans la *Charte* québécoise leur confère une nouvelle dimension, elle ne leur a pas attribué un caractère juridiquement contraignant. La majorité des dispositions dans le chapitre des « Droits économiques et sociaux » contiennent une réserve indiquant que la mise en œuvre des droits qu’elles protègent dépend de l’adoption de mesures législatives. Dans le cas de l’art. 45, le fait que toute personne dans le besoin n’ait pas droit à des mesures lui assurant un niveau de vie décent, mais plutôt à des mesures susceptibles de lui assurer ce niveau de vie, suggère que le législateur n’a pas voulu conférer aux tribunaux le pouvoir de réviser la suffisance des mesures adoptées ni de s’ériger en législateurs à cet égard. L’expression « prévues par la loi », interprétée à la lumière des autres dispositions du chapitre des droits économiques et sociaux, confirme que le droit prévu à l’art. 45 n’est protégé que dans la mesure prescrite par la loi. L’article 45 n’est toutefois pas dépourvu de tout contenu obligationnel. Puisque l’art. 10 de la *Charte* québécoise ne crée pas un droit autonome à l’égalité, le droit d’accès sans discrimination à des mesures d’assistance financière et à des mesures sociales ne serait pas garanti par la *Charte* québécoise en l’absence de l’art. 45.

*Le* juge Arbour (dissidente) : L’alinéa 29a) du règlement contrevenait à l’art. 7 de la *Charte* en privant ceux

those to whom it applied of their right to security of the person. Section 7 imposes a positive obligation on the state to offer basic protection for the life, liberty and security of its citizens.

The barriers that are traditionally said to preclude a positive claim against the state under s. 7 are unconvincing. The fact that a right may have some economic value is an insufficient reason to exclude it from the ambit of s. 7. Economic rights that are fundamental to human life or survival are not of the same ilk as corporate-commercial economic rights. The right to a minimum level of social assistance is intimately intertwined with considerations related to one's basic health and, at the limit, even one's survival. These rights can be readily accommodated under the s. 7 rights to "life, liberty and security of the person" without the need to constitutionalize "property" rights or interests. Nor should the interest claimed in this case be ruled out because it fails to exhibit the characteristics of a "legal right". The reliance on the subheading "Legal Rights" as a way of delimiting the scope of s. 7 protection has been supplanted by a purposive and contextual approach to the interpretation of constitutionally protected rights. New kinds of interests, quite apart from those engaged by one's dealings with the justice system and its administration, have been asserted and found to be deserving of s. 7 protection. To continue to insist upon the restrictive significance of the placement of s. 7 within the "Legal Rights" portion of the *Charter* would be to freeze constitutional interpretation in a manner inconsistent with the vision of the Constitution as a "living tree". Furthermore, in order to ground a s. 7 claim, it is not necessary that there be some affirmative state action interfering with life, liberty or security of the person. In certain cases, s. 7 can impose on the state a duty to act where it has not done so. A requirement of positive state interference is not implicit in the use of the phrase "principles of fundamental justice" or the concept of "deprivation" in s. 7. The concept of deprivation is sufficiently broad to embrace withholdings that have the effect of erecting barriers in the way of the attainment of some object. The context in which s. 7 is found within the *Charter* favours a conclusion that it can impose on the state a positive duty to act. Since illustrations of the "principles of fundamental justice" found in ss. 8 to 14 of the *Charter* entrench positive rights, it is to be expected that s. 7 rights also contain a positive dimension. Recent case law implies that mere state inaction will on occasion be sufficient to engage s. 7's protection. Finally, the concern that positive claims against the state are not justiciable does not present a barrier in the present case. While it may be true that courts are ill-equipped to decide policy matters concerning resource allocation, this does not support the conclusion that justiciability is a threshold issue barring

auxquels il s'appliquait du droit à la sécurité de leur personne. L'article 7 impose à l'État l'obligation positive d'assurer à ses citoyens la protection élémentaire en ce qui touche la vie, la liberté et la sécurité de leur personne.

Les objections généralement avancées pour s'opposer à la présentation, en vertu de l'art. 7, de demandes sollicitant l'intervention concrète de l'État ne sont pas convaincantes. Le fait qu'un droit puisse comporter une certaine valeur économique n'est pas une raison suffisante pour l'exclure du champ d'application de l'art. 7. Les droits économiques qui sont essentiels à la vie des individus et à leur survie ne sont pas de même nature que les droits économiques des sociétés commerciales. Le droit à un niveau minimal d'aide sociale est intimement lié à des considérations touchant fondamentalement à la santé d'une personne et même, à la limite, à sa survie. Ce droit peut facilement s'intégrer dans le droit « à la vie, à la liberté et à la sécurité de sa personne » prévu à l'art. 7, sans qu'il soit nécessaire de constitutionnaliser les droits ou intérêts de « propriété ». Le type de droit revendiqué en l'espèce ne saurait non plus être écarté parce qu'il ne présente pas les caractéristiques d'une « garantie juridique ». Le recours à l'intertitre « Garanties juridiques » comme moyen de circonscrire le champ d'application de l'art. 7 a été remplacé par l'application d'une démarche téléologique et contextuelle en matière d'interprétation des droits protégés par la Constitution. Au fil des ans, les plaideurs ont invoqué de nouveaux droits très distincts de ceux qui sont en cause lorsque le système judiciaire et l'administration de la justice sont concernés, et les tribunaux ont jugé que ces droits étaient protégés par l'art. 7. Continuer à insister sur l'effet restrictif qu'aurait le fait que l'art. 7 se trouve dans la section des « Garanties juridiques » de la *Charte* équivaldrait à figer l'interprétation constitutionnelle d'une manière incompatible avec la conception selon laquelle la Constitution est un « arbre vivant ». En outre, l'existence d'une mesure étatique concrète portant atteinte à la vie, à la liberté ou à la sécurité de la personne n'est pas requise pour fonder la présentation d'une demande en vertu de l'art. 7. Dans certaines circonstances, l'art. 7 peut imposer à l'État l'obligation d'agir lorsqu'il ne l'a pas fait. Le concept de « *deprivation* » évoqué dans le texte anglais de l'art. 7 et l'expression « principes de justice fondamentale » (et son équivalent anglais) dans le texte de cet article ne requièrent pas implicitement l'existence d'une mesure attentatoire concrète de la part de l'État. Le concept de « *deprivation* » est suffisamment large pour englober les privations dont l'effet est d'ériger des obstacles à la réalisation d'un objectif. La position de l'art. 7 dans la structure de la *Charte* milite en faveur de la conclusion selon laquelle cet

the consideration of the substantive claim in this case. This case raises the different question of whether the state is under a positive obligation to provide basic means of subsistence to those who cannot provide for themselves. The role of the courts as interpreters of the *Charter* and guardians of its fundamental freedoms requires them to adjudicate such rights-based claims. These claims can be dealt with here without addressing the question of how much expenditure by the state is necessary in order to secure the right claimed, a question which may not be justiciable.

A textual, purposive or contextual approach to the interpretation of s. 7 mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension. The grammatical structure of s. 7 seems to indicate that it protects two rights: a right, set out in the section's first clause, to "life, liberty and security of the person"; and a right, set out in the second clause, not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. As a purely textual matter, the fact that the first clause involves some greater protection than that accorded by the second clause seems beyond reasonable objection. There are at least two reasonable interpretations as to what this additional protection might consist of: the first clause may be interpreted as providing for a completely independent and self-standing right, which can be violated even absent a breach of fundamental justice, but requiring a s. 1 justification in the event of such violation; another possible interpretation focuses on the absence of the term "deprivation" in the first clause and suggests that it is at most in connection with the right afforded in the second clause, if at all, that there must be positive state action to ground a violation. Either interpretation demands recognition of the sort of interest claimed by the

article peut avoir pour effet d'imposer à l'État l'obligation d'agir. Comme les exemples de « principes de justice fondamentale » prévus aux art. 8 à 14 de la *Charte* consacrent des droits positifs, il est permis de penser que les droits visés à l'art. 7 comportent également une dimension positive. Il ressort implicitement de certains arrêts récents que la simple inaction de l'État est suffisante dans certaines circonstances pour faire jouer la protection de l'art. 7. Enfin, les doutes qui existent quant à la justiciabilité des demandes sollicitant l'intervention de l'État ne constituent pas un obstacle en l'espèce. Bien qu'il puisse être vrai que les tribunaux ne sont pas équipés pour trancher des questions de politique générale touchant à la répartition des ressources, ce facteur ne permet pas de conclure que la justiciabilité constitue une condition préalable faisant échec à l'examen au fond du présent litige. Le présent pourvoi soulève une question tout à fait différente, soit celle de savoir si l'État a l'obligation positive d'intervenir pour fournir des moyens élémentaires de subsistance aux personnes incapables de subvenir à leurs besoins. Dans leur rôle d'interprètes de la *Charte* et de protecteurs des libertés fondamentales garanties par celle-ci, les tribunaux sont requis de statuer sur les revendications en justice de tels droits. Il est possible, en l'espèce, de connaître des revendications de cette nature sans se demander combien l'État devrait déboursier pour garantir le droit revendiqué, question qui pourrait ne pas être justiciable.

L'interprétation de l'art. 7, qu'il s'agisse d'une analyse téléologique, textuelle ou contextuelle, mène à la conclusion que le droit de chacun à la vie, à la liberté et à la sécurité de sa personne garanti par cette disposition comporte une dimension positive. La structure grammaticale de l'art. 7 semble indiquer que celui-ci confère deux droits : le droit, énoncé dans la première partie de la disposition, « à la vie, à la liberté et à la sécurité de sa personne », ainsi que le droit, énoncé dans la deuxième partie de la disposition, à ce qu'il ne soit porté atteinte à la vie, à la liberté ou la sécurité d'une personne qu'en conformité avec les principes de justice fondamentale. D'un point de vue purement textuel, il semble qu'on ne puisse raisonnablement nier que la première partie de l'art. 7 accorde une protection plus large que celle prévue par la deuxième partie de cette disposition. Au moins deux interprétations raisonnables sont avancées en ce qui concerne la nature de cette protection additionnelle : suivant une de ces interprétations, la première partie établirait un droit entièrement distinct et autonome, auquel il peut être porté atteinte même en l'absence de violation des principes de justice fondamentale, sous réserve qu'en pareils cas il faut justifier cette atteinte au regard de l'article premier; selon l'autre interprétation, qui s'attache à l'absence du terme « *deprivation* » en anglais dans

appellant in this case and it is not necessary to decide which one is to be preferred.

A purposive interpretation of s. 7 as a whole requires that all the rights embodied in it be given meaning. Reducing s. 7 only to the second clause leaves no useful meaning to the right to life. Such an interpretation of s. 7 threatens not only the coherence, but also the purpose of the *Charter* as a whole. In order to avoid this result, it must be recognized that the state can potentially infringe the right to life, liberty and security of the person in ways that go beyond violating the right contained in the second clause of s. 7. Section 7 must be interpreted as protecting something more than merely negative rights, otherwise the s. 7 right to life will be reduced to the function of guarding against capital punishment — a possibly redundant function in light of s. 12 of the *Charter* — with all of the intolerable conceptual difficulties attendant upon such an interpretation.

With respect to the contextual analysis, positive rights are an inherent part of the *Charter's* structure. The *Charter* compels the state to act positively to ensure the protection of a significant number of rights. Moreover, justification under s. 1 which invokes the values that underpin the *Charter* as the only suitable basis for limiting those rights, confirms that *Charter* rights contain a positive dimension. Constitutional rights are not simply a shield against state interference. They place a positive obligation on the state to arbitrate competing demands arising from the liberty and rights of others. Thus if one's right to life, liberty and security of the person can be limited under s. 1 by the need to protect the life, liberty or security of others, it can only be because the right is not merely a negative right but a positive one, calling for the state not only to abstain from interfering with life, liberty and security of the person but also to actively secure that right in the face of competing demands.

The interest claimed in this case falls within the range of entitlements that the state is under a positive

la première partie de la disposition, c'est tout au plus à l'égard du droit garanti dans la deuxième partie, à supposer que ce soit même le cas, qu'il faut établir l'existence d'une mesure étatique positive pour fonder une plainte reprochant la violation de ce droit. Chacune de ces interprétations exige la reconnaissance du type de droit que revendique l'appelante en l'espèce et il n'est pas nécessaire de décider laquelle de ces interprétations doit être retenue.

L'interprétation téléologique de l'ensemble de l'art. 7 requiert que l'on donne un sens à tous les droits qui y sont consacrés. Le fait de limiter l'art. 7 uniquement à sa deuxième partie a pour effet de n'attribuer aucun rôle concret au droit à la vie. Une telle interprétation menace non seulement la cohérence de la *Charte* dans son ensemble, mais également son objet. Pour éviter ce résultat, il faut reconnaître qu'il pourrait arriver que l'État porte atteinte au droit à la vie, à la liberté et à la sécurité de la personne autrement qu'en violant le droit prévu à la deuxième partie de l'art. 7. Il faut considérer que l'art. 7 protège davantage que de simples droits négatifs, autrement le rôle du droit à la vie garanti par cette disposition se résumerait à la protection contre la peine de mort — faisant ainsi potentiellement double emploi avec l'art. 12 de la *Charte* —, avec toutes les difficultés conceptuelles intolérables qui découlent d'une telle interprétation.

Relativement à l'analyse contextuelle, les droits positifs font partie intégrante de la structure de la *Charte*. La *Charte* impose à l'État l'obligation d'agir concrètement en vue d'assurer la protection d'un nombre appréciable de droits. En outre, le processus de justification prévu par l'article premier, démarche qui considère les valeurs sous-tendant la *Charte* comme le seul fondement justifiant de restreindre les droits concernés, confirme que les droits consacrés par la *Charte* comportent une dimension positive. Les droits constitutionnels ne servent pas simplement de bouclier contre les atteintes à la liberté commises par l'État, mais ils ont également pour effet d'imposer à celui-ci l'obligation positive d'arbitrer les revendications conflictuelles découlant des droits et libertés de chacun. Si le droit d'un individu à la vie, à la liberté et à la sécurité de sa personne peut, par application de l'article premier, être restreint en raison de la nécessité de protéger la vie, la liberté ou la sécurité d'autrui, ce ne peut être que parce que ce droit n'est pas simplement un droit négatif mais aussi un droit positif, qui commande à l'État non seulement de s'abstenir de porter atteinte à la vie, à la liberté et à la sécurité d'une personne, mais également de garantir activement ce droit en présence de revendications conflictuelles.

Le droit revendiqué en l'espèce fait partie de ceux que l'État a l'obligation positive d'accorder en vertu de

obligation to provide under s. 7. Underinclusive legislation results in a violation of the *Charter* outside the context of s. 15 where: (1) the claim is grounded in a fundamental *Charter* right or freedom rather than in access to a particular statutory regime; (2) a proper evidentiary foundation demonstrates that exclusion from the regime constitutes a substantial interference with the exercise and fulfilment of a protected right; and (3) it is determined that the state can truly be held responsible for the inability to exercise the right or freedom in question. Here, exclusion from the statutory regime effectively excludes the claimants from any real possibility of having their basic needs met. It is not exclusion from the particular statutory regime that is at stake but the claimants' fundamental rights to security of the person and life itself, which exist independently of any statutory enactment. The evidence demonstrates that the physical and psychological security of young adults was severely compromised during the period at issue and that the legislated exclusion of young adults from the full benefits of the social assistance regime substantially interfered with their fundamental right to security of the person and perhaps even their right to life. Freedom from state interference with bodily or psychological integrity is of little consolation to those who are faced with a daily struggle to meet their most basic bodily and psychological needs. In such cases, one can reasonably conclude that positive state action is what is required in order to breathe purpose and meaning into their s. 7 guaranteed rights. The state can properly be held accountable for the claimants' inability to exercise their s. 7 rights. The issue here is simply whether the state is under an obligation of performance to alleviate the claimants' condition. The claimants need not establish that the state can be held causally responsible for the socio-economic environment in which their s. 7 rights were threatened, nor do they need to establish that the government's inaction worsened their plight. The legislation is directed at providing supplemental aid to those who fall below a subsistence level — an interest which s. 7 was meant to protect. Legislative intervention aimed at providing for essential needs touching on the personal security and survival of indigent members of society is sufficient to satisfy whatever "minimum state action" requirement might be necessary to engage s. 32 of the *Charter*. By enacting the *Social Aid Act*, the Quebec government triggered a state obligation to ensure that any differential treatment or underinclusion in the provision of these essential needs did not run afoul of the fundamental rights guaranteed by the *Charter*, and in particular by s. 7. It failed to discharge this obligation. As the protection of positive rights is grounded in the first clause of s. 7, which provides a free-standing right to life, liberty and security of the person, and as the violation here consists of inaction and does not bring the justice system

l'art. 7. En dehors du contexte de l'art. 15, une mesure législative n'ayant pas un caractère suffisamment inclusif entraîne une violation de la *Charte* lorsque les conditions suivantes sont réunies : (1) l'argument doit reposer sur une liberté ou un droit fondamental garanti par la *Charte*, plutôt que sur l'accès à un régime légal précis; (2) il doit exister une preuve appropriée, démontrant que l'exclusion du régime légal crée une entrave substantielle à l'exercice du droit protégé; (3) il faut déterminer si l'État peut vraiment être tenu responsable de l'incapacité d'exercer la liberté ou le droit fondamental en question. Dans le présent pourvoi, l'exclusion des demandeurs du régime légal les prive effectivement de toute possibilité concrète de pourvoir à leurs besoins essentiels. Ce qui est en jeu n'est pas l'exclusion du régime légal concerné, mais les droits fondamentaux des demandeurs à la sécurité de leur personne et à la vie même, qui existent indépendamment de tout texte législatif. La preuve établit que la sécurité physique et psychologique des jeunes adultes a été sérieusement compromise au cours de la période pertinente et que le fait, dans le texte de loi, d'avoir exclu les jeunes adultes du plein bénéfice des avantages du régime d'aide sociale a porté substantiellement atteinte à leur droit fondamental à la sécurité de leur personne et peut-être même à leur droit à la vie. Le droit de ne pas être victimes d'atteintes par l'État à leur intégrité physique ou psychologique est une bien mince consolation pour les personnes qui doivent quotidiennement lutter pour subvenir à leurs besoins physiques et psychologiques les plus élémentaires. Dans ces cas, il est raisonnablement possible de conclure qu'une intervention concrète de l'État est nécessaire pour donner sens et effet aux droits garantis par l'art. 7. L'État peut à juste titre être tenu responsable de l'incapacité des demandeurs à exercer les droits que leur garantit l'art. 7. Dans la présente affaire, il s'agit tout simplement de décider si l'État a l'obligation d'agir pour soulager la situation pénible des demandeurs. Ces derniers n'ont pas à prouver que l'État peut être tenu causalement responsable de l'environnement socio-économique dans lequel les droits que leur garantit l'art. 7 ont été menacés, ni que l'inaction de l'État a aggravé leur sort. La législation pertinente vise à fournir une aide complémentaire aux personnes dont les moyens de subsistance sont inférieurs à un niveau donné — droit que l'art. 7 est censé protéger. Une intervention législative destinée à pourvoir aux besoins essentiels des citoyens nécessiteux en matière de sécurité personnelle et de subsistance est suffisante pour satisfaire à toute condition d'application de l'art. 32 de la *Charte* qui requerrait l'existence d'un « minimum d'action gouvernementale ». En édictant la *Loi sur l'aide sociale*, le gouvernement du Québec a fait naître pour l'État l'obligation de s'assurer que toute différence de traitement ou non-inclusion concernant la prestation de ces services

into motion, it is not necessary to determine whether the violation of the appellant's s. 7 rights was in accordance with the principles of fundamental justice.

The violation of the claimants' right to life, liberty and security of the person cannot be saved by s. 1 of the *Charter*. Although preventing the attraction of young adults to social assistance and facilitating their integration into the workforce might satisfy the "pressing and substantial objective" requirement of the *Oakes* test, it is difficult to accept that denial of the basic means of subsistence is rationally connected to promoting the long-term liberty and inherent dignity of young adults. Moreover, there is agreement with Bastarache J.'s finding that those means were not minimally impairing in a number of ways.

Section 29(a) of the Regulation infringed s. 15(1) of the *Charter*. On the s. 15 issue, there is general agreement with Bastarache J.'s analysis and conclusions. The infringement could not be saved by s. 1 for substantially the same reasons discussed in relation to the s. 7 violation.

There is also agreement with Bastarache J. that s. 45 of the Quebec *Charter* establishes a positive right to a minimal standard of living but that, in the circumstances of this case, this right cannot be enforced under s. 52 or s. 49.

Finally, there is agreement with Bastarache J. as to the appropriate remedy.

*Per* L'Heureux-Dubé J. (dissenting): There is agreement with Bastarache and LeBel JJ. that s. 29(a) of the Regulation violated s. 15 of the *Charter*. Presumptively excluding groups that clearly fall within an enumerated category from s. 15's protection does not serve the purposes of the equality guarantee. The enumerated ground of age is a permanent marker of suspect distinction. Any attempt to exclude youth from s. 15 protection misplaces the focus of a s. 15 inquiry, which is properly on the

essentiels n'est pas incompatible avec les droits fondamentaux garantis par la *Charte*, tout particulièrement l'art. 7. Il ne s'est pas acquitté de cette obligation. Comme la protection des droits positifs découle de la première partie de l'art. 7, qui reconnaît à chacun un droit autonome à la vie, à la liberté et à la sécurité de sa personne et comme, en l'espèce, la violation découle d'une inaction et ne fait pas entrer en jeu le système judiciaire, il n'est pas nécessaire de se demander si cette atteinte aux droits garantis par l'art. 7 à l'appelante a été portée en conformité avec les principes de justice fondamentale.

La violation du droit des demandeurs à la vie, à la liberté et à la sécurité de sa personne n'est pas justifiée au sens de l'article premier. Bien que l'objectif consistant à prévenir l'effet d'attraction du régime d'aide sociale sur les jeunes adultes et à favoriser leur intégration dans la population active puisse satisfaire à la condition requérant l'existence d'un « objectif urgent et réel » que prévoit le critère élaboré dans l'arrêt *Oakes*, il est difficile d'accepter que la négation des moyens élémentaires de subsistance puisse avoir un lien rationnel avec les valeurs qu'on tend à favoriser, à savoir la liberté et la dignité inhérente des jeunes adultes à long terme. En outre, il y a accord avec la conclusion du juge Bastarache selon laquelle l'atteinte causée par ces moyens n'était pas, pour plusieurs raisons, minimale.

L'alinéa 29a) du règlement violait le par. 15(1) de la *Charte*. Pour ce qui est de l'art. 15, il y a accord général avec l'analyse et les conclusions du juge Bastarache. La violation de l'art. 15 n'était pas justifiée au regard de l'article premier, essentiellement pour les raisons exposées à l'égard de la violation de l'art. 7.

Il y a également accord avec l'opinion du juge Bastarache selon laquelle l'art. 45 de la *Charte* québécoise établit un droit positif à un niveau de vie minimal, mais que le respect de ce droit ne peut être imposé en vertu des art. 52 ou 49 dans les circonstances du présent pourvoi.

Enfin, il y a accord avec les conclusions du juge Bastarache quant à la réparation qui convient en l'espèce.

*Le* juge L'Heureux-Dubé (dissidente) : L'opinion des juges Bastarache et LeBel, selon laquelle l'al. 29a) du règlement violait l'art. 15 de la *Charte*, est acceptée. Exclure a priori de la protection de l'art. 15 des groupes qui appartiennent clairement à une catégorie énumérée ne sert pas les fins de la garantie d'égalité. Le motif énuméré de l'âge est un indicateur permanent de l'existence d'une distinction suspecte. Toute tentative d'exclure les jeunes de la protection de l'art. 15 déplace le point de

effects of discrimination and not on the categorizing of grounds. Furthermore, the perspective of the legislature should not be incorporated in a s. 15 analysis. An intention to discriminate is not necessary for a finding of discrimination. Conversely, the fact that a legislature intends to assist the group or individual adversely affected by the distinction does not preclude a finding of discrimination.

Section 29(a) clearly draws a distinction on an enumerated ground. The only issue is whether s. 29(a) denies human dignity in purpose or effect. Harm to dignity results from infringements of individual interests including physical and psychological integrity. Such infringements undermine self-respect and self-worth and communicate to the individual that he or she is not a full member of Canadian society. Stereotypes are not needed to find a distinction discriminatory. Here, the contextual factors listed in *Law* support a finding of discrimination. In particular, the severe harm suffered by the claimant to a fundamental interest, as a result of a legislative distinction drawn on an enumerated or analogous ground, was sufficient for a court to conclude that the distinction was discriminatory. Because she was under 30, the claimant was exposed to the risk of severe poverty. She lived at times below the government's own standard of bare subsistence. Her psychological and physical integrity were breached. A reasonable person in the claimant's position, apprised of all the circumstances, would have perceived that her right to dignity had been infringed as a sole consequence of being under 30 years of age, a condition over which she had no control, and that she had been excluded from full participation in Canadian society. With respect to the other contextual factors, a legislative scheme which causes individuals to suffer severe threats to their physical and psychological integrity as a result of a personal characteristic which cannot be changed *prima facie* does not adequately take into account the needs, capacity or circumstances of the individual or group in question. An ameliorative purpose, as a contextual factor, must be for the benefit of a group less advantaged than the one targeted by the distinction. There is no such group in the present case. Finally, since unemployment was far higher among young adults as compared to the general active population, and an unprecedented number of young people were entering the job market at a time when federal social assistance programs were faltering, it is difficult to conclude that they did not suffer from a pre-existing disadvantage. Disadvantage need not be shared by all members of a group for there to be a finding of discrimination, if, as in this case, it can be shown that only

mire de l'analyse de l'art. 15, laquelle doit porter sur les effets de la discrimination et non sur le classement des motifs dans une catégorie. De surcroît, il n'y a pas lieu de prendre en considération le point de vue du législateur dans l'analyse fondée sur l'art. 15. Une intention de discriminer n'est pas nécessaire pour conclure à la discrimination. Inversement, le fait qu'un législateur ait l'intention d'aider le groupe ou la personne sur lesquels la distinction alléguée a un effet préjudiciable n'empêche pas de conclure à la discrimination.

L'alinéa 29a) établit clairement une distinction fondée sur un motif énuméré. La seule question qui se pose est de savoir si, dans son objet ou son effet, il porte atteinte à la dignité humaine. La dignité humaine est violée s'il y a atteinte aux intérêts individuels, dont l'intégrité physique et psychologique. Ces atteintes minent le respect et l'estime de soi et transmettent à l'individu l'idée qu'il n'est pas un membre à part entière de la société canadienne. Une distinction peut être discriminatoire même si elle ne repose pas sur des stéréotypes. En l'espèce, les facteurs contextuels énumérés dans l'arrêt *Law* étayaient une conclusion de discrimination. En particulier, la grave atteinte à un droit fondamental dont a été victime l'appelante, en raison d'une distinction législative fondée sur un motif énuméré ou analogue, était suffisante pour qu'un tribunal puisse statuer que la distinction était discriminatoire. L'appelante était exposée au risque d'une grande pauvreté du fait qu'elle avait moins de 30 ans. Elle a parfois vécu en-deçà du niveau de subsistance minimal fixé par le gouvernement même. Il y a eu atteinte à son intégrité psychologique et physique. Une personne raisonnable, placée dans la position de l'appelante et informée de toutes les circonstances, aurait estimé que son droit à la dignité était violé pour le seul motif qu'elle avait moins de 30 ans, alors qu'elle n'était pas en mesure de faire quoi que ce soit pour modifier cet attribut, et qu'elle était exclue d'une pleine participation à la société canadienne. En ce qui concerne les autres facteurs contextuels, un régime législatif qui menace sérieusement l'intégrité physique et psychologique de certaines personnes, simplement parce qu'elles possèdent une caractéristique personnelle qui ne peut être changée, ne tient pas adéquatement compte, à première vue, des besoins, des capacités et de la situation de la personne ou du groupe en cause. Un objectif d'amélioration, comme facteur contextuel, doit être à l'avantage d'un groupe moins favorisé que celui visé par la distinction. Il n'est pas question d'un tel groupe en l'espèce. Enfin, étant donné que le taux de chômage était beaucoup plus élevé chez les jeunes adultes que pour l'ensemble de la population active, et qu'un nombre record de jeunes entrait sur le marché du travail à une époque où les programmes fédéraux d'aide sociale étaient chancelants, il est difficile de conclure que les jeunes adultes n'étaient pas victimes d'un désavantage

members of that group suffered the disadvantage. The breach of s. 15 was not justified. On this point, there is agreement with Bastarache J.'s s. 1 analysis.

For the reasons given by Arbour J., s. 29(a) of the Regulation violated s. 7 of the *Charter*. Although governments should in general make policy implementation choices, other actors may aid in determining whether social programs are necessary. A claimant should be able to establish with adequate evidence what would constitute a minimum level of assistance. For the reasons given by the dissenting judge in the Court of Appeal and substantially for the reasons expressed by Arbour J., the s. 7 violation was not justified.

For the reasons given by the dissenting judge in the Court of Appeal, s. 29(a) of the Regulation infringes s. 45 of the Quebec *Charter*.

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By McLachlin C.J.

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préexistant. Il n'est pas nécessaire que le désavantage frappe tous les membres d'un groupe pour qu'il y ait discrimination, à condition qu'il soit possible de démontrer, comme c'est le cas dans la présente affaire, que seuls des membres de ce groupe sont victimes du désavantage. La violation de l'art. 15 n'était pas justifiée. Sur ce point, il y a accord avec l'analyse que le juge Bastarache effectue au regard de l'article premier.

Pour les motifs exposés par le juge Arbour, l'al. 29a) du règlement contrevient à l'art. 7 de la *Charte*. Bien qu'il revienne en général aux gouvernements de faire les choix qui concernent la mise en œuvre des politiques, d'autres acteurs peuvent aider à déterminer si des programmes sociaux sont nécessaires. Un demandeur doit être en mesure d'établir, au moyen d'une preuve suffisante, ce qui serait un niveau minimal d'aide. Pour les motifs exposés par le juge dissident de la Cour d'appel et essentiellement pour les mêmes raisons que le juge Arbour, la violation de l'art. 7 n'était pas justifiée.

Pour les motifs exposés par le juge dissident de la Cour d'appel, l'al. 29a) du règlement viole l'art. 45 de la *Charte québécoise*.

#### Jurisprudence

Citée par le juge en chef McLachlin

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By LeBel J. (dissenting)

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By L'Heureux-Dubé J. (dissenting)

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Citée par le juge Arbour (dissidente)

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*Carmen Palardy, Georges Massol and Stéphanie Bernstein*, for the appellant.

*André Fauteux and Isabelle Harnois*, for the respondent.

*Janet E. Minor and Peter Landmann*, for the intervener the Attorney General for Ontario.

*Gabriel Bourgeois, Q.C.*, for the intervener the Attorney General for New Brunswick.

*Sarah Macdonald*, for the intervener the Attorney General of British Columbia.

*Margaret Unsworth*, for the intervener the Attorney General for Alberta.

*David Matas*, for the intervener Rights and Democracy (also known as International Centre for Human Rights and Democratic Development).

*Hélène Tessier*, for the intervener Commission des droits de la personne et des droits de la jeunesse.

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Weinrib, Lorraine Eisenstat. « The Supreme Court of Canada and Section One of the Charter » (1988), 10 *Sup. Ct. L. Rev.* 469.

POURVOI contre un arrêt de la Cour d’appel du Québec, [1999] R.J.Q. 1033, [1999] J.Q. n<sup>o</sup> 1365 (QL), qui a confirmé un jugement de la Cour supérieure, [1992] R.J.Q. 1647, [1992] J.Q. n<sup>o</sup> 928 (QL). Pourvoi rejeté, les juges L’Heureux-Dubé, Bastarache, Arbour et LeBel sont dissidents.

*Carmen Palardy, Georges Massol et Stéphanie Bernstein*, pour l’appelante.

*André Fauteux et Isabelle Harnois*, pour l’intimé.

*Janet E. Minor et Peter Landmann*, pour l’intervenant le procureur général de l’Ontario.

*Gabriel Bourgeois, c.r.*, pour l’intervenant le procureur général du Nouveau-Brunswick.

*Sarah Macdonald*, pour l’intervenant le procureur général de la Colombie-Britannique.

*Margaret Unsworth*, pour l’intervenant le procureur général de l’Alberta.

*David Matas*, pour l’intervenant Droits et Démocratie (aussi appelé Centre international des droits de la personne et du développement démocratique).

*Hélène Tessier*, pour l’intervenante la Commission des droits de la personne et des droits de la jeunesse.

*Gwen Brodsky and Rachel Cox*, for the intervener the National Association of Women and the Law (NAWL).

*Vincent Calderhead and Martha Jackman*, for the intervener the Charter Committee on Poverty Issues (CCPI).

*Chantal Masse and Fred Headon*, for the intervener the Canadian Association of Statutory Human Rights Agencies (CASHRA).

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major and Binnie JJ. was delivered by

#### THE CHIEF JUSTICE —

##### I. Introduction

1 Louise Gosselin was born in 1959. She has led a difficult life, complicated by a struggle with psychological problems and drug and alcohol addictions. From time to time she has tried to work, attempting jobs such as cook, waitress, salesperson, and nurse's assistant, among many. But work would wear her down or cause her stress, and she would quit. For most of her adult life, Ms. Gosselin has received social assistance.

2 In 1984, the Quebec government altered its existing social assistance scheme in an effort to encourage young people to get job training and join the labour force. Under the scheme, which has since been repealed, the base amount payable to welfare recipients under 30 was lower than the base amount payable to those 30 and over. The new feature was that, to receive an amount comparable to that received by older people, recipients under 30 had to participate in a designated work activity or education program.

3 Ms. Gosselin contends that the lower base amount payable to people under 30 violates: (1) s. 15(1) of the *Canadian Charter of Rights and Freedoms* ("Canadian Charter"), which guarantees equal treatment without discrimination based on grounds

*Gwen Brodsky et Rachel Cox*, pour l'intervenante l'Association nationale de la femme et du droit (ANFD).

*Vincent Calderhead et Martha Jackman*, pour l'intervenant le Comité de la Charte et des questions de pauvreté (CCQP).

*Chantal Masse et Fred Headon*, pour l'intervenante l'Association canadienne des commissions et conseil des droits de la personne (ACCCDP).

Version française du jugement du juge en chef McLachlin et des juges Gonthier, Iacobucci, Major et Binnie rendu par

#### LE JUGE EN CHEF —

##### I. Introduction

Louise Gosselin est née en 1959. Elle a vécu une vie difficile, compliquée par des problèmes psychologiques et de dépendance à l'alcool et aux drogues. Elle a tenté de travailler à l'occasion, notamment comme cuisinière, serveuse, vendeuse et aide-infirmière. Cependant, le travail l'épuisait ou la stressait et elle quittait son emploi. Pendant la majeure partie de sa vie adulte, M<sup>me</sup> Gosselin a reçu de l'aide sociale.

En 1984, le gouvernement du Québec a modifié le régime d'aide sociale en vigueur à l'époque en vue d'encourager les jeunes à obtenir une formation professionnelle et à s'intégrer dans la population active. En vertu de ce régime, abrogé depuis, l'allocation de base payable aux bénéficiaires d'aide sociale de moins de 30 ans était inférieure à celle accordée aux 30 ans et plus. L'élément novateur de ce régime était qu'il obligeait les bénéficiaires de moins de 30 ans à participer à une activité de travail désignée ou à un programme de formation pour recevoir un montant comparable à celui touché par les bénéficiaires plus âgés.

Madame Gosselin soutient que l'allocation de base inférieure payable aux personnes de moins de 30 ans contrevient : (1) au par. 15(1) de la *Charte canadienne des droits et libertés* (la « *Charte canadienne* ») qui garantit l'égalité de traitement sans

including age; (2) s. 7 of the *Canadian Charter*, which prevents the government from depriving individuals of liberty and security except in accordance with the principles of fundamental justice; and (3) s. 45 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 (“*Quebec Charter*”). She further argues that neither of the alleged *Canadian Charter* violations can be demonstrably justified under s. 1.

On this basis, Ms. Gosselin asks this Court to order the Quebec government to pay the difference between the lower and the higher base amounts to all the people who: (1) lived in Quebec and were between the ages of 18 and 30 at any time from 1985 to 1989; (2) received the lower base amount payable to those under 30; and (3) did not participate in the government programs, for whatever reason. On her submissions, this would mean ordering the government to pay almost \$389 million in benefits plus the interest accrued since 1985. Ms. Gosselin claims this remedy on behalf of over 75 000 unnamed class members, none of whom came forward in support of her claim.

In my view, the evidence fails to support Ms. Gosselin’s claim on any of the asserted grounds. Accordingly, I would dismiss the appeal.

## II. Facts and Decisions

In 1984, in the face of alarming and growing unemployment among young adults, the Quebec legislature made substantial amendments to the *Social Aid Act*, R.S.Q., c. A-16, creating a new scheme — the scheme at issue in this litigation. Section 29(a) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, made under the Act continued to cap the base amount of welfare payable to those under 30 at roughly one third of the base amount payable to those 30 and over. However, the 1984 scheme for the first time made it possible for people under 30 to increase their welfare payments,

discrimination fondée notamment sur l’âge; (2) à l’art. 7 de la *Charte canadienne* qui interdit au gouvernement de porter atteinte à la liberté et à la sécurité d’une personne sauf en conformité avec les principes de justice fondamentale; (3) à l’art. 45 de la *Charte des droits et libertés de la personne* du Québec, L.R.Q., ch. C-12 (la « *Charte québécoise* »). Elle fait également valoir qu’aucune des violations alléguées de la *Charte canadienne* ne peut se justifier au regard de l’article premier.

Sur ce fondement, M<sup>me</sup> Gosselin demande à notre Cour d’ordonner au gouvernement du Québec de rembourser une somme égale à l’écart entre les allocations de base inférieure et supérieure à toutes les personnes qui : (1) vivaient au Québec et avaient entre 18 et 30 ans à un moment quelconque au cours de la période s’échelonnant de 1985 à 1989; (2) ont touché l’allocation de base inférieure payable aux moins de 30 ans; (3) ne participaient pas aux programmes gouvernementaux, pour quelque raison que ce soit. Selon ses observations, la Cour devrait ainsi ordonner au gouvernement de payer presque 389 millions de dollars en prestations plus les intérêts accumulés depuis 1985. Madame Gosselin sollicite ce redressement pour le compte de plus de 75 000 membres non désignés du groupe, dont aucun ne s’est présenté pour appuyer sa demande.

À mon avis, la preuve n’établit le bien-fondé d’aucun des moyens plaidés par M<sup>me</sup> Gosselin à l’appui de sa demande. Je suis donc d’avis de rejeter le pourvoi.

## II. Les faits et les décisions rendues

En 1984, devant le taux de chômage alarmant et sans cesse croissant observé chez les jeunes adultes, le législateur québécois a apporté d’importantes modifications à la *Loi sur l’aide sociale*, L.R.Q., ch. A-16, créant un nouveau régime — le régime contesté en l’espèce. L’alinéa 29a) du *Règlement sur l’aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, pris en application de la Loi, maintenait les prestations de base payables aux personnes de moins de 30 ans au tiers environ des prestations de base versées aux 30 ans et plus. Pour la première fois cependant, le nouveau régime permettait aux moins de 30 ans de

over and above the basic entitlement, to the same (or nearly the same) level as those in the 30-and-over group.

7

The new scheme was based on the philosophy that the most effective way to encourage and enable young people to join the workforce was to make increased benefits conditional on participation in one of three programs: On-the-job Training, Community Work, or Remedial Education. Participating in either On-the-job Training or Community Work boosted the welfare payment to a person under 30 up to the base amount for those 30 and over; participating in Remedial Education brought an under-30 within \$100 of the 30-and-over base amount. The 30-and-over base amount still represented only 55 percent of the poverty level for a single person. For example, in 1987, non-participating under-30s were entitled to \$170 per month, compared to \$466 per month for welfare recipients 30 and over. According to Statistics Canada, the poverty level for a single person living in a large metropolitan area was \$914 per month in 1987. Long-term dependence on welfare was neither socially desirable nor, realistically speaking, economically feasible. The Quebec scheme was designed to encourage under-30s to get training or basic education, helping them to find permanent employment and avoid developing a habit of relying on social assistance during these formative years.

8

The government initially made available 30 000 places in the three training programs. The record indicates that the percentage of eligible under-30s who actually participated in the programs averaged around one-third, but it does not explain this participation rate. Although Ms. Gosselin filed a class action on behalf of over 75 000 individuals, she provided no direct evidence of any other young person's experience with the government programs. She alone provided first-hand evidence and testimony as a class member in this case, and she in fact participated in each of the Community Work, Remedial

hausser le niveau de leurs prestations d'aide sociale pour recevoir des prestations supérieures à l'allocation de base et égales (ou presque) à celles versées aux prestataires de 30 ans et plus.

Selon la philosophie qui sous-tendait le nouveau régime, la façon la plus efficace d'encourager et de permettre l'intégration des jeunes dans la population active consistait à leur verser des prestations plus élevées à condition qu'ils participent à l'un des trois programmes suivants : Stages en milieu de travail, Travaux communautaires et Rattrapage scolaire. En participant à l'un ou l'autre des deux premiers programmes, les bénéficiaires de moins de 30 ans touchaient l'équivalent de l'allocation de base payable aux 30 ans et plus, alors qu'en participant au programme Rattrapage scolaire, ils touchaient une somme inférieure de 100 \$ à cette allocation. L'allocation de base payable aux 30 ans et plus ne représentait quand même que 55 p. 100 du seuil de pauvreté pour une personne seule. Par exemple, en 1987, les bénéficiaires de moins de 30 ans qui ne participaient à aucun des programmes avaient droit à 170 \$ par mois, contre 466 \$ pour les bénéficiaires de 30 ans et plus. Selon Statistique Canada, le seuil de pauvreté pour une personne seule vivant dans une zone métropolitaine était en 1987 de 914 \$ par mois. La dépendance à long terme à l'aide sociale n'était ni socialement souhaitable ni, de façon réaliste, financièrement possible. Le régime du Québec visait à inciter les moins de 30 ans à acquérir une instruction de base ou une formation, ce qui les aiderait à trouver un emploi permanent et à éviter de développer une dépendance à l'aide sociale au cours des années où ils amorcent leur vie d'adultes.

Le gouvernement avait ouvert au départ 30 000 places dans les trois programmes de formation. Le dossier indique que la proportion de personnes admissibles de moins de 30 ans qui ont réellement participé aux programmes est d'environ un tiers en moyenne, mais il n'explique pas ce taux de participation. Bien que M<sup>me</sup> Gosselin ait intenté un recours collectif au nom de plus de 75 000 personnes, elle n'a fourni aucune preuve directe de l'expérience qu'aurait vécue une autre jeune personne dans le cadre des programmes gouvernementaux. Elle est la seule personne en l'espèce à avoir fourni une

Education and On-the-job Training Programs at various times. She ended up dropping out of virtually every program she started, apparently because of her own personal problems and personality traits. The testimony from one social worker, particularly as his clinic was attached to a psychiatric hospital and therefore received a disproportionate number of welfare recipients who also had serious psychological problems, does not give us a better or more accurate picture of the situation of the other class members, or of the relationship between Ms. Gosselin's personal difficulties and the structure of the welfare program.

Ms. Gosselin challenged the 1984 social assistance scheme on behalf of all welfare recipients under 30 subject to the differential regime from 1985 to 1989 (when, for reasons unrelated to this litigation, it was replaced by legislation that does not make age-based distinctions). As indicated above, she argued that Quebec's social assistance scheme violates s. 7 and s. 15(1) of the *Canadian Charter*, and s. 45 of the *Quebec Charter*. She asks the Court to declare s. 29(a) of the Regulation — which provided a lesser base welfare entitlement to people under 30 — to have been invalid from 1987 (when it lost the protection of the notwithstanding clause) to 1989, and to order the government of Quebec to reimburse all affected welfare recipients for the difference between what they actually received and what they would have received had they been 30 years of age or over, for a total of roughly \$389 million, plus interest.

The trial judge, Reeves J., held that the claim was not supported by the evidence and that the distinction made by Quebec's social assistance regime was not discriminatory under s. 15(1) of the *Canadian Charter* because it was based on genuine considerations that corresponded to relevant characteristics of

preuve originale et témoigné à titre de membre du groupe, et elle a participé, de fait, à différentes époques, à chacun des trois programmes Travaux communautaires, Rattrapage scolaire et Stages en milieu de travail. Pratiquement chaque fois, elle finissait par abandonner le programme auquel elle s'était inscrite, apparemment en raison de ses problèmes personnels et de ses traits de personnalité. Le témoignage d'un travailleur social, dont la clinique était rattachée à un hôpital psychiatrique et accueillait par conséquent un nombre disproportionné de prestataires d'aide sociale qui avaient aussi de graves problèmes psychologiques, ne nous brosse pas un tableau plus juste ou plus précis de la situation des autres membres du groupe ni du lien entre les difficultés personnelles de M<sup>me</sup> Gosselin et l'économie générale du régime d'aide sociale.

Madame Gosselin a contesté le régime d'aide sociale de 1984 au nom de tous les bénéficiaires d'aide sociale de moins de 30 ans qui étaient assujettis au régime établissant un traitement différent entre 1985 et 1989 (année où le législateur québécois, pour des raisons sans rapport avec la présente action en justice, l'a remplacé par un régime ne faisant aucune distinction fondée sur l'âge). Comme je l'ai indiqué précédemment, M<sup>me</sup> Gosselin soutient que le régime d'aide sociale du Québec contrevient à l'art. 7 et au par. 15(1) de la *Charte canadienne*, ainsi qu'à l'art. 45 de la *Charte québécoise*. Elle demande à notre Cour de déclarer que l'al. 29a) du Règlement — qui accordait une prestation de base moindre aux moins de 30 ans — était invalide de 1987 (lorsque a pris fin la protection offerte par la disposition de dérogation) jusqu'en 1989, et d'ordonner au gouvernement du Québec de rembourser à tous les bénéficiaires d'aide sociale visés une somme égale à la différence entre les prestations qu'ils ont reçues et celles qu'ils auraient touchées s'ils avaient eu 30 ans ou plus, soit une somme totale d'environ 389 millions de dollars, plus les intérêts.

Le juge Reeves, qui a présidé le procès, a conclu que la demande n'était pas étayée par la preuve et que la distinction établie par le régime d'aide sociale du Québec n'était pas discriminatoire au sens du par. 15(1) de la *Charte canadienne*, parce qu'elle était fondée sur des considérations véritables,

the under-30 age group, including the importance of providing under-30s with incentives to get training and work experience in the face of widespread youth unemployment: [1992] R.J.Q. 1647. He dismissed Ms. Gosselin's s. 7 claim, holding that s. 7's protection of security of the person does not extend to economic security and does not create a constitutional right to be free from poverty. He also rejected the claim under s. 45 of the *Quebec Charter* on the ground that s. 45 does not create an entitlement to a particular level of state assistance.

correspondant à des caractéristiques pertinentes du groupe des moins de 30 ans — notamment l'importance d'inciter les moins de 30 ans à acquérir une formation et de l'expérience de travail pour contrer le chômage très répandu chez les jeunes : [1992] R.J.Q. 1647. Le juge Reeves a rejeté la prétention fondée sur l'art. 7 que faisait valoir M<sup>me</sup> Gosselin, statuant que la protection offerte par cet article, garantissant le droit à la sécurité de la personne, ne s'étend pas à la sécurité financière et ne crée pas de droit constitutionnel de vivre à l'abri de la pauvreté. Il n'a pas non plus retenu l'argument fondé sur l'art. 45 de la *Charte québécoise*, au motif que cette disposition ne crée pas le droit de recevoir de l'État un niveau d'aide particulier.

11 All three judges of the Quebec Court of Appeal agreed that s. 7 of the *Canadian Charter* was not engaged in this case: [1999] R.J.Q. 1033. Mailhot J.A. found this case indistinguishable from *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, and dismissed the s. 15(1) claim accordingly. Baudouin J.A. found that Quebec's social assistance scheme breached s. 15(1), but he found the breach justified in a free and democratic society under s. 1 of the *Canadian Charter*. Robert J.A. would have found that the social assistance scheme breached s. 15(1) of the *Canadian Charter* and was not saved by s. 1, but he would have dismissed the claim for damages as inappropriate. On s. 45 of the *Quebec Charter*, only Robert J.A. found a breach, for which he held damages unavailable.

Les trois juges de la Cour d'appel du Québec ont reconnu que l'art. 7 de la *Charte canadienne* ne s'appliquait pas en l'espèce : [1999] R.J.Q. 1033. Madame le juge Mailhot a estimé que l'affaire ne pouvait être distinguée de l'arrêt *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, et elle a en conséquence rejeté l'argument fondé sur le par. 15(1). Le juge Baudouin a conclu que le régime d'aide sociale du Québec violait le par. 15(1), mais il a jugé que cette atteinte était justifiée dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte canadienne*. Le juge Robert aurait conclu que le régime d'aide sociale violait le par. 15(1) de la *Charte canadienne* et qu'il ne pouvait être validé par application de l'article premier; il aurait cependant rejeté la demande de dommages-intérêts, considérant qu'il ne s'agissait pas d'une réparation convenable. En ce qui concerne l'art. 45 de la *Charte québécoise*, seul le juge Robert a conclu à la violation de cette disposition, mais il a jugé qu'elle ne donnait pas ouverture à des dommages-intérêts.

### III. Issues

12 This case raises the important question of how to determine when the differential provision of government benefits crosses the line that divides appropriate tailoring in light of different groups' circumstances, and discrimination. To what extent does the *Canadian Charter* restrict a government's discretion to extend different kinds of help, and different levels

### III. Les questions en litige

Le pourvoi soulève l'importante question de savoir dans quelles circonstances le gouvernement, en accordant des prestations sur une base différente, franchit la ligne de démarcation entre l'adaptation d'une mesure à la situation différente d'un groupe et la discrimination. Dans quelle mesure la *Charte canadienne* restreint-elle le pouvoir discrétionnaire

of financial assistance, to different groups of welfare recipients? How much evidence is required to compel a government to retroactively reimburse tens of thousands of people for alleged shortfalls in their welfare payments, arising from a conditional benefits scheme? These issues have implications for the range of options available to governments throughout Canada in tailoring welfare programs to address the particular needs and circumstances of individuals requiring social assistance.

The specific legal issues are found in the stated constitutional questions:

1. Did s. 29(a) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?
2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
3. Did s. 29(a) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?
4. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

A further issue is whether s. 29(a) of the *Regulation* violates s. 45 of the *Quebec Charter*, and if so, whether a remedy is available.

A preliminary issue arises in connection with s. 33 of the *Canadian Charter* — the “notwithstanding clause”. By virtue of *An Act respecting the Constitution Act, 1982*, R.S.Q., c. L-4.2, the Quebec

des gouvernements d’offrir divers types d’assistance et niveaux d’aide financière à des groupes différents de bénéficiaires d’aide sociale? Quelle est l’étendue de la preuve requise pour contraindre le gouvernement à rembourser à des dizaines de milliers de personnes le montant d’aide sociale qu’elles n’ont pas perçu parce que le régime assujettissait les prestations à une condition? Cette question a des répercussions sur l’éventail des solutions dont disposent les gouvernements de tous les ressorts au Canada pour concevoir des programmes de sécurité sociale adaptés à la situation et aux besoins particuliers des personnes qui ont besoin de l’aide sociale.

Les questions de droit en litige sont énoncées dans les questions constitutionnelles ainsi formulées :

1. Le paragraphe 29a) du *Règlement sur l’aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, adopté en vertu de la *Loi sur l’aide sociale*, L.R.Q., ch. A-16, violait-il le par. 15(1) de la *Charte canadienne des droits et libertés* pour le motif qu’il établissait une distinction discriminatoire fondée sur l’âge relativement aux personnes seules, aptes au travail, âgées de 18 à 30 ans?
2. Dans l’affirmative, cette violation est-elle justifiée dans le cadre d’une société libre et démocratique, en vertu de l’article premier de la *Charte canadienne des droits et libertés*?
3. Le paragraphe 29a) du *Règlement sur l’aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, adopté en vertu de la *Loi sur l’aide sociale*, L.R.Q., ch. A-16, violait-il l’art. 7 de la *Charte canadienne des droits et libertés* pour le motif qu’il portait atteinte au droit à la sécurité des personnes qu’il visait, et ce d’une façon incompatible avec les principes de justice fondamentale?
4. Dans l’affirmative, cette violation est-elle justifiée dans le cadre d’une société libre et démocratique, en vertu de l’article premier de la *Charte canadienne des droits et libertés*?

Il faut également déterminer si l’al. 29a) du *Règlement* viole l’art. 45 de la *Charte québécoise* et, dans l’affirmative, si une réparation peut être accordée.

Une question préliminaire se pose relativement à l’art. 33 de la *Charte canadienne*, la disposition de dérogation. Le législateur québécois a édicté la *Loi concernant la Loi constitutionnelle de 1982*,

legislature withdrew all Quebec laws from the *Canadian Charter* regime for five years from their inception. This means that the Act is immune from *Canadian Charter* scrutiny from June 23, 1982 to June 23, 1987, and the programs part of the scheme is immune from April 4, 1984 to April 4, 1989 (see *An Act to amend the Social Aid Act*, S.Q. 1984, c. 5, ss. 4 and 5). It could be argued, therefore, that the scheme is protected from *Canadian Charter* scrutiny on s. 7 or s. 15(1) grounds for the whole period except for the four months from April 4, 1989 to August 1, 1989. This raises the further question of whether evidence on the legislation's impact outside the four-month period subject to *Canadian Charter* scrutiny can be used to generate conclusions about compliance with the *Canadian Charter* within the four-month period. In view of my conclusion that the program is constitutional in any event, I need not resolve these issues.

#### IV. Analysis

##### A. *Does the Social Assistance Scheme Violate Section 15(1) of the Canadian Charter?*

###### 1. The Section 15 Test

16 Section 15(1) of the *Canadian Charter* provides that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

17 To establish a violation of s. 15(1), the claimant must establish on a civil standard of proof that: (1) the law imposes differential treatment between the claimant and others, in purpose or effect; (2) one or more enumerated or analogous grounds are the basis for the differential treatment; and (3) the law in question has a purpose or effect that is discriminatory in the sense that it denies human dignity or

L.R.Q., ch. L-4.2, pour soustraire toutes les lois québécoises à l'application de la *Charte canadienne* pendant une période de cinq ans à compter de leur adoption. En conséquence, la Loi était à l'abri d'un contrôle fondé sur la *Charte canadienne* du 23 juin 1982 au 23 juin 1987, et les programmes établis par le régime l'étaient entre le 4 avril 1984 et le 4 avril 1989 (voir la *Loi modifiant la Loi sur l'aide sociale*, L.Q. 1984, ch. 5, art. 4 et 5). On pourrait donc avancer que le contrôle de la conformité du régime avec l'art. 7 ou le par. 15(1) de la *Charte canadienne* est exclu pour toute la période en cause sauf les quatre mois écoulés entre le 4 avril 1989 et le 1<sup>er</sup> août 1989. Cette situation soulève une autre question, soit celle de savoir si la preuve concernant l'effet de la mesure législative en dehors de la période de quatre mois où le régime était susceptible d'un examen fondé sur la *Charte canadienne* peut être utilisée pour tirer des conclusions quant à sa conformité avec la *Charte canadienne* durant cette période de quatre mois. Compte tenu de ma conclusion que le régime est constitutionnel de toute façon, il n'est pas nécessaire que je tranche ces questions.

#### IV. Analyse

##### A. *Le régime d'aide sociale viole-t-il le par. 15(1) de la Charte canadienne?*

###### 1. Le test de l'art. 15

Le paragraphe 15(1) de la *Charte canadienne* dispose que « [l]a loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques. »

Pour établir une violation du par. 15(1), la demanderesse doit, selon la norme de preuve en matière civile, démontrer que (1) par son objet ou ses effets, la règle de droit contestée la traite différemment d'autrui, (2) ce traitement différent est fondé sur un ou plusieurs motifs énumérés ou analogues, et (3) l'objet ou les effets de la règle de droit sont discriminatoires en ce que celle-ci porte atteinte à la dignité

treats people as less worthy on one of the enumerated or analogous grounds. In this case, the first two elements are clear, and the analysis focuses on whether the scheme was discriminatory.

My colleague Bastarache J. and I agree that *Law* remains the governing standard. We agree that the s. 15(1) test involves a contextual inquiry to determine whether a challenged distinction, viewed from the perspective of a reasonable person in the claimant's circumstances, violates that person's dignity and fails to respect her as a full and equal member of society. We agree that a distinction made on an enumerated or analogous ground violates essential human dignity to the extent that it reflects or promotes the view that the individuals affected are less deserving of concern, respect, and consideration than others: *Law, supra*, at para. 42; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171, *per* McIntyre J. We agree that a claimant bears the burden under s. 15(1) of showing on a civil standard of proof that a challenged distinction is discriminatory, in the sense that it harms her dignity and fails to respect her as a full and equal member of society. We agree that, if a claimant meets this burden, the burden shifts to the government to justify the distinction under s. 1.

Where we disagree is on whether the claimant in this particular case has met her burden of proof. We both examine the contextual factors enunciated in *Law*, but we reach different conclusions with respect to the adequacy of the factual record, the nature of the inferences we can draw from that record, and the deference owed to the findings of the trial judge. Whatever sympathy Ms. Gosselin's economic circumstances might provoke, I simply cannot find that she has met her burden of proof in showing that the Quebec government discriminated against her based on her age. In my respectful view, she has not demonstrated that the government treated her as

humaine ou traite certaines personnes comme si elles étaient moins dignes d'être reconnues pour l'un ou l'autre des motifs énumérés ou analogues. En l'espèce, les deux premiers éléments sont clairs, et l'analyse vise à déterminer si le régime était discriminatoire.

Mon collègue le juge Bastarache et moi sommes d'accord pour dire que l'arrêt *Law* demeure la norme applicable. Nous reconnaissons que le test du par. 15(1) nécessite un examen contextuel visant à déterminer si une distinction contestée, considérée du point de vue d'une personne raisonnable placée dans la situation de la demanderesse, porte atteinte à la dignité de la personne et ne la respecte pas en tant que membre à part entière de la société. Nous convenons qu'une distinction fondée sur un motif énuméré ou analogue porte atteinte à la dignité humaine essentielle dans la mesure où elle traduit ou propage l'idée que les personnes visées sont moins dignes d'intérêt, de respect ou de considération que les autres : *Law*, précité, par. 42; *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, p. 171, le juge McIntyre. Nous partageons l'opinion qu'il incombe à la demanderesse de démontrer en vertu du par. 15(1), suivant la norme de preuve en matière civile, qu'une distinction contestée est discriminatoire en ce sens qu'elle porte atteinte à sa dignité et ne la respecte pas en tant que membre à part entière de la société. Nous nous entendons également sur le fait qu'il appartient ensuite au gouvernement, si la demanderesse s'acquitte de son fardeau, de justifier la distinction sous le régime de l'article premier.

Nous divergeons cependant d'opinion sur la question de savoir si la demanderesse en l'espèce a satisfait à son fardeau de preuve. Nous procédons tous les deux à un examen des facteurs contextuels énoncés dans *Law*, mais arrivons à des conclusions différentes quant à la suffisance du dossier factuel, à la nature des inférences que nous pouvons faire à partir du dossier et à la retenue dont nous devons faire preuve à l'égard des conclusions du juge de première instance. Quelle que soit la sympathie que les circonstances économiques de M<sup>me</sup> Gosselin puissent susciter, je ne peux tout simplement pas conclure qu'elle s'est acquittée de la preuve qui lui

less worthy than older welfare recipients, simply because it conditioned increased payments on her participation in programs designed specifically to integrate her into the workforce and to promote her long-term self-sufficiency.

incombait de démontrer que le gouvernement du Québec a fait preuve de discrimination fondée sur l'âge à son endroit. À mon humble avis, elle n'a pas démontré que le gouvernement l'a traitée comme une personne de moindre valeur que les bénéficiaires d'aide sociale plus âgés, simplement parce qu'il a assujéti le versement de prestations accrues à sa participation à des programmes conçus expressément pour l'intégrer dans la population active et promouvoir son autonomie à long terme.

20 We must approach the question of whether the scheme was discriminatory in light of the purpose of the s. 15 equality guarantee. That purpose is to ensure that governments respect the innate and equal dignity of every individual without discrimination on the basis of the listed or analogous grounds: *Law, supra*, at para. 51. The aspect of human dignity targeted by s. 15(1) is the right of each person to participate fully in society and to be treated as an equal member, regardless of irrelevant personal characteristics, or characteristics attributed to the individual based on his or her membership in a particular group without regard to the individual's actual circumstances. As Iacobucci J. put it in *Law* (at para. 51):

Nous devons examiner le caractère discriminatoire du régime par rapport à l'objet de la garantie d'égalité accordée par l'art. 15, qui consiste à garantir que les gouvernements respectent la dignité inhérente égale de chaque personne sans discrimination fondée sur un motif énuméré ou analogue : *Law*, précité, par. 51. L'aspect de la dignité humaine visée par le par. 15(1) est le droit de chaque personne de participer pleinement à la société et d'être traitée comme un membre égal de la société, indépendamment des caractéristiques personnelles non pertinentes ou des caractéristiques attribuées à une personne en raison de son appartenance à un groupe particulier sans égard à sa situation réelle. Comme l'affirme le juge Iacobucci dans l'arrêt *Law*, par. 51 :

[T]he purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

[L]e par. 15(1) a pour objet d'empêcher toute atteinte à la dignité et à la liberté humaines essentielles par l'imposition de désavantages, de stéréotypes et de préjugés politiques ou sociaux, et de favoriser l'existence d'une société où tous sont reconnus par la loi comme des êtres humains égaux ou comme des membres égaux de la société canadienne, tous aussi capables, et méritant le même intérêt, le même respect, et la même considération.

21 Discrimination occurs when people are marginalized or treated as less worthy on the basis of irrelevant personal characteristics, without regard to their actual circumstances. The enumerated and analogous grounds of s. 15 serve as "legislative markers of suspect grounds associated with stereotypical, discriminatory decision making"; differential treatment based on these grounds invites judicial scrutiny: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 7, per McLachlin and Bastarache JJ. However, not every adverse distinction made on the basis of an enumerated or analogous ground constitutes

Il y a discrimination lorsque des personnes sont marginalisées ou traitées comme des personnes de moindre valeur en raison de caractéristiques personnelles non pertinentes, sans égard à leur situation réelle. Les motifs énumérés et analogues visés à l'art. 15 servent d'« indicateurs législatifs de l'existence de motifs suspects, associés à des processus décisionnels discriminatoires et fondés sur des stéréotypes »; la différence de traitement fondée sur ces motifs appelle un examen judiciaire : *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203, par. 7, les juges McLachlin et Bastarache. Toutefois, toute

discrimination: see *Corbiere*. Some group-based distinctions may be appropriate or indeed promote substantive equality, as envisaged in s. 15(2): see *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37.

Section 15(1) seeks to ensure that all are treated as equally worthy of full participation in Canadian society, regardless of irrelevant personal characteristics or membership in groups defined by the enumerated and analogous grounds: see D. Greschner, “The Purpose of Canadian Equality Rights” (2002), 6 *Rev. Const. Stud.* 291. The focus is not on whether or not the claimant is subject to a formal distinction, but on whether the claimant has in substance been treated as less worthy than others, whether or not a formal distinction exists: *Andrews, supra*, at pp. 164-69, *per* McIntyre J.; *Law, supra*, at para. 25; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

Section 15’s purpose of protecting equal membership and full participation in Canadian society runs like a leitmotif through our s. 15 jurisprudence. *Corbiere* addressed the participation of off-reserve Aboriginal band members in band governance. *Eaton* and *Eldridge* spoke of the harms of excluding disabled individuals from the larger society: *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. *Vriend* dealt with a legislature’s exclusion of the ground of sexual orientation from a human rights statute protecting individuals from discrimination based on a range of other grounds: *Vriend v. Alberta*, [1998] 1 S.C.R. 493. *Granovsky* resonated with the language of belonging: “Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself”:

distinction préjudiciable fondée sur un motif énuméré ou analogue ne constitue pas une mesure discriminatoire : voir *Corbiere*. Certaines distinctions fondées sur des caractéristiques de groupe peuvent être appropriées ou en fait promouvoir l’égalité réelle, comme le prévoit le par. 15(2) : voir l’arrêt *Lovelace c. Ontario*, [2000] 1 R.C.S. 950, 2000 CSC 37.

Le paragraphe 15(1) cherche à garantir que tous soient traités comme également dignes de participer pleinement dans la société canadienne, indépendamment de caractéristiques personnelles non pertinentes ou de l’appartenance à des groupes définis par rapport à des motifs énumérés et analogues : voir D. Greschner, « The Purpose of Canadian Equality Rights » (2002), 6 *Rev. Const. Stud.* 291. Il ne faut pas porter son attention sur la question de savoir si la partie demanderesse fait l’objet d’une distinction formelle, mais se demander si elle a été traitée réellement comme une personne de moindre valeur que d’autres, peu importe qu’il existe ou non une distinction formelle : *Andrews*, précité, p. 164-169, le juge McIntyre; *Law*, précité, par. 25; *Colombie-Britannique (Public Service Employee Relations Commission) c. BCGSEU*, [1999] 3 R.C.S. 3.

L’objet de l’art. 15, qui consiste à protéger une appartenance égale et une pleine participation à la société canadienne, ressort comme un leitmotif dans notre jurisprudence sur l’art. 15. L’arrêt *Corbiere* a statué sur la participation des membres de bandes autochtones à l’administration de la bande. Les arrêts *Eaton* et *Eldridge* traitent du préjudice que leur exclusion de l’ensemble de la société cause aux personnes atteintes d’une déficience : *Eaton c. Conseil scolaire du comté de Brant*, [1997] 1 R.C.S. 241; *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624. L’arrêt *Vriend* porte sur l’exclusion par une législature du motif de l’orientation sexuelle dans une loi en matière de droits de la personne qui protège les individus contre la discrimination fondée sur un éventail d’autres motifs : *Vriend c. Alberta*, [1998] 1 R.C.S. 493. L’arrêt *Granovsky* a repris le thème de l’appartenance : « Ce n’est généralement pas la

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*Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28, at para. 30.

personne ayant une déficience qui est à l'origine de l'exclusion et de la marginalisation, mais plutôt l'environnement socioéconomique et, malheureusement, l'État lui-même » : *Granovsky c. Canada (Ministre de l'Emploi et de l'Immigration)*, [2000] 1 R.C.S. 703, 2000 CSC 28, par. 30.

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To determine whether a distinction made on an enumerated or analogous ground is discriminatory, we must examine its context. As Binnie J. stated in *Granovsky*, *supra*, at para. 59, citing U.S. Supreme Court Marshall J.'s partial dissent in *Cleburne v. Cleburne Living Centre, Inc.*, 473 U.S. 432 (1985): “[a] sign that says ‘men only’ looks very different on a bathroom door than a courthouse door”. In each case, we must ask whether the distinction, viewed in context, treats the subject as less worthy, less imbued with human dignity, on the basis of an enumerated or analogous ground.

Pour déterminer si une distinction fondée sur un motif énuméré ou analogue est discriminatoire, nous devons en examiner le contexte. Comme le juge Binnie l'a affirmé dans l'arrêt *Granovsky*, précité, par. 59, en citant les propos suivants du juge Marshall de la Cour suprême des États-Unis, dissident en partie, dans l'arrêt *Cleburne c. Cleburne Living Centre, Inc.*, 473 U.S. 432 (1985) : [TRADUCTION] « [l]'effet d'une affiche indiquant “Hommes seulement” diffère considérablement selon qu'elle se trouve sur la porte d'une salle de toilettes ou sur celle d'un palais de justice ». Dans chaque cas, nous devons nous demander si la distinction, examinée dans son contexte, traite le sujet comme une personne de moindre valeur ou moins empreinte de dignité, sur le fondement d'un motif énuméré ou analogue.

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The need for a contextual inquiry to establish whether a distinction conflicts with s. 15(1)'s purpose is the central lesson of *Law*. The issue, as my colleagues and I all agree, is whether “a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity” having regard to the individual's or group's traits, history, and circumstances: *Law*, at para. 60, followed in *Lovelace*, *supra*, at para. 55. As an aid to determining whether a distinction has a discriminatory purpose or effect under part (3) of this test, *Law* proposes an investigation of four contextual factors relating to the challenged distinction: (1) pre-existing disadvantage; (2) correspondence between the ground of distinction and the actual needs and circumstances of the affected group; (3) the ameliorative purpose or effect of the impugned measure for a more disadvantaged group; and (4) the nature and scope of the interests affected.

La principale leçon à tirer de l'arrêt *Law* est qu'il faut procéder à un examen contextuel afin d'établir si une distinction entre en conflit avec l'objet du par. 15(1). Mes collègues et moi nous entendons pour dire que la question à trancher est celle de savoir « si une personne raisonnable se trouvant dans une situation semblable à celle du demandeur estimerait que la mesure législative imposant une différence de traitement a pour effet de porter atteinte à sa dignité » compte tenu des traits, de l'histoire et de la situation de la personne ou du groupe en cause : *Law*, par. 60, suivi dans *Lovelace*, précité, par. 55. Pour nous aider à déterminer si une distinction possède un objet ou un effet discriminatoire à la troisième étape d'application de ce test, l'arrêt *Law* nous propose d'examiner quatre facteurs contextuels se rapportant à la distinction contestée : (1) l'existence d'un désavantage préexistant; (2) la correspondance entre les motifs de distinction et les besoins et la situation véritables du groupe touché; (3) l'objectif ou l'effet d'amélioration de la mesure contestée pour un groupe plus défavorisé; (4) la nature et l'étendue du droit touché.

Both the purpose of the scheme and its effect must be considered in making this evaluation. I agree with Bastarache J. that the effects of the scheme are critical. However, under *Law*, the context of a given legislative scheme also includes its purpose. Simply put, it makes sense to consider what the legislator intended in determining whether the scheme denies human dignity. Intent, like the other contextual factors, is not determinative. Our case law has established that even a well-intentioned or facially neutral scheme can have the effect of discriminating: *BCGSEU*, *supra*. The scheme here is not facially neutral: we are dealing with an explicit distinction. The purpose of the distinction, in the context of the overall legislative scheme, is a factor that a reasonable person in the position of the complainant would take into account in determining whether the legislator was treating him or her as less worthy and less deserving of concern, respect and consideration than others.

I emphasize that a beneficent purpose will not shield an otherwise discriminatory distinction from judicial scrutiny under s. 15(1). Legislative purpose is relevant only insofar as it relates to whether or not a reasonable person in the claimant's position would feel that a challenged distinction harmed her dignity. As a matter of common sense, if a law is designed to promote the claimant's long-term autonomy and self-sufficiency, a reasonable person in the claimant's position would be less likely to view it as an assault on her inherent human dignity. This does not mean that one must uncritically accept the legislature's stated purpose at face value: a reasonable person in the claimant's position would not accept the exclusion of women from the workplace based merely on the legislature's assertion that this is for women's "own good". However, where the legislature is responding to certain concerns, and where those concerns appear to be well founded, it is legitimate to consider the legislature's purpose as part of the overall contextual evaluation of a challenged distinction from the claimant's perspective, as called for in *Law*. This is reflected in the questions Iacobucci J. asked in *Law*: "Do the impugned

Dans le cadre de cette évaluation, il faut examiner à la fois l'objet du régime et son effet. Je souscris à l'opinion du juge Bastarache que les effets du régime sont d'une importance primordiale. Cependant, en application de l'arrêt *Law*, le contexte d'un régime législatif donné inclut également son objet. En termes simples, il est logique d'examiner l'intention du législateur pour déterminer si le régime porte atteinte à la dignité humaine. À l'instar des autres facteurs contextuels, l'intention ne constitue pas un facteur déterminant. Notre jurisprudence a établi que même un régime établi dans une intention louable ou neutre à première vue peut avoir un effet discriminatoire : *BCGSEU*, précité. Le régime en cause en l'espèce n'est pas neutre à première vue : il établit une distinction explicite. Dans le contexte de l'ensemble du régime législatif, l'objet de la distinction constitue un facteur dont une personne raisonnable placée dans la situation de la demanderesse tiendrait compte pour déterminer si le législateur la traite comme une personne de moindre valeur ou moins digne d'intérêt, de respect et de considération que d'autres.

J'insiste sur le fait qu'un but salutaire ne soustraira pas une distinction par ailleurs discriminatoire à un examen judiciaire au regard du par. 15(1). L'objet d'une mesure législative n'est pertinent que dans la mesure où il se rapporte à la question de savoir si une personne raisonnable placée dans la situation de la demanderesse serait d'avis qu'une distinction contestée a porté atteinte à sa dignité. Logiquement, si un texte législatif est conçu pour promouvoir l'autonomie et l'indépendance à long terme de la demanderesse, une personne raisonnable placée dans la situation de la demanderesse aura moins tendance à le considérer attentatoire à sa dignité humaine inhérente. Cela ne signifie pas que l'on doive accepter à première vue, sans le moindre esprit critique, l'objet déclaré par le législateur : une personne raisonnable placée dans la situation de la demanderesse n'accepterait pas l'exclusion des femmes du marché du travail si le législateur affirmait simplement qu'il prend cette mesure pour leur [TRADUCTION] « propre bien ». Cependant, lorsque le législateur répond ainsi à certaines préoccupations et que ces préoccupations semblent bien fondées, il est

CPP provisions, in purpose or effect, violate essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice?"; "Does the law, in purpose or effect, perpetuate the view that people under 45 are less capable or less worthy of recognition or value as human beings or as members of Canadian society?" (para. 99 (emphasis added)).

## 2. Applying the Test

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The Regulation at issue made a distinction on the basis of an enumerated ground, age. People under 30 were subject to a different welfare regime than people 30 and over. The question is whether this distinction in purpose or effect resulted in substantive inequality contrary to s. 15(1)'s purpose of ensuring that governments treat all individuals as equally worthy of concern, respect, and consideration. More precisely, the question is whether a reasonable person in Ms. Gosselin's position would, having regard to all the circumstances and the context of the legislation, conclude that the Regulation in purpose or effect treated welfare recipients under 30 as less worthy of respect than those 30 and over, marginalizing them on the basis of their youth.

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To answer this question, we must consider the four factors set out in *Law*. None of these factors is a prerequisite for finding discrimination, and not all factors will apply in every case. The list of factors is neither absolute nor exhaustive. In addition, the factors may overlap, since they are all designed to illuminate the relevant contextual considerations surrounding a challenged distinction. Nonetheless, the four factors provide a useful

légitime d'examiner le but qu'il vise en procédant à l'évaluation contextuelle globale de la distinction contestée dans la perspective de la demanderesse, comme l'exige l'arrêt *Law*. Ce point de vue ressort des questions posées par le juge Iacobucci dans *Law* : « Les dispositions contestées du RPC ont-elles pour objet ou pour effet de porter atteinte à la dignité et à la liberté humaines essentielles par l'imposition de désavantages, de stéréotypes et de préjugés politiques ou sociaux? »; « L'objet et l'effet de la loi perpétuent-ils l'opinion que les gens âgés de moins de 45 ans sont moins capables, ou moins dignes d'être reconnus ou valorisés en tant qu'être humain ou que membre de la société canadienne? » (par. 99 (je souligne)).

## 2. Application du test

Le Règlement en litige établissait une distinction fondée sur un motif énuméré, en l'occurrence l'âge. Les personnes de moins de 30 ans étaient assujetties à un régime d'aide sociale différent de celui applicable aux 30 ans et plus. Il faut déterminer si l'objet ou l'effet de cette distinction créait une inégalité réelle à l'encontre de l'objet du par. 15(1), qui consiste à garantir que les gouvernements traitent toutes les personnes comme dignes du même intérêt, du même respect et de la même considération. Plus précisément, la question est de savoir si une personne raisonnable placée dans la situation de M<sup>me</sup> Gosselin conclurait, compte tenu de l'ensemble des circonstances et du contexte de la mesure législative, que le Règlement, de par son objet ou son effet, traitait les bénéficiaires d'aide sociale de moins de 30 ans comme s'ils étaient moins dignes de respect que ceux de 30 ans et plus, en les marginalisant sur le fondement de leur jeunesse.

Pour répondre à cette question, nous devons examiner les quatre facteurs énoncés dans *Law*. Aucun de ces facteurs ne constitue un préalable à une conclusion de discrimination, et ils ne s'appliquent pas tous dans chaque cas. Cette liste de facteurs n'est ni absolue ni exhaustive. En outre, il peut exister un chevauchement entre les facteurs puisqu'ils sont tous conçus pour éclaircir les considérations contextuelles pertinentes entourant une distinction

guide to evaluating an allegation of discrimination, and I will examine each of them in turn.

(a) *Pre-existing Disadvantage*

A key marker of discrimination and denial of human dignity under s. 15(1) is whether the affected individual or group has suffered from “pre-existing disadvantage, vulnerability, stereotyping, or prejudice”: *Law*, at para. 63. Historic patterns of discrimination against people in a group often indicate the presence of stereotypical or prejudicial views that have marginalized its members and prevented them from participating fully in society. This, in turn, raises the strong possibility that current differential treatment of the group may be motivated by or may perpetuate the same discriminatory views. The contextual factor of pre-existing disadvantage invites us to scrutinize group-based distinctions carefully to ensure that they are not based, either intentionally or unconsciously, on these kinds of unfounded generalizations and stereotypes.

Many of the enumerated grounds correspond to historically disadvantaged groups. For example, it is clear that members of particular racial or religious groups should not be excluded from receiving public benefits on account of their race or religion. However, unlike race, religion, or gender, age is not strongly associated with discrimination and arbitrary denial of privilege. This does not mean that examples of age discrimination do not exist. But age-based distinctions are a common and necessary way of ordering our society. They do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization under this first contextual factor, in the way that other enumerated or analogous grounds might.

contestée. Néanmoins, ces quatre facteurs offrent un guide utile pour l'évaluation d'une allégation de discrimination, et je les examinerai maintenant à tour de rôle.

a) *Un désavantage préexistant*

Un indicateur clé de discrimination et de négation de la dignité humaine fondamentale au sens du par. 15(1) est la question de savoir si la personne ou le groupe en cause est victime de la « préexistence d'un désavantage, de vulnérabilité, de stéréotypes ou de préjugés » : *Law*, par. 63. Des antécédents de discrimination contre les personnes appartenant à un groupe révèlent souvent la présence de stéréotypes ou de préjugés qui ont marginalisé les membres de ce groupe et les ont empêchés de participer pleinement à la société. Cette constatation soulève, à son tour, la forte possibilité que le traitement différent maintenant appliqué à ce groupe puisse être motivé par ces mêmes opinions discriminatoires ou les perpétue. Le facteur contextuel du désavantage préexistant nous invite à examiner soigneusement les distinctions fondées sur des caractéristiques de groupe pour nous assurer qu'elles ne reposent pas, intentionnellement ou inconsciemment, sur ces types de généralisations et de stéréotypes dénués de fondement.

Bon nombre des motifs énumérés correspondent à des groupes historiquement défavorisés. Par exemple, il est évident que les membres de groupes raciaux ou religieux particuliers ne devraient pas, en raison de leur race ou de leur religion, être inadmissibles à bénéficier des avantages d'un régime public. Cependant, contrairement à la race, à la religion ou au sexe, l'âge n'est pas fortement associé à la discrimination et à la dénégaration arbitraire de privilèges. Ce qui ne veut pas dire qu'il n'existe pas de cas de discrimination fondée sur l'âge. Cependant, les distinctions fondées sur l'âge sont courantes et nécessaires pour maintenir l'ordre dans notre société. Elles n'évoquent pas automatiquement le contexte d'un désavantage préexistant qui donne à croire à l'existence d'une discrimination et d'une marginalisation selon ce premier facteur contextuel, comme pourraient le faire d'autres motifs énumérés ou analogues.

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To expand on the earlier example, a sign on a courthouse door proclaiming “Men Only” evokes an entire history of discrimination against a historically disadvantaged class; a sign on a barroom door that reads “No Minors” fails to similarly offend. The fact that “[e]ach individual of any age has personally experienced all earlier ages and expects to experience the later ages” (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 52-54) operates against the arbitrary marginalization of people in a particular age group. Again, this does not mean that age is a “lesser” ground for s. 15 purposes. However, pre-existing disadvantage and historic patterns of discrimination against a particular group do form part of the contextual evaluation of whether a distinction is discriminatory, as called for in *Law*. Concerns about age-based discrimination typically relate to discrimination against people of advanced age who are presumed to lack abilities that they may in fact possess. Young people do not have a similar history of being undervalued. This is by no means dispositive of the discrimination issue, but it may be relevant, as it was in *Law*.

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Both as a general matter, and based on the evidence and our understanding of society, young adults as a class simply do not seem especially vulnerable or undervalued. There is no reason to believe that individuals between ages 18 and 30 in Quebec are or were particularly susceptible to negative preconceptions. No evidence was adduced to this effect, and I am unable to take judicial notice of such a counter-intuitive proposition. Indeed, the opposite conclusion seems more plausible, particularly as the programs participation component of the social assistance scheme was premised on a view of the greater long-term employability of under-30s, as compared to their older counterparts. Neither the nature of the distinction at issue nor the evidence

Si l’on étoffe l’exemple donné précédemment, une affiche indiquant « Hommes seulement » fixée sur les portes d’un palais de justice évoquerait de longs antécédents de discrimination contre une catégorie de personnes historiquement désavantagée; une affiche indiquant « Interdit aux mineurs » fixée à la porte d’un bar ne choquerait pas autant. Comme l’indique P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 2, p. 52-54, le fait que [TRADUCTION] « [t]oute personne a vécu les expériences propres à chacune des étapes de la vie qu’elle a traversées jusque-là et compte bien vivre celles qui l’attendent à mesure qu’elle vieillira » joue contre la marginalisation arbitraire des personnes d’un groupe d’âge donné. Encore une fois, cela ne signifie pas que l’âge est un motif « de moindre importance » pour l’application de l’art. 15. Cependant, l’examen du désavantage préexistant et des tendances historiques à la discrimination contre un groupe particulier fait partie de l’évaluation contextuelle à laquelle il faut procéder pour déterminer si une distinction est discriminatoire, comme l’exige l’arrêt *Law*. Les préoccupations quant à la discrimination fondée sur l’âge sont généralement liées à la discrimination contre des personnes d’âge avancé que l’on présume dépourvues de certaines aptitudes qu’elles possèdent en réalité. Les jeunes adultes n’ont pas été sous-estimés de la même manière par le passé. Cette constatation ne tranche pas la question de l’existence d’une discrimination, mais elle peut être pertinente, comme c’était le cas dans l’affaire *Law*.

En règle générale, mais aussi selon la preuve et notre conception de la société, il ne semble pas vraiment que, en tant que groupe, les jeunes adultes soient particulièrement vulnérables ou sous-estimés. Il n’y a aucune raison de penser que les personnes âgées de 18 à 30 ans au Québec sont ou étaient particulièrement vulnérables aux préjugés négatifs. Aucune preuve en ce sens n’a été présentée, et je suis incapable de prendre connaissance d’office d’une telle proposition contraire au sens commun. De fait, la conclusion inverse semble plus plausible, tout particulièrement du fait que l’élément de participation aux programmes du régime d’aide sociale reposait sur la perception de la meilleure employabilité à long terme des personnes de moins de 30

suggests that the affected group of young adults constitutes a group that historically has suffered disadvantage, or that is at a particular risk of experiencing adverse differential treatment based on the attribution of presumed negative characteristics: see *Lovelace*, *supra*, at para. 69.

With regard to this contextual factor, Ms. Gosselin is in the same position as Mrs. Law. In *Law*, Iacobucci J. stated (at para. 95):

Relatively speaking, adults under the age of 45 have not been consistently and routinely subjected to the sorts of discrimination faced by some of Canada's discrete and insular minorities. For this reason, it will be more difficult as a practical matter for this Court to reason, from facts of which the Court may appropriately take judicial notice, that the legislative distinction at issue violates the human dignity of the appellant.

If anything, people under 30 appear to be advantaged over older people in finding employment. As Iacobucci J. also stated in *Law*, with respect to adults under 45 (at para. 101):

It seems to me that the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice. Indeed, this Court has often recognized age as a factor in the context of labor force attachment and detachment. For example, writing for the majority in *McKinney*, [[1990] 3 S.C.R. 229], LaForest J. stated as follows, at p. 299:

Barring specific skills, it is generally known that persons over 45 have more difficulty finding work than others. They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills.

Iacobucci J. went on to note that “[s]imilar thoughts were expressed in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at pp. 998-99, *per* Iacobucci J., and at pp. 1008-9, *per* McLachlin J., [. . . and] *Moge v. Moge*, [1992] 3 S.C.R. 813, at pp. 881-83, *per* McLachlin J.”

ans par rapport à leurs aînés. Ni la nature de la distinction en litige ni la preuve ne tendent à indiquer que le groupe de jeunes adultes touché constitue un groupe historiquement défavorisé, ou qu’il risque particulièrement d’être victime d’une différence de traitement préjudiciable fondée sur l’attribution de prétendues caractéristiques négatives : voir l’arrêt *Lovelace*, précité, par. 69.

En ce qui concerne ce facteur contextuel, M<sup>me</sup> Gosselin se trouve dans la même situation que M<sup>me</sup> Law. Dans *Law*, le juge Iacobucci a fait les remarques suivantes (au par. 95) :

Relativement parlant, les adultes de moins de 45 ans n’ont pas continuellement subi le genre de discrimination à laquelle ont fait face certaines minorités distinctes et isolées du Canada. Par conséquent, notre Cour aura plus de difficultés à conclure en pratique, à partir des faits dont elle peut à bon droit prendre connaissance d’office, que la distinction législative en cause viole la dignité humaine de l’appelante.

Les personnes de moins de 30 ans sembleraient plutôt avantagées par rapport aux plus âgées dans la recherche d’un emploi. Pour reprendre les propos du juge Iacobucci concernant les adultes de moins de 45 ans, dans *Law*, par. 101 :

Il me semble qu’un tribunal peut à bon droit prendre connaissance d’office du fait que plus l’on vieillit, plus il est difficile de trouver et de conserver un emploi. En fait, notre Cour a souvent reconnu que l’âge était un facteur à considérer dans le contexte de la participation au marché du travail et du retrait de ce dernier. Par exemple, le juge La Forest a affirmé, au nom de la Cour à la majorité dans *McKinney*, [[1990] 3 R.C.S. 229], à la p. 299 :

À moins qu’elles aient des compétences particulières, on reconnaît généralement que les personnes de plus de 45 ans ont plus de difficulté à se trouver du travail que les autres. Elles n’ont pas la souplesse des jeunes, un désavantage souvent aggravé par le fait que les jeunes disposent généralement d’une formation plus récente dans les techniques plus modernes.

Le juge Iacobucci a ensuite fait remarquer que « [d]es idées semblables ont été exprimées dans l’arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, aux p. 998 et 999, le juge Iacobucci, et aux pp. 1008 et 1009, le juge McLachlin, [. . . et] *Moge c. Moge*, [1992] 3 R.C.S. 813, aux pp. 881 à 883, le juge McLachlin. »

35 Given the lack of pre-existing disadvantage experienced by young adults, Ms. Gosselin attempts to shift the focus from age to welfare, arguing that all welfare recipients suffer from stereotyping and vulnerability. However, this argument does not assist her claim. The ground of discrimination upon which she founds her claim is age. The question with respect to this contextual factor is therefore whether the targeted age-group, comprising young adults aged 18 to 30, has suffered from historic disadvantage as a result of stereotyping on the basis of age. Re-defining the group as welfare recipients aged 18 to 30 does not help us answer that question, in particular because the 30-and-over group that Ms. Gosselin asks us to use as a basis of comparison also consists entirely of welfare recipients.

36 I conclude that the appellant has not established that people aged 18 to 30 have suffered historical disadvantage on the basis of their age. There is nothing to suggest that people in this age group have historically been marginalized and treated as less worthy than older people.

(b) *Relationship Between Grounds and the Claimant Group's Characteristics or Circumstances*

37 The second contextual factor we must consider in determining whether the distinction is discriminatory in the sense of denying human dignity and equal worth is the relationship between the ground of distinction (age) and the actual characteristics and circumstances of the claimant's group: *Law*, at para. 70. A law that is closely tailored to the reality of the affected group is unlikely to discriminate within the meaning of s. 15(1). By contrast, a law that imposes restrictions or denies benefits on account of presumed or unjustly attributed characteristics is likely to deny essential human worth and to be discriminatory. Both purpose and effect are relevant here, insofar as they would affect the perception of a

Les jeunes adultes n'étant pas victimes d'un désavantage préexistant, M<sup>me</sup> Gosselin tente de faire de l'aide sociale et non de l'âge l'aspect central de l'analyse, soutenant que tous les bénéficiaires d'aide sociale sont victimes de stéréotypes et se trouvent dans une situation de vulnérabilité. Toutefois, cet argument n'appuie aucunement ses prétentions. Le motif de discrimination sur lequel elle fonde son action est l'âge. La question qu'il faut trancher au regard de ce facteur contextuel consiste donc à déterminer si le groupe d'âge ciblé, soit les jeunes adultes de 18 à 30 ans, a subi historiquement un désavantage en raison d'un stéréotype fondé sur l'âge. Redéfinir le groupe comme se composant des bénéficiaires d'aide sociale âgés de 18 à 30 ans ne nous aide pas à répondre à cette question, tout particulièrement parce que le groupe des 30 ans et plus que M<sup>me</sup> Gosselin nous demande de considérer comme point de comparaison est lui aussi composé entièrement de bénéficiaires d'aide sociale.

Je conclus que l'appelante n'a pas établi que les personnes âgées de 18 à 30 ans sont désavantagées historiquement en raison de leur âge. Rien n'indique que les personnes incluses dans ce groupe d'âge ont été typiquement marginalisées et traitées comme des personnes de moindre valeur que leurs aînés.

b) *Le rapport entre les motifs de discrimination et la situation ou les caractéristiques du groupe auquel appartient la demanderesse*

Le rapport entre, d'une part, le motif de distinction (l'âge) et, d'autre part, la situation et les caractéristiques véritables du groupe auquel appartient la demanderesse est le deuxième facteur contextuel que nous devons examiner pour déterminer si la distinction est discriminatoire, en ce sens qu'elle porte atteinte à la dignité et à la valeur égale de tout être humain : *Law*, par. 70. Une mesure législative adaptée spécifiquement à la réalité du groupe concerné risque peu d'être discriminatoire au sens du par. 15(1). À l'opposé, une mesure qui impose des restrictions ou refuse des avantages sur le fondement de caractéristiques présumées ou attribuées à tort risque de porter atteinte à la valeur humaine

reasonable person in the claimant's position: see *Law*, at para. 96.

I turn first to purpose in order to evaluate whether or not the rationale for the challenged distinction corresponded to the actual circumstances of under-30s subject to differential welfare scheme. The evidence indicates that the purpose of the challenged distinction, far from being stereotypical or arbitrary, corresponded to the actual needs and circumstances of individuals under 30. In the late 1960s and early 1970s, the unemployment rate among young Quebecers was relatively low, as jobs were readily available. However, circumstances changed dramatically in the course of the ensuing years. First, North America experienced a deep recession in the early 1980s, which hit Quebec hard and drove unemployment from a traditional rate hovering around 8 percent to a peak of 14.4 percent of the active population in 1982, and among the young from 6 percent (1966) to 23 percent. At the same time, the federal government tightened eligibility requirements for federal unemployment insurance benefits, and the number of young people entering the job market for the first time surged. These three events caused an unprecedented increase in the number of people capable of working who nevertheless ended up on the welfare rolls.

The situation of young adults was particularly dire. The unemployment rate among young adults was far higher than among the general population. People under 30, capable of working and without any dependants, made up a greater proportion of welfare recipients than ever before. Moreover, this group accounted for the largest — and steadily growing — proportion of new entrants into the welfare system: by 1983 fully two-thirds of new welfare recipients were under 30, and half were under the age of 23. In addition to coming onto the welfare rolls in ever greater numbers, younger individuals

essentielle des personnes visées et d'être discriminatoire. Tant l'objet que l'effet de la mesure législative sont pertinents, dans la mesure où ils influent sur la perception d'une personne raisonnable placée dans la situation de la demanderesse : voir l'arrêt *Law*, par. 96.

J'examinerai tout d'abord l'objet de la distinction contestée afin d'évaluer si sa justification correspondait à la situation véritable des moins de 30 ans assujettis au régime d'aide sociale établissant un traitement différent. La preuve démontre que, loin d'être stéréotypé ou arbitraire, l'objet de la distinction contestée correspondait aux besoins et à la situation véritables des personnes de moins de 30 ans. Vers la fin des années 60 et au début des années 70, le taux de chômage chez les jeunes Québécois était relativement faible, car les emplois étaient facilement accessibles. Toutefois, la situation a changé radicalement au cours des années qui ont suivi. Premièrement, au début des années 80, l'Amérique du Nord a connu une profonde récession, qui a frappé durement le Québec et y a fait grimper le taux de chômage, qui était traditionnellement d'environ 8 p. 100, à un sommet de 14,4 p. 100 de la population active en 1982; chez les jeunes, ce taux est alors passé de 6 p. 100 (en 1966) à 23 p. 100. À la même époque, le gouvernement fédéral a resserré les conditions d'admissibilité aux prestations fédérales d'assurance-chômage et le nombre de jeunes intégrant le marché du travail pour la première fois a fortement augmenté. Ces trois éléments ont provoqué un accroissement sans précédent du nombre de personnes aptes au travail qui ont néanmoins joint les rangs des prestataires d'aide sociale.

La situation des jeunes adultes était particulièrement difficile. Leur taux de chômage était beaucoup plus élevé que celui de l'ensemble de la population. Les personnes de moins de 30 ans aptes au travail et sans personne à charge comptaient pour une proportion plus élevée des bénéficiaires d'aide sociale que jamais auparavant. En outre, ce groupe formait la proportion la plus importante — et sans cesse croissante — de nouveaux bénéficiaires d'aide sociale : en 1983, les deux tiers des nouveaux bénéficiaires d'aide sociale avaient moins de 30 ans et la moitié avaient moins de 23 ans. En plus de joindre les rangs

did so for increasingly lengthy periods of time. In 1975, 60 percent of welfare recipients under 30 not incapable of working left the welfare rolls within six months. By 1983, only 30 percent did so.

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Behind these statistics lay a complex picture. The “new economy” emerging in the 1980s offered diminishing prospects for unskilled or under-educated workers. At the same time, a disturbing trend persisted of young Quebecers dropping out of school and trying to join the workforce. The majority of unemployed youths in the early 1980s were school drop-outs. Unemployed youths were, on average, significantly less educated than the general population, and the unemployment rate among young people with fewer than eight years of education stood at 40 percent to 60 percent. Lack of skills and basic education were among the chief causes of youth unemployment.

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The government’s short-term purpose in the scheme at issue was to get recipients under 30 into work and training programs that would make up for the lower base amount they received while teaching them valuable skills. The differential regime of welfare payments was tailored to help the burgeoning ranks of unemployed youths obtain the skills and basic education they needed to get permanent jobs. The mechanism was straightforward. In order to increase their welfare benefits, people under 30 would be required to participate in On-the-job Training, Community Work or Remedial Education Programs. Participating in the training and community service programs would bring welfare benefits up to the basic level payable to the 30-and-over group, and in the education program to about \$100 less.

des prestataires d’aide sociale en nombre de plus en plus grand, les jeunes bénéficiaires recevaient de l’aide sociale pendant des périodes de plus en plus longues. Alors qu’en 1975, 60 p. 100 des bénéficiaires de moins de 30 ans aptes au travail cessaient de toucher des prestations d’aide sociale dans un délai de six mois, en 1983, ce pourcentage avait chuté à seulement 30 p. 100.

Derrière ces statistiques se profilait un tableau complexe. La « nouvelle économie » qui a vu le jour dans les années 80 offrait de moins en moins de possibilités pour les travailleurs non qualifiés ou peu instruits. Parallèlement, on continuait d’observer chez les jeunes Québécois une tendance troublante à abandonner l’école et à tenter d’entrer sur le marché du travail. Au début des années 80, la majorité des jeunes chômeurs étaient des décrocheurs. Les jeunes chômeurs avaient en moyenne un niveau de scolarité sensiblement moins élevé que celui de l’ensemble de la population et le taux de chômage chez les jeunes comptant moins de huit années de scolarité oscillait entre 40 et 60 p. 100. Le manque de compétences et de formation de base figurait parmi les principales causes du chômage chez les jeunes.

À court terme, l’objectif que visait le gouvernement en instaurant le régime contesté était de faire participer les bénéficiaires de moins de 30 ans à des programmes de travail et de formation qui complèteraient l’allocation de base inférieure qu’ils recevaient, tout en leur faisant acquérir des compétences utiles. Le régime établissant des niveaux de prestations d’aide sociale différents a été conçu pour aider le nombre sans cesse croissant de jeunes chômeurs à acquérir les compétences et la formation de base dont ils avaient besoin pour trouver des emplois permanents. Il implantait un mécanisme simple. Pour obtenir une majoration de leurs prestations d’aide sociale, les bénéficiaires de moins de 30 ans devaient participer aux programmes Stages en milieu de travail, Travaux communautaires ou Rattrapage scolaire. Lorsqu’ils participaient à l’un ou l’autre des deux premiers programmes, les bénéficiaires de moins de 30 ans recevaient des prestations égales aux prestations de base versées aux bénéficiaires de 30 ans et plus, alors qu’en participant au troisième ils recevaient une somme inférieure d’environ 100 \$ à ces prestations de base.

The government's longer-term purpose was to provide young welfare recipients with precisely the kind of remedial education and skills training they lacked and needed in order eventually to integrate into the workforce and become self-sufficient. This policy reflects the practical wisdom of the old Chinese proverb: "Give a man a fish and you feed him for a day. Teach him how to fish and you feed him for a lifetime." This was not a denial of young people's dignity; it was an affirmation of their potential.

Simply handing over a bigger welfare cheque would have done nothing to help welfare recipients under 30 escape from unemployment and its potentially devastating social and psychological consequences above and beyond the short-term loss of income. Moreover, opposition to the incentive program entirely overlooks the cost to young people of being on welfare during the formative years of their working lives. For young people without significant educational qualifications, skills, or experience, entering into the labour market presents considerable difficulties. A young person who relies on welfare during this crucial initial period is denied those formative experiences which, for those who successfully undertake the transition into the productive workforce, lay the foundation for economic self-sufficiency and autonomy, not to mention self-esteem. The longer a young person stays on welfare, the more difficult it becomes to integrate into the workforce at a later time. In this way, reliance on welfare can contribute to a vicious circle of inability to find work, despair, and increasingly dismal prospects.

Instead of turning a blind eye to these problems, the government sought to tackle them at their roots, designing social assistance measures that might help welfare recipients achieve long-term autonomy. Because federal rules in effect at the time prohibited making participation in the programs mandatory, the province's only real leverage in promoting these programs lay in making participation a prerequisite for increases in welfare. Even if one does not agree

À plus long terme, le gouvernement visait à offrir aux jeunes bénéficiaires précisément les cours de rattrapage et les compétences qui leur manquaient et dont ils avaient besoin pour réussir à s'intégrer dans la population active et à devenir autonomes. Cette politique traduit la sagesse pratique du vieux proverbe chinois qui dit : « Donne un poisson à un homme, il aura à manger pour un jour; apprends-lui à pêcher, il pourra se nourrir toute sa vie. » Cette mesure ne constituait pas une négation de la dignité des jeunes adultes, mais bien au contraire la reconnaissance de leur potentiel.

Le simple fait de verser un chèque plus élevé aux jeunes bénéficiaires d'aide sociale de moins de 30 ans ne les aurait nullement aidés à échapper au chômage et à ses conséquences sociales et psychologiques potentiellement dévastatrices, au-delà de la seule perte temporaire de revenus. Qui plus est, la critique visant le régime d'encouragement ne tient absolument aucun compte du coût qu'entraîne pour les jeunes adultes le recours à l'aide sociale pendant les années où ils amorcent leur vie professionnelle. Il est très difficile pour un jeune peu instruit et ne possédant pas de compétences ou d'expérience significatives d'entrer sur le marché du travail. Les jeunes qui ont recours à l'aide sociale au cours de cette période cruciale sont privés des expériences formatrices sur lesquelles ceux qui parviennent à joindre les rangs de la population active bâtissent leur indépendance et leur autonomie financière, sans oublier leur estime de soi. Plus longtemps un jeune a recours à l'aide sociale, plus il aura de la difficulté à s'intégrer un jour dans la population active. En ce sens, le fait de dépendre de l'aide sociale peut contribuer à créer le cercle vicieux de l'incapacité à trouver du travail, du désespoir et des perspectives de plus en plus sombres.

Au lieu de fermer les yeux sur ces problèmes, le gouvernement a voulu s'attaquer à leurs causes, en concevant des mesures d'aide sociale susceptibles d'aider les bénéficiaires d'aide sociale à devenir autonomes à long terme. Parce que les règles fédérales en vigueur à l'époque interdisaient d'imposer la participation aux programmes, le seul véritable moyen dont la province disposait pour promouvoir ces programmes était de faire de la participation un

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with the reasoning of the legislature or with its priorities, one cannot argue based on this record that the legislature's purpose lacked sufficient foundation in reality and common sense to fall within the bounds of permissible discretion in establishing and fine-tuning a complex social assistance scheme. Logic and common sense support the legislature's decision to structure its social assistance programs to give young people, who have a greater potential for long-term insertion into the workforce than older people, the incentive to participate in programs specifically designed to provide them with training and experience. As indicated above, the government's purpose is a relevant contextual factor in the s. 15(1) analysis insofar as it relates to how a reasonable person in the claimant's circumstances would have perceived the incentive-based welfare regime. In this case, far from ignoring the actual circumstances of under-30s, the scheme at issue was designed to address their needs and abilities. A reasonable person in the claimant's circumstances would have taken this into account.

préalable à la majoration des prestations. Même si on ne souscrit pas au raisonnement du législateur ou à ses priorités, on ne saurait affirmer, compte tenu de ces éléments, que les mesures prises par le législateur n'étaient pas suffisamment ancrées dans la réalité et le sens commun pour être considérées comme relevant de l'exercice légitime de son pouvoir discrétionnaire d'établir un régime complexe d'aide sociale et de l'ajuster dans ses moindres détails. La logique et le sens commun appuient la décision du législateur de structurer ses programmes d'aide sociale de façon à inciter les jeunes adultes — qui ont un plus grand potentiel d'intégration à long terme dans la population active que leurs aînés — à participer à des programmes spécialement conçus pour leur permettre d'acquérir formation et expérience. Comme je l'ai indiqué plus tôt, l'objectif du gouvernement est un facteur contextuel pertinent pour l'application du par. 15(1), quant à la perception qu'une personne raisonnable placée dans la situation de la demanderesse aurait eu du régime d'aide sociale fondé sur des mesures d'encouragement. En l'espèce, loin d'ignorer la situation réelle des personnes de moins de 30 ans, le régime en cause était conçu pour répondre à leurs besoins et à leurs capacités. Une personne raisonnable placée dans la situation de la demanderesse aurait pris cet élément en considération.

45 Turning to effect, Ms. Gosselin argues that the regime set up under the Regulation in fact failed to address the needs and circumstances of welfare recipients under 30 because the ability to “top up” the basic entitlement by participating in programs was more theoretical than real. She argues that, notwithstanding the legislature's intentions, the practical consequence of the Regulation was to abandon young welfare recipients, leaving them to survive on a grossly inadequate sum of money. In this way the program did not correspond to their actual needs, she argues, and amounted to discriminatory marginalization of the affected group.

Pour ce qui est de l'effet du régime, M<sup>me</sup> Gosselin plaide que le régime établi par le Règlement ne répondait pas véritablement aux besoins et à la situation des bénéficiaires d'aide sociale de moins de 30 ans, parce que la possibilité qu'ils avaient de « compléter » leurs prestations de base en participant aux programmes était plus théorique que réelle. Elle avance que, malgré les intentions du législateur, le Règlement avait comme conséquence concrète d'abandonner les jeunes bénéficiaires d'aide sociale à leur sort en les obligeant à survivre à l'aide de prestations nettement insuffisantes. Pour cette raison, le régime ne correspondait pas à leurs besoins véritables, soutient-elle, et il équivalait à une marginalisation discriminatoire du groupe touché.

46 The main difficulty with this argument is that the trial judge, after a lengthy trial and careful scrutiny of the record, found that Ms. Gosselin had failed to

La principale difficulté liée à cet argument tient au fait que le juge de première instance, après un long procès et un examen minutieux du dossier, a

establish actual adverse effect. Reeves J. cautioned against generalizing from Ms. Gosselin's experience, and against over-reliance on opinion statements by experts in this regard, given the absence of any evidence to support the experts' claims about the material situation of individuals in the under-30 age group. He concluded: [TRANSLATION] "It is therefore highly doubtful that the representative plaintiff, acting on behalf of some 75 000 individuals, has discharged her burden of proof concerning whether the law had adverse effects on them" (p. 1664).

I can find no basis upon which this Court can set aside this finding. There is no indication in the record that any welfare recipient under 30 wanting to participate in one of the programs was refused enrollment. Louise Gosselin, who in fact participated in each of the three programs, was the only witness to provide first-hand testimony about the programs at trial. There is no evidence that anyone who tried to access the programs was turned away, or that the programs were designed in such a way as to systematically exclude under-30s from participating. In fact, these programs were initially available only to people under 30 (and, in the case of the Remedial Education Program, to heads of single-parent households 30 and over); they were opened up to all welfare recipients in 1989. As the trial judge emphasized, the record contains no first-hand evidence supporting Ms. Gosselin's claim about the difficulties with the programs, and no indication that Ms. Gosselin can be considered representative of the under-30 class. It is, in my respectful opinion, utterly implausible to ask this Court to find the Quebec government guilty of discrimination under the *Canadian Charter* and order it to pay hundreds of millions of taxpayer dollars to tens of thousands of unidentified people, based on the testimony of a single affected individual. Nor does Ms. Gosselin present sufficient evidence that her own situation was a result of discrimination in violation of s. 15(1). The trial judge did not find evidence indicating a violation, and my

conclu que M<sup>me</sup> Gosselin n'avait pas établi l'existence d'un véritable effet préjudiciable. Le juge Reeves a fait une mise en garde contre toute généralisation à partir de la situation de M<sup>me</sup> Gosselin et l'attribution d'une trop grande importance aux témoignages d'opinion des experts à ce sujet, vu l'absence d'éléments de preuve étayant ces opinions concernant la situation matérielle des personnes de moins de 30 ans. Il a tiré la conclusion suivante : « Il est donc fort douteux que la demanderesse représentante, agissant pour le compte de quelque 75 000 individus, ait déchargé le fardeau de la preuve quant à savoir si l'application de la loi a produit à leur égard des effets défavorables » (p. 1664).

Je ne vois aucune raison sur laquelle la Cour pourrait se fonder pour écarter cette conclusion. Rien, dans le dossier, n'indique qu'un bénéficiaire quelconque de moins de 30 ans qui voulait participer à un des programmes n'aurait pas réussi à s'y inscrire. Au procès, Louise Gosselin — qui a en fait participé à chacun des trois programmes — a été le seul témoin à déposer directement sur son expérience personnelle relativement à ces programmes. Nous ne disposons d'aucun élément de preuve établissant que quelqu'un aurait tenté de participer aux programmes et se serait vu opposer un refus ni que les programmes auraient été conçus de façon à exclure systématiquement les moins de 30 ans. En fait, initialement, ces programmes étaient offerts seulement aux moins de 30 ans (et, dans le cas du programme Rattrapage scolaire, aux chefs de familles monoparentales âgés de 30 ans et plus); c'est en 1989 qu'ils sont devenus accessibles à tous les bénéficiaires d'aide sociale. Le juge de première instance a insisté sur le fait que le dossier ne renferme aucune preuve originale étayant l'allégation de M<sup>me</sup> Gosselin quant aux difficultés relatives aux programmes, ni aucun élément démontrant que M<sup>me</sup> Gosselin peut être considérée comme représentative du groupe des moins de 30 ans. À mon humble avis, il est franchement irréaliste de demander à la Cour de déclarer le gouvernement du Québec coupable de discrimination en contravention de la *Charte canadienne* et de lui ordonner de payer des centaines de millions de dollars de l'argent des

review of the record does not reveal any error in this regard.

48 It is unnecessary to engage in the exercise of surmising how many program places would have been required had every eligible welfare recipient under 30 chosen to participate. In fact, contrary to her allegation, Ms. Gosselin's own experience clearly establishes that participation was a real possibility. For most of the relevant period, Ms. Gosselin's benefits were increased as a result of program participation. On those occasions when Ms. Gosselin dropped out of programs, the record indicates that this was due to personal problems, which included psychological and substance abuse components, rather than to flaws in the programs themselves. Ms. Gosselin's experience suggests that even individuals with serious problems were capable of supplementing their income under the impugned regime.

49 Ms. Gosselin also objects to the fact that the Remedial Education Program yielded less of an increase in benefits than the other programs, leaving participants in that program with a lower basic entitlement than the older group. However, this seems to amount to little more than an incentive for young individuals to prefer some programs (On-the-job Training or Community Work) over another (Remedial Education). In addition, it is worth noting that the government provided books and other materials to Remedial Education participants free of charge. The decision to structure the programs in this particular fashion may be good or bad policy, but it does not establish a breach of the claimant's essential human dignity,

contribuables à des dizaines de milliers de personnes non identifiées, sur le fondement du témoignage d'une seule et unique personne touchée. Madame Gosselin n'a pas non plus présenté une preuve suffisante pour établir que sa propre situation résultait d'une discrimination interdite par le par. 15(1). Le juge de première instance n'a pas trouvé de preuve de l'existence d'une violation et, après avoir examiné le dossier, je ne décèle aucune erreur de sa part à cet égard.

Il est inutile de se lancer dans des conjectures quant au nombre de places qui auraient dû être offertes dans les programmes si tous les bénéficiaires d'aide sociale de moins de 30 ans avaient décidé d'y participer. En fait, l'expérience de M<sup>me</sup> Gosselin démontre clairement que, contrairement à ce qu'elle avance, il était vraiment possible de participer aux programmes. Pendant la majeure partie de la période pertinente, M<sup>me</sup> Gosselin a touché des prestations majorées parce qu'elle participait à un programme. Le dossier indique que, chaque fois, lorsque M<sup>me</sup> Gosselin abandonnait un programme, ce n'était pas en raison des lacunes des programmes mêmes, mais plutôt en raison de problèmes personnels, notamment de problèmes psychologiques et de dépendance à l'alcool et aux drogues. L'expérience vécue par M<sup>me</sup> Gosselin laisse croire que même les personnes qui avaient de graves problèmes étaient en mesure de toucher un supplément de revenu en vertu du régime contesté.

Madame Gosselin critique aussi le fait que la participation au programme Rattrapage scolaire n'entraînait pas une majoration aussi grande des prestations que les autres programmes, les participants ayant droit à des prestations inférieures au montant de base versé au groupe plus âgé. Cependant, il semble qu'il s'agisse simplement d'une mesure visant à inciter les jeunes à privilégier certains programmes (Stages en milieu de travail et Travaux communautaires) plutôt qu'un autre (Rattrapage scolaire). En outre, il faut signaler que le gouvernement fournissait gratuitement des livres et d'autre matériel aux participants au programme Rattrapage scolaire. La décision de structurer les programmes de cette façon particulière peut s'avérer bonne ou

or a lack of correlation between the provision and the affected group's actual circumstances.

My colleague Bastarache J. relies on the conclusion of Robert J.A., dissenting, that, based on the expert evidence, there were not enough places available in the programs to meet the needs of all welfare recipients under 30. This evidence was before the trial judge, who rejected it as insufficient and specifically cautioned against over-reliance on the experts' opinions. With respect, I am of the view that it is not open to this Court to revisit the trial judge's conclusion absent demonstrated error. Furthermore, my colleague appears to accept in the course of his s. 7 analysis that Ms. Gosselin's problems cannot be attributed solely to the age-based distinction she challenges under s. 15. He states, "[i]n this case, the threat to the appellant's right to security of the person [i.e., her poverty] was brought upon her by the vagaries of a weak economy, not by the legislature's decision not to accord her more financial assistance or to require her to participate in several programs in order for her to receive more assistance" (para. 217). And again: "[The appellant] has not demonstrated that the legislation, by excluding her, has reduced her security any more than it would have already been, given market conditions" (para. 222); "nor did the underinclusive nature of the Regulation substantially prevent or inhibit the appellant from protecting her own security" (para. 223).

My colleague Bastarache J. also relies on the claim that only a very small percentage of welfare recipients under 30 actually received the base amount allocated to those 30 and over, because the majority of participants tended to opt for the lower-paying Remedial Education Program (Robert J.A. cites a figure of 11.2 percent, apparently from an economist's 1988 report). The first point is, again,

mauvaise sur le plan des principes, mais elle ne prouve pas l'existence d'une atteinte à la dignité humaine essentielle de la demanderesse ni l'absence de corrélation entre la disposition législative et la situation réelle de groupe touché.

Mon collègue le juge Bastarache se fonde sur la conclusion du juge Robert, dissident, de la Cour d'appel, qui a affirmé que, suivant le témoignage d'expert, il n'existait pas suffisamment de places disponibles dans les programmes pour répondre aux besoins de tous les bénéficiaires d'aide sociale de moins de 30 ans. Cette preuve a été présentée au juge de première instance qui l'a rejetée parce qu'il l'estimait insuffisante et qui a d'ailleurs fait une mise en garde explicite contre l'attribution d'une trop grande importance aux opinions des experts. En toute déférence, je suis d'avis qu'il n'appartient pas à la Cour de réexaminer la conclusion du juge de première instance en l'absence d'une erreur établie. Par ailleurs, mon collègue semble reconnaître dans le cadre de son analyse fondée sur l'art. 7 que les problèmes de M<sup>me</sup> Gosselin ne peuvent être attribués uniquement à la distinction fondée sur l'âge qu'elle conteste en invoquant l'art. 15. Il affirme : « [e]n l'espèce, le risque de violation de son droit à la sécurité de sa personne [c'est-à-dire sa pauvreté] découlait des aléas d'une économie chancelante, et non de la décision du législateur de ne pas lui accorder une aide financière plus élevée ou de l'obliger à participer à plusieurs programmes pour recevoir une aide accrue » (par. 217). Il ajoute que : « [L'appelante] n'a pas démontré que, en l'excluant, le texte de loi a réduit sa sécurité à un niveau inférieur à ce qu'elle était déjà, compte tenu de la situation économique » (par. 222); « le caractère non inclusif du règlement n'a pas empêché concrètement l'appelante de protéger sa propre sécurité » (par. 223).

Mon collègue le juge Bastarache se fonde également sur l'allégation que seulement un très faible pourcentage des bénéficiaires d'aide sociale de moins de 30 ans ont touché l'allocation de base accordée aux personnes de 30 ans et plus parce que la majorité des participants avaient tendance à opter pour le programme Rattrapage scolaire, qui générerait des prestations moins élevées (le juge Robert

that the trial judge did not find Ms. Gosselin's statistical and expert evidence convincing, particularly given the absence of first-hand testimony from actual class members. But there are other problems. There is no evidence about why only about one-third of eligible welfare recipients participated in the programs. Nor is there evidence about the actual income of under-30s who did not participate; clearly "aid received" is not necessarily equivalent to "total income".

de la Cour d'appel cite un pourcentage de 11,2 p. 100, apparemment tiré d'un rapport d'économiste datant de 1988). D'abord, encore une fois, le juge de première instance n'a pas trouvé convaincants les éléments de preuve statistique ni les témoignages d'experts présentés par M<sup>me</sup> Gosselin, tout particulièrement en l'absence de témoignage original d'autres membres du groupe. Mais d'autres problèmes se posent. Il n'existe aucune preuve expliquant pourquoi environ un tiers seulement des bénéficiaires d'aide sociale admissibles ont participé aux programmes. Il n'existe pas non plus d'éléments de preuve quant au revenu réel des moins de 30 ans qui n'ont pas participé aux programmes; de toute évidence l'« aide reçue » n'équivaut pas nécessairement au « revenu total ».

52 For these reasons, the appellant has not shown that the impugned Regulation effectively excluded her or others like her from the protection against extreme poverty afforded by the social security scheme. Rather, the effect was to cause young people to attend training and education programs as a condition of receiving the full "basic needs" level of social assistance. I do not believe that making payments conditional in this way violated the dignity or human worth of persons under 30 years of age. The condition was not imposed as a result of negative stereotypes. The condition did not effectively consign the appellant or others like her to extreme poverty. Finally, the condition did not force the appellant to do something that demeaned her dignity or human worth.

Pour ces motifs, l'appelante n'a pas démontré que le Règlement contesté l'a effectivement privée — ou a privé ses semblables — de la protection contre la pauvreté extrême offerte par le régime d'aide sociale. Il a plutôt eu pour effet de faire participer les jeunes à des programmes de formation et d'études, leur participation constituant un préalable à l'obtention du niveau d'aide sociale nécessaire pour répondre à tous leurs « besoins essentiels ». Je ne crois pas que le fait d'assujettir ainsi les paiements à une condition porte atteinte à la dignité ou à la valeur humaine des personnes de moins de 30 ans. Cette condition n'a pas été imposée en conséquence de stéréotypes négatifs. Elle n'a pas effectivement confiné l'appelante et ses semblables à la pauvreté extrême. Enfin, cette condition n'a pas obligé l'appelante à accomplir un acte qui aurait porté atteinte à sa dignité ou à sa valeur en tant qu'être humain.

53 The long-term effects of the Regulation are also relevant in considering how a reasonable person in the claimant's position would have viewed the government program. The argument is that it imposed short-term pain. But the government thought that in the long run the program would benefit recipients under 30 by encouraging them to get training and find employment. We do not know whether it did so; the fact that the scheme was subsequently revamped may suggest the contrary. The point is simply this: Ms. Gosselin has not established, on the record before us, that the scheme did not correspond to the

Les effets à long terme du Règlement sont aussi pertinents pour déterminer comment une personne raisonnable placée dans la situation de la demanderesse aurait perçu le régime gouvernemental. On avance que ce régime créait une situation pénible à court terme. Cependant, le gouvernement était d'avis que le régime profiterait à long terme aux bénéficiaires de moins de 30 ans en les incitant à obtenir une formation et à trouver du travail. Nous ignorons si le régime a atteint cet objectif, mais les modifications ultérieures apportées au régime pourraient laisser croire le contraire. En termes simples,

needs and situation of welfare recipients under 30 in the short or the long term, or that a reasonable person in her circumstances would have perceived that the government's efforts to equip her with training rather than simply giving her a monthly stipend denied her human dignity or treated her as less than a "full perso[n]" (Bastarache J., at para. 258).

It may well be that some under-30s fell through the cracks of the system and suffered poverty. However, absent concrete evidence, it is difficult to infer from this that the program failed to correspond to the actual needs of under-30s. I find no basis to interfere with the trial judge's conclusion that the record here simply does not support the contention of adverse effect on younger welfare recipients. This makes it difficult to conclude that the effect of the program did not correspond to the actual situation of welfare recipients under 30.

I add two comments. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required to find that a challenged provision does not violate the *Canadian Charter*. The situation of those who, for whatever reason, may have been incapable of participating in the programs attracts sympathy. Yet the inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group. As Iacobucci J. noted in *Law, supra*, at para. 105, we should not demand "that legislation must always correspond perfectly with social reality in order to comply with s. 15(1) of the *Charter*". Crafting a social assistance plan to meet the needs of young adults is a complex problem, for which there is no perfect solution. No matter what measures the government adopts, there will always be some individuals for whom a different set of measures might

voici ce qu'il en est : au vu du dossier qui nous a été soumis, M<sup>me</sup> Gosselin n'a pas établi que le régime ne correspondait pas aux besoins et à la situation des bénéficiaires d'aide sociale de moins de 30 ans, que ce soit à court ou à long terme, ni qu'une personne raisonnable placée dans sa situation aurait eu le sentiment que les efforts déployés par le gouvernement pour lui offrir une formation au lieu d'une simple allocation mensuelle portaient atteinte à sa dignité humaine ou la traitaient avec moins de respect « en tant que citoyen[ne] à part entière » (le juge Bastarache, par. 258).

Il se peut que certains bénéficiaires de moins de 30 ans aient été victimes des lacunes du système et aient souffert de pauvreté. Cependant, en l'absence d'une preuve concrète, il est difficile d'en déduire que le régime ne correspondait pas aux besoins réels des moins de 30 ans. À mon avis, il n'existe aucune raison de modifier la conclusion du juge de première instance, qui a affirmé que le dossier en l'espèce n'appuie tout simplement pas la prétention que le régime produisait des effets préjudiciables sur les bénéficiaires plus jeunes. On pourrait donc difficilement conclure que l'effet du régime ne correspondait pas à la véritable situation des bénéficiaires d'aide sociale de moins de 30 ans.

J'ajouterai deux commentaires. Premièrement, il est possible de conclure qu'une disposition contestée ne viole pas la *Charte canadienne* même en l'absence de correspondance parfaite entre un régime de prestations et les besoins ou la situation du groupe demandeur. On peut éprouver de la sympathie pour les personnes qui, pour une raison ou une autre, n'ont peut-être pas pu participer aux programmes. Cependant, le fait qu'un programme social donné ne réponde pas aux besoins de tous, sans exception, ne nous permet pas de conclure que ce programme ne correspond pas aux besoins et à la situation véritables du groupe concerné. Comme l'a souligné le juge Iacobucci dans *Law*, précité, par. 105, nous ne devrions pas exiger « qu'une loi doi[ve] toujours correspondre parfaitement à la réalité sociale pour être conforme au par. 15(1) de la *Charte* ». L'élaboration d'un régime d'aide sociale destiné à répondre aux besoins des jeunes adultes est un problème complexe, auquel il n'existe pas

have been preferable. The fact that some people may fall through a program's cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected, or that distinctions contained in the law amount to discrimination in the substantive sense intended by s. 15(1).

56 Second, we cannot infer disparity between the purpose and effect of the scheme and the situation of those affected, from the mere failure of the government to prove that the assumptions upon which it proceeded were correct. Bastarache J. argues that the distinction between people under 30 and older people lacks a "rational basis" because it is "[b]ased on the unverifiable presumption that people under 30 had better chances of employment and lower needs" (para. 248). This seems to place on the legislator the duty to verify all its assumptions empirically, even where these assumptions are reasonably grounded in everyday experience and common sense. With respect, this standard is too high. Again, this is primarily a disagreement as to evidence, not as to fundamental approach. The legislator is entitled to proceed on informed general assumptions without running afoul of s. 15, *Law*, at para. 106, provided these assumptions are not based on arbitrary and demeaning stereotypes. The idea that younger people may have an easier time finding employment than older people is not such a stereotype. Indeed, it was relied on in *Law* to justify providing younger widows and widowers with a lesser survivor's benefit.

57 A final objection is that the selection of 30 years of age as a cut-off failed to correspond to the actual situation of young adults requiring social assistance. However, all age-based legislative distinctions have an element of this literal kind of

de solution parfaite. Quelles que soient les mesures adoptées par le gouvernement, il existera toujours un certain nombre de personnes auxquelles un autre ensemble de mesures aurait mieux convenu. Le fait que certaines personnes soient victimes des lacunes d'un programme ne prouve pas que la mesure législative en cause ne tient pas compte de l'ensemble des besoins et de la situation du groupe de personnes touché, ni que la distinction établie par cette mesure crée une discrimination réelle au sens du par. 15(1).

Deuxièmement, le simple fait que le gouvernement n'ait pas prouvé l'exactitude des hypothèses sur lesquelles il s'est fondé ne permet pas d'inférer qu'il y a disparité entre, d'une part, l'objet et l'effet du régime et, d'autre part, la situation des personnes touchées. Le juge Bastarache avance que la distinction entre les personnes de moins de 30 ans et les personnes plus âgées ne repose pas sur des « raisons logiques », mais « sur l'hypothèse invérifiable selon laquelle les personnes de moins de 30 ans ont des besoins moins grands que leurs aînés et de meilleures chances que ceux-ci de se trouver un emploi » (par. 248). Ce raisonnement semble imposer au législateur l'obligation de vérifier empiriquement toutes ses hypothèses, même lorsqu'elles sont raisonnablement fondées sur le quotidien et le sens commun. En toute déférence, cette norme est trop exigeante. Encore une fois, il s'agit principalement d'un désaccord sur la preuve, et non sur l'approche fondamentale. Le législateur peut légitimement s'appuyer sur des hypothèses générales documentées sans contrevenir à l'art. 15 (voir l'arrêt *Law*, précité, par. 106), à la condition que ces hypothèses ne soient pas fondées sur des stéréotypes arbitraires et dégradants. L'idée qu'il pourrait être plus facile pour les jeunes adultes que pour leurs aînés de trouver du travail ne constitue pas un tel stéréotype. En fait, cette raison a été invoquée dans *Law* pour justifier le versement de prestations de survivant réduites aux veuves et veufs plus jeunes.

Une dernière objection porte que la décision de choisir 30 ans comme âge limite était arbitraire parce qu'elle ne tenait pas compte de la situation véritable des jeunes adultes ayant besoin de l'aide sociale. Toutefois, toutes les distinctions législatives

“arbitrariness”. That does not invalidate them. Provided that the age chosen is reasonably related to the legislative goal, the fact that some might prefer a different age — perhaps 29 for some, 31 for others — does not indicate a lack of sufficient correlation between the distinction and actual needs and circumstances. Here, moreover, there is no evidence that a different cut-off age would have been preferable to the one selected.

I conclude that the record in this case does not establish lack of correlation in purpose or effect between the ground of age and the needs and circumstances of welfare recipients under 30 in Quebec.

(c) *The Ameliorative Purpose or Effect of the Impugned Law Upon a More Disadvantaged Person or Group in Society*

A third factor to be considered in determining whether the group-based devaluation of human worth targeted by s. 15 is established, is whether the challenged distinction was designed to improve the situation of a more disadvantaged group. In *Law*, the Court took into account that the lower pensions for younger widows and widowers were linked to higher pensions for needier, less advantaged, widows and widowers: *Law*, at para. 103.

Here there is no link between creating an incentive scheme for young people involving lower benefits coupled with a program participation requirement, and providing more benefits for older or more disadvantaged people. From this perspective, this contextual factor is neutral. More broadly, the distinction in benefits can be argued to reflect the different situations of recipients under 30 and recipients 30 and over. It is true that younger people require as much to live as older people. However, we may take judicial notice of the increased difficulty older people may encounter in finding employment, as this Court did in *Law*. At the same time, the benefits of training

fondées sur l'âge possèdent cette « part d'arbitraire », sans que cela les invalide pour autant. Pourvu que l'âge choisi ait un lien raisonnable avec l'objectif législatif, le fait que certaines personnes auraient préféré un âge différent — peut-être 29 ans pour certaines ou encore 31 ans pour d'autres — ne révèle pas une absence de corrélation suffisante entre la distinction, d'une part, et les besoins et la situation véritables, d'autre part. En outre, dans la présente affaire, aucune preuve n'indique qu'un autre âge limite aurait été préférable à celui qui a été choisi.

Je conclus que le dossier en l'espèce n'établit pas l'absence de lien, quant à l'objet ou à l'effet de la distinction, entre le motif de l'âge et les besoins et la situation des bénéficiaires d'aide sociale de moins de 30 ans au Québec.

c) *L'objectif ou l'effet d'amélioration de la mesure législative à l'égard d'une personne ou d'un groupe plus défavorisé dans la société*

Pour déterminer si l'on a établi, au regard de l'art. 15, l'atteinte à la valeur humaine sur le fondement de caractéristiques de groupe, il faut examiner un troisième facteur, soit le fait que la distinction contestée ait été ou non conçue pour améliorer la situation d'un groupe plus défavorisé. Dans *Law*, notre Cour a tenu compte du fait que le versement de pensions réduites aux veuves et veufs plus jeunes avait un lien avec le versement de pensions plus élevées aux veuves et veufs plus nécessiteux, moins favorisés : *Law*, par. 103.

En l'espèce, il n'existe aucun lien entre, d'une part, la création d'un régime d'encouragement destiné aux jeunes adultes, combinant le versement de prestations inférieures et l'obligation de participer à des programmes, et, d'autre part, le versement de prestations supérieures aux personnes plus âgées ou plus défavorisées. De ce point de vue, ce facteur contextuel est neutre. De façon plus générale, on peut soutenir que la distinction entre les prestations reflète les situations différentes des bénéficiaires de moins de 30 ans et de ceux de 30 ans et plus. Il est exact que les jeunes adultes ont besoin du même montant que leurs aînés pour subvenir

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and entry into the workforce are greater for younger people than for older people: younger people have a longer career span ahead of them once they join the labour force, and, for them, dependence on welfare risks establishing a chronic pattern at an early age.

à leurs besoins. Cependant, nous pourrions prendre connaissance d’office, comme dans *Law*, des difficultés accrues auxquelles les personnes plus âgées risquent de se heurter dans la recherche d’un emploi. Parallèlement, la formation et l’entrée sur le marché du travail comportent des avantages plus importants pour les jeunes adultes que pour leurs aînés : en effet, les jeunes adultes ont devant eux une carrière plus longue que leurs aînés, lorsqu’ils s’intègrent dans la population active, et ils risquent que leur dépendance à l’aide sociale les amène, tôt, à y recourir de façon chronique.

61 Viewed thus, the differential treatment of older and younger welfare recipients does not indicate that older recipients were more valued or respected than younger recipients. Older welfare recipients were, if not more disadvantaged (as in *Law*), “differently disadvantaged”. Their different positions with respect to long-term employability as compared to younger people provided a reasonable basis for the legislature to tailor its programs to their different situations and needs. The provision of different initial amounts of monetary support to each of the two groups does not indicate that one group’s dignity was prized above the other’s. Those 30 and over and under-30s were not “similarly situated” in ways relevant to determining the appropriate level of social assistance in the form of unconditional welfare payments.

De ce point de vue, les traitements différents réservés aux jeunes bénéficiaires et aux bénéficiaires plus âgés n’indiquent pas que les seconds étaient plus valorisés ou respectés que les premiers. S’ils n’étaient pas davantage défavorisés, comme dans l’affaire *Law*, les bénéficiaires plus âgés étaient « défavorisés différemment ». Compte tenu de leur situation différente de celle des jeunes adultes sur le plan de l’employabilité à long terme, il était raisonnable de la part du législateur d’adapter ses programmes à leur situation et à leurs besoins distincts. Le fait que chaque groupe reçoive des allocations de base différentes comme aide financière n’indique pas que la dignité d’un groupe était privilégiée par rapport à celle de l’autre. Les moins de 30 ans et les 30 ans et plus ne se trouvaient pas « dans la même situation » quant aux éléments pertinents pour déterminer le niveau d’aide sociale qu’il convenait de leur verser sous forme de paiements inconditionnels.

62 More generally, as discussed above, the Regulation was aimed at ameliorating the situation of welfare recipients under 30. A reasonable person in Ms. Gosselin’s position would take this into account in determining whether the scheme treated under-30s as less worthy of respect and consideration than those 30 and over.

De façon plus générale, comme je l’ai déjà mentionné, le Règlement visait à améliorer la situation des prestataires d’aide sociale de moins de 30 ans. Une personne raisonnable placée dans la situation de M<sup>me</sup> Gosselin en tiendrait compte pour déterminer si le régime traitait les moins de 30 ans comme s’ils étaient moins dignes de respect et de considération que les 30 ans et plus.

(d) *Nature and Scope of the Interests Affected by the Impugned Law*

d) *La nature et l’étendue du droit touché par la mesure législative contestée*

63 This factor directs us to consider the impact of the impugned law — how “severe and localized the . . . consequences [are] on the affected group”:

Dans l’examen de ce facteur, il faut examiner les effets de la mesure législative contestée — à quel point « les conséquences [. . .] ressenties par

*Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 63, quoted in *Law, supra*, at para. 74.

The trial judge, as noted, was unable to conclude that the evidence established actual adverse effects on welfare recipients under 30. The legislature thought it was helping under-30 welfare recipients; while we can surmise that the lower amount caused under-30s greater financial anxiety in the short term than a larger payment would have, we do not know how this actually played out in the context of the program participation scheme, or whether those 30 and over, who were only receiving 55 percent of the poverty level, experienced similar anxiety. The complainant argues that the lesser amount harmed under-30s and denied their essential human dignity by marginalizing them and preventing them from participating fully in society. But again, there is no evidence to support this claim. For those under 30 who were unable, for whatever reason, to increase their base entitlement, the lower base amount might have represented a significant adverse impact, depending on the availability of other resources, like family assistance. But even if we are prepared to accept that some young people must have been pushed well below the poverty line, we do not know how many, nor for how long. In this situation, it is difficult to gauge the nature and scope of the interests affected by the Regulation. We return once more to the central difficulty faced by the trial judge: despite Ms. Gosselin's claim to speak on behalf of 75 000 young people, she simply did not give the court sufficient evidence to support her allegation that the lower base amount was discriminatory, either against her or against the class as a whole.

Assessing the severity of the consequences also requires us to consider the positive impact of the

le groupe touché sont graves et localisées » : *Egan c. Canada*, [1995] 2 R.C.S. 513, par. 63, cité dans *Law*, précité, par. 74.

Le juge de première instance n'a pas été en mesure de conclure que la preuve établissait l'existence de véritables effets préjudiciables sur les bénéficiaires de moins de 30 ans. Le législateur croyait aider les bénéficiaires de moins de 30 ans; bien que nous puissions présumer que le fait de toucher un montant inférieur a aggravé à court terme l'anxiété financière éprouvée par les bénéficiaires de moins de 30 ans, nous ne savons pas quel rôle ce facteur a véritablement joué dans le contexte du régime de participation aux programmes, ni si les bénéficiaires de plus de 30 ans, qui ne touchaient que 55 p. 100 du montant correspondant au seuil de pauvreté, ont éprouvé la même anxiété. La demanderesse avance que le versement du montant inférieur a été préjudiciable aux bénéficiaires de moins de 30 ans et a porté atteinte à leur dignité humaine essentielle en les marginalisant et en les empêchant de participer pleinement dans la société. Il n'existe encore une fois aucun élément de preuve qui étaye cette allégation. Il se peut que les personnes de moins de 30 ans qui, pour quelque raison que ce soit, n'ont pas pu accroître leur allocation de base, aient subi un effet préjudiciable appréciable du fait que leurs prestations de base étaient moins élevées, selon l'accessibilité d'autres ressources, comme l'aide de leur famille. Cependant, même si nous sommes disposés à reconnaître que certains jeunes bénéficiaires ont dû se retrouver bien au-dessous du seuil de pauvreté, nous ne savons pas combien ont connu ce sort, ni pendant combien de temps. Dans ces circonstances, il est difficile d'apprécier la nature et l'étendue des droits touchés par le Règlement. Nous revenons une fois de plus à la principale difficulté à laquelle s'est heurté le juge de première instance : bien que M<sup>me</sup> Gosselin ait soutenu parler au nom de 75 000 jeunes bénéficiaires, elle n'a tout simplement pas présenté au tribunal une preuve suffisante à l'appui de son allégation portant que l'allocation de base inférieure était discriminatoire, que ce soit envers elle ou envers l'ensemble de la catégorie.

Pour apprécier la gravité des conséquences, il faut également tenir compte de l'effet positif de

legislation on welfare recipients under 30. The evidence shows that the regime set up under the *Social Aid Act* sought to promote the self-sufficiency and autonomy of young welfare recipients through their integration into the productive workforce, and to combat the pernicious side effects of unemployment and welfare dependency. The participation incentive worked towards the realization of goals that go to the heart of the equality guarantee: self-determination, personal autonomy, self-respect, feelings of self-worth, and empowerment. These are the stuff and substance of essential human dignity: see *Law*, *supra*, at para. 53. I respectfully disagree with the suggestion that the incentive provisions somehow indicated disdain for young people or a belief that they could be made productive only through coercion. On the contrary, the program's structure reflected faith in the usefulness of education and the importance of encouraging young people to develop their skills and employability, rather than being consigned to dependence and unemployment. In my view, the interest promoted by the differential treatment at issue in this case is intimately and inextricably linked to the essential human dignity that animates the equality guarantee set out at s. 15(1) of the *Canadian Charter*.

la mesure législative sur les bénéficiaires d'aide sociale de moins de 30 ans. La preuve démontre que le régime établi en vertu de la *Loi sur l'aide sociale* visait à favoriser l'autonomie et l'indépendance financière des jeunes bénéficiaires d'aide sociale par leur intégration dans la population active et à combattre les effets secondaires pernicioseux du chômage et de la dépendance à l'aide sociale. La mesure incitant à la participation aux programmes tendait à la réalisation d'objectifs qui sont au cœur de la garantie d'égalité : autodétermination, autonomie personnelle, respect de soi, confiance en soi et prise en charge de sa destinée. C'est là l'essence de la dignité humaine essentielle : voir *Law*, précité, par. 53. En toute déférence, je rejette l'hypothèse voulant que les dispositions incitatives dénotent du mépris envers les jeunes ou la conviction qu'ils ne peuvent devenir productifs que si on les y contraints. Au contraire, la structure du régime est une marque de foi en l'utilité de l'instruction et en l'importance d'encourager les jeunes à accroître leurs compétences et leur employabilité, plutôt qu'à rester confinés à la dépendance et au chômage. À mon avis, l'intérêt favorisé par la différence de traitement en litige est intimement et inextricablement lié à la dignité humaine essentielle qui anime la garantie d'égalité prévue au par. 15(1) de la *Charte canadienne*.

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We must decide this case on the evidence before us, not on hypotheticals, or on what we think the evidence ought to show. My assessment of the evidence leads me to conclude that, notwithstanding its possible short-term negative impact on the economic circumstances of some welfare recipients under 30 as compared to those 30 and over, the thrust of the program was to improve the situation of people in this group, and to enhance their dignity and capacity for long-term self-reliance. The nature and scope of the interests affected point not to discrimination but to concern for the situation of welfare recipients under 30. Absent more persuasive evidence to the contrary, I cannot conclude that a reasonable person in the claimant's position would have experienced this scheme as discriminatory, based

Nous devons trancher le présent pourvoi en fonction de la preuve qui nous a été soumise et non en fonction d'hypothèses ou de ce que nous croyons que la preuve devrait démontrer. Après avoir revu la preuve, j'estime que, même s'il est possible qu'il ait eu des conséquences négatives à court terme sur la situation économique de certains bénéficiaires d'aide sociale de moins de 30 ans comparativement à leurs aînés, le régime a pour idée maîtresse d'améliorer la situation des personnes appartenant à ce groupe et de renforcer leur dignité humaine et leur capacité de subvenir à leurs besoins à long terme. La nature et la portée des droits touchés tendent à révéler l'existence non pas d'une discrimination, mais plutôt d'une préoccupation pour la situation des bénéficiaires d'aide sociale de moins de 30 ans. En l'absence d'éléments de preuve plus convaincants

on the contextual factors and the concern for dignity emphasized in *Law*.

(e) *Summary of Contextual Factors Analysis*

The question is whether a reasonable welfare recipient under age 30 who takes into account the contextual factors relevant to the claim would conclude that the lower base amount provided to people under 30 treated her, in purpose or effect, as less worthy and less deserving of respect, consideration and opportunity than people 30 and over. On the evidence before us, the answer to this question must be no.

Looking at the four contextual factors set out in *Law*, I cannot conclude that the denial of human dignity fundamental to a finding of discrimination is established. This is not a case where the complainant group suffered from pre-existing disadvantage and stigmatization. Lack of correspondence between the program and the actual circumstances of recipients under 30 is not established, in either purpose or effect. The “ameliorative purpose” factor is neutral with respect to discrimination. Finally, the findings of the trial judge and the evidence do not support the view that the overall impact on the affected individuals undermined their human dignity and their right to be recognized as fully participating members of society, notwithstanding their membership in the class affected by the distinction.

A reasonable welfare recipient under 30 might have concluded that the program was harsh, perhaps even misguided. (As noted, it eventually was repealed.) But she would not reasonably have concluded that it treated younger people as less worthy or less deserving of respect in a way that had the purpose or effect of marginalizing or denigrating younger people in our society. If anything, she

établissant le contraire, je ne puis conclure qu’une personne raisonnable placée dans la situation de la demanderesse aurait considéré ce régime discriminatoire, compte tenu des facteurs contextuels et de la préoccupation pour la dignité sur laquelle l’arrêt *Law* met l’accent.

e) *Résumé de l’analyse des facteurs contextuels*

La question est de savoir si un bénéficiaire d’aide sociale raisonnable de moins de 30 ans, qui prendrait en compte les facteurs contextuels pertinents, conclurait que, de par son objet ou son effet, l’allocation de base inférieure versée aux personnes de moins de 30 ans la traitait comme si elle était moins digne de respect et de considération et méritait moins qu’on lui accorde une chance que les 30 ans et plus. Au vu de la preuve dont nous disposons, nous devons y répondre par la négative.

À partir de l’examen des quatre facteurs contextuels énoncés dans *Law*, il m’est impossible de conclure que l’on a établi l’existence d’une atteinte à la dignité humaine, essentielle pour conclure à la discrimination. Il ne s’agit pas d’un cas où le groupe de la demanderesse a souffert d’un désavantage préexistant et de stigmates. On n’a pas établi l’absence de correspondance entre le régime, quant à son objet ou à son effet, et la situation réelle des bénéficiaires de moins de 30 ans. Le facteur de l’« effet d’amélioration » est neutre pour ce qui est de la discrimination. Enfin, les conclusions du juge de première instance et les éléments de preuve n’appuient pas la prétention que l’incidence globale du régime sur les personnes touchées a porté atteinte à leur dignité humaine et à leur droit d’être reconnues comme membres à part entière de la société, même si elles font partie de la catégorie touchée par la distinction.

Un bénéficiaire d’aide sociale raisonnable de moins de 30 ans aurait pu conclure que le régime était dur et, peut-être, qu’il n’était pas judicieux. (Comme je l’ai mentionné, il a finalement été abrogé.) Cependant, il n’aurait pas pu raisonnablement conclure que le régime traitait les jeunes adultes comme s’ils étaient des personnes de moindre valeur ou moins dignes de respect, et ce d’une façon

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would have concluded that the program treated young people as more able than older people to benefit from training and education, more able to get and retain a job, and more able to adapt to their situations and become fully participating and contributing members of society.

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Far from relying on false stereotypes, the program was calibrated to address the particular needs and circumstances of young adults requiring social assistance, considered from both short-term and long-term perspectives. I do not suggest that stereotypical thinking must always be present for a finding that s. 15 is breached. However, its absence is a factor to be considered. The age-based distinction was made for an ameliorative, non-discriminatory purpose, and its social and economic thrust and impact were directed to enhancing the position of young people in society by placing them in a better position to find employment and live fuller, more independent lives. Nor, on the findings of the trial judge, is it established that the program's effect was to undermine the worth of its members in comparison with older people.

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The most compelling way to put the claimant's case is this. We are asked to infer from the apparent lack of widespread participation in programs that some recipients under 30 must at some time have been reduced to utter poverty. From this we are further asked to infer that at least some of these people's human dignity and ability to participate as fully equal members of society were compromised.

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The inferences that this argument asks us to draw are problematic. The trial judge, as discussed, was unable to find evidence of actual adverse impact on under-30s as a group. Moreover, the argument rests on a standard of perfection in social programs. As this Court noted in *Law*, that is not the standard to be applied. Some people will always fall through the cracks of social programs. That does not

qui avait pour objet ou pour effet de les marginaliser ou de les dénigrer dans notre société. Ce bénéficiaire raisonnable aurait plutôt conclu que le régime traitait les jeunes adultes comme plus aptes que leurs aînés à profiter de la formation et des cours, plus aptes à obtenir et à conserver un emploi et plus aptes à s'adapter à leur situation et à participer et contribuer pleinement en tant que membres à la société.

Loin d'être fondé sur des stéréotypes erronés, le régime était conçu pour répondre, tant à court terme qu'à long terme, aux besoins et à la situation des jeunes adultes ayant besoin d'aide sociale. Je n'insinue pas qu'il doit toujours exister un stéréotype à l'appui d'une conclusion qu'il y a eu violation de l'art. 15. Cependant, l'inexistence d'un stéréotype constitue un facteur dont il faut tenir compte. La distinction fondée sur l'âge a été créée dans un objectif d'amélioration non discriminatoire; son idée maîtresse et ses effets sur les plans social et économique tendaient à l'amélioration de la situation des jeunes dans la société en accroissant leurs chances de trouver du travail et de mener une vie plus équilibrée et plus indépendante. De plus, suivant les conclusions du juge de première instance, on n'a pas établi que le régime a eu pour effet de dévaloriser les membres de ce groupe par rapport à leurs aînés.

Voici la formulation la plus juste de l'argument de la demanderesse. Elle nous demande d'inférer de l'absence apparente d'une forte participation aux programmes que certains bénéficiaires de moins de 30 ans ont nécessairement été réduits à vivre dans la plus grande pauvreté à un moment quelconque. À partir de cette inférence, elle nous demande aussi de conclure qu'au moins certaines de ces personnes ont subi une atteinte à leur dignité et à leur capacité de vivre dans l'égalité comme membres à part entière de la société.

Les inférences que l'on nous demande ainsi de faire posent des problèmes. Comme je l'ai expliqué, le juge de première instance n'a pas été en mesure de trouver des éléments de preuve établissant l'existence d'un véritable effet préjudiciable sur les moins de 30 ans en tant que groupe. Par ailleurs, cet argument repose sur une norme de perfection des programmes sociaux. Comme notre Cour l'a affirmé

establish denial of human dignity and breach of s. 15. What is required is demonstration that the program as a whole and in the context of *Law*'s four factors in purpose or effect denied human dignity to the affected class, penalizing or marginalizing them simply for being who they were. In this case, that has not been shown.

In many respects, the case before us is strikingly similar to *Law*. The provision there drew an age-based distinction in a survivor's entitlement to pension benefits, allocating no benefit to survivors who were under 35 years of age at the time of the contributor's death, in the absence of specific circumstances provided for in the legislation. The provision here draws an age-based distinction in an unemployed individual's entitlement to welfare benefits, allocating a reduced monetary benefit coupled with a program participation incentive to unemployed individuals who are under 30 years of age at the time of receipt, in the absence of specific circumstances provided for in the Regulation. The appellant in *Law* argued that the distinction, however well intentioned, was based on a faulty assumption that younger people can more easily obtain employment than older people. The appellant here argues that the distinction, however well intentioned, is based on a faulty assumption that younger people can more easily obtain employment than older people. The appellant in *Law* emphasized short-term differences, while the respondent emphasized long-term needs. The appellant here emphasizes short-term differences, while the respondent emphasizes long-term needs. The Court held in *Law* that while the law contained a facial age-based distinction that treated younger people adversely, "the differential treatment does not reflect or promote the notion that they are less capable or less deserving of concern, respect, and consideration, when the dual perspectives of long-term security and the greater opportunity of youth are considered" (para. 102). Similarly here, the aim of the legislation in averting long-term dependency on welfare and

dans *Law*, ce n'est pas là la norme qui doit être appliquée. Il existera toujours des personnes qui seront victimes des lacunes des programmes sociaux. La preuve d'une atteinte à la dignité humaine ou d'une violation de l'art. 15 n'est pas établie pour autant. Il faut plutôt démontrer que le régime dans son ensemble et dans le contexte des quatre facteurs énoncés dans *Law* a, de par son objet ou son effet, porté atteinte à la dignité humaine des personnes appartenant à la catégorie touchée, en les pénalisant ou les marginalisant simplement en raison de ce qu'elles étaient. En l'espèce, cela n'a pas été démontré.

Le présent pourvoi ressemble remarquablement à *Law* à de nombreux égards. Dans cette affaire, la disposition en cause établissait une distinction fondée sur l'âge quant au droit à une pension de survivant et n'accordait aucune prestation aux conjoints survivants de moins de 35 ans au moment du décès du cotisant, sous réserve de certaines exceptions prévues par la loi. En l'espèce, la disposition litigieuse établit une distinction fondée sur l'âge quant au droit d'une personne sans emploi à des prestations d'aide sociale et elle prévoit que les chômeurs âgés de moins de 30 ans au moment du versement des prestations recevront des prestations réduites assorties d'un complément les encourageant à participer à un programme, sous réserve de certaines exceptions prévues par le Règlement. Dans l'arrêt *Law*, l'appelante soutenait que la distinction, toute bien intentionnée qu'elle fût, était fondée sur une hypothèse erronée voulant que les personnes plus jeunes puissent décrocher un emploi plus facilement que leurs aînés. En l'espèce, l'appelante avance que la distinction, toute bien intentionnée qu'elle soit, est fondée sur une hypothèse erronée voulant que les personnes plus jeunes puissent décrocher un emploi plus facilement que leurs aînés. Dans l'arrêt *Law*, l'appelante faisait ressortir les différences à court terme, et l'intimé les besoins à long terme. En l'espèce, l'appelante fait ressortir les différences à court terme, et l'intimé les besoins à long terme. Dans l'arrêt *Law*, notre Cour a statué que, même si la loi renfermait à première vue une distinction fondée sur l'âge défavorisant les personnes plus jeunes, « si elle est analysée du double point de vue de la sécurité à long terme et des possibilités plus grandes offertes par la jeunesse, la différence de traitement ne traduit

promoting insertion into the labour force, coupled with the provision of job training and remedial education programs, leads to the conclusion that the differential treatment does not reflect or promote the notion that young people are less capable or less deserving of concern, respect, and consideration. The Court found in *Law* that the legislation's failure to correspond perfectly to the circumstances of each and every individual member of the affected group did not "affect the ultimate conclusion that the legislation is consonant with the human dignity and freedom of the appellant" (para. 106). Likewise here, the legislation's arguable failure to correspond perfectly to Ms. Gosselin's personal circumstances, the only circumstances described in the record, does not affect the ultimate conclusion that the legislation is consonant with her human dignity and freedom, and with the human dignity and freedom of under-30s generally.

ni n'encourage l'idée que ces personnes sont moins capables, ou moins dignes d'intérêt, de respect et de considération » (par. 102). De même, en l'espèce, le but de la disposition législative, qui consiste à éviter la dépendance à long terme à l'aide sociale et à promouvoir l'intégration dans la population active, conjugué à la prestation de programmes de formation professionnelle et de rattrapage scolaire, mène à la conclusion que la différence de traitement ne traduit ni n'encourage l'idée que les jeunes personnes sont moins capables, ou moins dignes d'intérêt, de respect et de considération. Dans l'arrêt *Law*, notre Cour a conclu que le fait que les dispositions de la loi ne correspondent pas parfaitement à la situation de chacun des membres du groupe touché ne « compromet pas la conclusion ultime, soit qu'elles sont compatibles avec la dignité et la liberté de l'appelante » (par. 106). De même, en l'espèce, le fait que l'on puisse soutenir que la mesure législative ne correspond pas parfaitement à la situation personnelle de M<sup>me</sup> Gosselin, la seule décrite au dossier, ne compromet pas la conclusion ultime, soit qu'elle est compatible avec la dignité et la liberté de l'appelante et avec la dignité et la liberté des moins de 30 ans en général.

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I conclude that the impugned law did not violate the essential human dignity of welfare recipients under 30. We must base our decision on the record before us, not on personal beliefs or hypotheticals. On the facts before us, the law did not discriminate against Ms. Gosselin, either individually or as a member of the group of 18- to 30-year-olds in Quebec. The differential welfare scheme did not breach s. 15(1) of the *Canadian Charter*.

Je conclus que la mesure législative contestée ne portait pas atteinte à la dignité humaine essentielle des bénéficiaires d'aide sociale de moins de 30 ans. Nous devons fonder notre décision sur le dossier qui nous a été soumis et non sur des hypothèses ou des convictions personnelles. Au vu des faits, tels qu'ils nous ont été présentés, la mesure législative contestée ne créait pas de discrimination à l'endroit de M<sup>me</sup> Gosselin, individuellement ou en tant que membre du groupe des 18 à 30 ans au Québec. Le régime d'aide sociale établissant une différence de traitement ne contrevenait donc pas au par. 15(1) de la *Charte canadienne*.

B. *Does the Social Assistance Scheme Violate Section 7 of the Canadian Charter?*

B. *Le régime d'aide sociale viole-t-il l'art. 7 de la Charte canadienne?*

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Section 7 states that "[e]veryone has the right to life, liberty and security of the person" and "the right not to be deprived" of these "except in accordance with the principles of fundamental justice". The appellant argues that the s. 7 right to security of the person includes the right to receive a particular

L'article 7 dispose que « [c]hacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale ». L'appelante fait valoir que le droit à la sécurité de la personne emporte le droit de recevoir de l'État un niveau

level of social assistance from the state adequate to meet basic needs. She argues that the state deprived her of this right by providing inadequate welfare benefits, in a way that violated the principles of fundamental justice. There are three elements to this claim: (1) that the legislation affects an interest protected by the right to life, liberty and security of the person within the meaning of s. 7; (2) that providing inadequate benefits constitutes a “deprivation” by the state; and (3) that, if deprivation of a right protected by s. 7 is established, this was not in accordance with the principles of fundamental justice. The factual record is insufficient to support this claim. Nevertheless, I will examine these three elements.

The first inquiry is whether the right here contended for — the right to a level of social assistance sufficient to meet basic needs — falls within s. 7. This requires us to consider the content of the right to life, liberty and security of the person, and the nature of the interests protected by s. 7.

As emphasized by my colleague Bastarache J., the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those “that occur as a result of an individual’s interaction with the justice system and its administration”: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 65. “[T]he justice system and its administration” refers to “the state’s conduct in the course of enforcing and securing compliance with the law” (*G. (J.)*, at para. 65). This view limits the potential scope of “life, liberty and security of the person” by asking whom or what s. 7 protects against. Under this narrow interpretation, s. 7 does not protect against all measures that might in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of justice: see *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (the “Prostitution Reference”), at pp. 1173-74, *per* Lamer J. (as he then was), writing for himself; *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at

d’aide sociale suffisant pour répondre à ses besoins essentiels. Elle prétend que l’État a porté atteinte à ce droit qui lui est garanti en lui versant des prestations d’aide sociale insuffisantes, de façon non conforme aux principes de justice fondamentale. Sa prétention comporte trois éléments : (1) la mesure législative porte atteinte à un intérêt protégé par le droit à la vie, à la liberté et à la sécurité de la personne au sens de l’art. 7; (2) le versement de prestations insuffisantes constitue une « atteinte » par l’État; (3) l’atteinte à son droit protégé par l’art. 7, si elle est établie, n’a pas été portée en conformité avec les principes de justice fondamentale. Le dossier factuel n’est pas suffisant pour étayer cette prétention. J’examinerai néanmoins ces trois éléments.

La première question est de savoir si le droit revendiqué en l’espèce — le droit à un niveau d’aide sociale suffisant pour répondre aux besoins essentiels — est inclus dans l’art. 7. À cette fin, nous devons examiner le contenu du droit à la vie, à la liberté et à la sécurité de la personne ainsi que la nature des intérêts protégés par l’art. 7.

Comme le souligne mon collègue le juge Bastarache, selon le courant jurisprudentiel dominant concernant l’art. 7, cette disposition a pour objet d’empêcher certains types d’atteintes à la vie, à la liberté et à la sécurité de la personne, soit celles « qui résultent d’une interaction de l’individu avec le système judiciaire et l’administration de la justice » : *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, par. 65. Les mots « le système judiciaire et l’administration de la justice » s’entendent du « comportement de l’État en tant qu’il fait observer et appliquer la loi » (*G. (J.)*, par. 65). Une telle interprétation limite la portée possible du droit « à la vie, à la liberté ou à la sécurité de la personne » en demandant contre qui ou contre quoi l’art. 7 accorde sa protection. Suivant cette interprétation étroite, cet article ne protégerait pas contre toutes les mesures susceptibles de porter atteinte d’une façon ou d’une autre au droit à la vie, à la liberté ou à la sécurité, mais seulement contre celles pouvant être imputées à un acte de l’État accompli dans le cadre de l’administration de la justice : voir *Renvoi relatif à l’art. 193 et à l’al. 195.1(1)c) du Code criminel*

paras. 21-23, *per* Lamer C.J., again writing for himself alone; and *G. (J.)*, *supra*, for the majority. This approach was affirmed in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, *per* Bastarache J. for the majority.

(*Man.*), [1990] 1 R.C.S. 1123 (le « *Renvoi sur la prostitution* »), p. 1173-1174, le juge Lamer (plus tard Juge en chef), s'exprimant en son propre nom; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, par. 21-23, le juge en chef Lamer, s'exprimant de nouveau en son propre nom; ainsi que *G. (J.)*, précité, le juge Lamer s'exprimant alors au nom de la majorité. Cette approche a été confirmée dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, 2000 CSC 44, le juge Bastarache, s'exprimant pour la majorité.

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This Court has indicated in its s. 7 decisions that the administration of justice does not refer exclusively to processes operating in the criminal law, as Lamer C.J. observed in *G. (J.)*, *supra*. Rather, our decisions recognize that the administration of justice can be implicated in a variety of circumstances: see *Blencoe*, *supra* (human rights process); *B. (R.)*, *supra* (parental rights in relation to state-imposed medical treatment); *G. (J.)*, *supra* (parental rights in the custody process); *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925 (liberty to refuse state-imposed addiction treatment). Bastarache J. argues that s. 7 applies only in an adjudicative context. With respect, I believe that this conclusion may be premature. An adjudicative context might be sufficient, but we have not yet determined that one is necessary in order for s. 7 to be implicated.

Dans ses décisions concernant l'art. 7, notre Cour a indiqué que l'administration de la justice ne s'entend pas exclusivement des procédures criminelles, comme l'a fait remarquer le juge en chef Lamer dans l'arrêt *G. (J.)*, précité. Au contraire, notre jurisprudence reconnaît que tout un éventail de situations peuvent faire entrer en jeu l'administration de la justice : voir *Blencoe*, précité (procédures en matière de droits de la personne); *B. (R.)*, précité (droits des parents relativement à un traitement médical imposé par l'État); *G. (J.)*, précité (droits des parents dans le cadre de procédures judiciaires en matière de garde d'enfant); *Office des services à l'enfant et à la famille de Winnipeg (région du Nord-Ouest) c. G. (D.F.)*, [1997] 3 R.C.S. 925 (liberté de refuser des traitements contre une dépendance imposés par l'État). Le juge Bastarache affirme que l'art. 7 s'applique exclusivement dans un contexte juridictionnel. En toute déférence, je crois que cette conclusion est peut-être prématurée. La présence d'un contexte juridictionnel pourrait suffire, mais il n'a pas encore été jugé qu'un tel contexte est nécessaire pour que l'art. 7 entre en jeu.

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In my view, it is both unnecessary and undesirable to attempt to state an exhaustive definition of the administration of justice at this stage, delimiting all circumstances in which the administration of justice might conceivably be implicated. The meaning of the administration of justice, and more broadly the meaning of s. 7, should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration. The issue here is not whether the administration of justice is implicated — plainly it

À mon avis, il serait à la fois inutile et peu souhaitable de tenter, à ce moment-ci, de formuler une définition exhaustive de la notion d'administration de la justice, qui cernerait toutes les situations où l'administration de la justice pourrait en théorie entrer en jeu. Il convient de laisser le sens de la notion d'administration de la justice — et de façon plus générale la portée de l'art. 7 — évoluer graduellement, au fur et à mesure que des questions jusqu'ici imprévues seront soumises aux tribunaux.

is not — but whether the Court ought to apply s. 7 despite this fact.

Can s. 7 apply to protect rights or interests wholly unconnected to the administration of justice? The question remains unanswered. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 56, Dickson C.J., for himself and Lamer J. entertained (without deciding on) the possibility that the right to security of the person extends “to protect either interests central to personal autonomy, such as a right to privacy”. Similarly, in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 1003, Dickson C.J., for the majority, left open the question of whether s. 7 could operate to protect “economic rights fundamental to human . . . survival”. Some cases, while on their facts involving the administration of justice, have described the rights protected by s. 7 without explicitly linking them to the administration of justice: *B.(R.)*, *supra*; *G. (D.F.)*, *supra*.

Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state’s ability to deprive people of these. Such a deprivation does not exist in the case at bar.

One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey’s celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as “a living tree capable of growth and expansion within its natural limits”: see *Reference re Provincial Electoral*

En l’espèce, la question n’est pas de savoir si l’administration de la justice est en jeu — de toute évidence elle ne l’est pas —, mais si, malgré ce fait, la Cour doit appliquer l’art. 7.

L’article 7 peut-il être invoqué pour protéger des droits ou intérêts n’ayant aucun rapport avec l’administration de la justice? Cette question n’a encore jamais été résolue. Dans l’arrêt *R. c. Morgentaler*, [1988] 1 R.C.S. 30, p. 56, le juge en chef Dickson, s’exprimant en son nom et en celui du juge Lamer, a évoqué (sans toutefois trancher la question) la possibilité que le droit à la sécurité de la personne aille plus loin et « protège les intérêts primordiaux de l’autonomie personnelle, tel le droit à la vie privée ». De même, dans l’arrêt *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 1004, le juge en chef Dickson, s’exprimant au nom de la majorité, n’a pas répondu à la question de savoir si l’art. 7 pouvait être invoqué pour protéger les « droits économiques, fondamentaux à la [. . .] survie [de la personne] ». Dans certaines causes, même si les faits concernaient l’administration de la justice, la Cour a décrit les droits protégés par l’art. 7 sans les rattacher explicitement à l’administration de la justice : *B. (R.)* et *G. (D.F.)*, précités.

Même s’il était possible d’interpréter l’art. 7 comme englobant les droits économiques, un autre obstacle surgirait. L’article 7 précise qu’il ne peut être porté atteinte au droit de chacun à la vie, à la liberté et à la sécurité de sa personne qu’en conformité avec les principes de justice fondamentale. En conséquence, jusqu’à maintenant, rien dans la jurisprudence ne tend à indiquer que l’art. 7 impose à l’État une obligation positive de garantir à chacun la vie, la liberté et la sécurité de sa personne. Au contraire, on a plutôt considéré que l’art. 7 restreint la capacité de l’État de porter atteinte à ces droits. Il n’y a pas d’atteinte de cette nature en l’espèce.

Il est possible qu’un jour que l’art. 7 a pour effet de créer des obligations positives. Paraphrasant les paroles célèbres prononcées par lord Sankey dans *Edwards c. Attorney-General for Canada*, [1930] A.C. 124 (C.P.), p. 136, on peut affirmer que la *Charte canadienne* est [TRADUCTION] « un arbre susceptible de croître et de se développer à

*Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180, per McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe*, *supra*, at para. 188 are apposite:

We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.

The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

83 I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory “workfare” provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.

84 In view of my conclusions under s. 15(1) and s. 7 of the *Canadian Charter*, the issue of justification

l'intérieur de ses limites naturelles » : voir *Renvoi : Circonscriptions électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158, p. 180, le juge McLachlin. Ce serait faire erreur que de considérer que le sens de l'art. 7 est figé ou que son contenu a été défini de façon exhaustive dans les arrêts antérieurs. À cet égard, il semble à propos de citer les motifs du juge LeBel dans *Blencoe*, précité, par. 188 :

Nous devons toutefois nous rappeler que l'art. 7 énonce certaines valeurs fondamentales de la *Charte*. Il est sûrement vrai qu'il nous faut éviter de ramener la *Charte*, voire le droit canadien, à une disposition souple et complexe comme l'art. 7. Toutefois, son importance est telle pour la définition des garanties de fond et de procédure en droit canadien qu'il serait périlleux de bloquer l'évolution de cette partie du droit. Il restera difficile pendant encore assez longtemps de prévoir et d'évaluer toutes les répercussions de l'art. 7. Notre Cour devrait être consciente de la nécessité de maintenir une certaine souplesse dans l'interprétation de l'art. 7 de la *Charte* et dans l'évolution de son application.

La question n'est donc pas de savoir si l'on a déjà reconnu — ou si on reconnaîtra un jour — que l'art. 7 crée des droits positifs. Il s'agit plutôt de savoir si les circonstances de la présente affaire justifient une application nouvelle de l'art. 7, selon laquelle il imposerait à l'État l'obligation positive de garantir un niveau de vie adéquat.

J'estime que les circonstances ne justifient pas pareille conclusion. Avec égards pour l'opinion de ma collègue le juge Arbour, je n'estime pas que la preuve est suffisante en l'espèce pour étayer l'interprétation de l'art. 7 qu'elle propose. Je n'écarte pas la possibilité qu'on établisse, dans certaines circonstances particulières, l'existence d'une obligation positive de pourvoir au maintien de la vie, de la liberté et de la sécurité de la personne. Toutefois, tel n'est pas le cas en l'espèce. Le régime contesté comportait des dispositions prévoyant du « travail obligatoire » compensatoire et la preuve n'a pas établi l'existence d'un véritable fardeau. Le cadre factuel très ténu en l'espèce ne saurait étayer l'imposition à l'État d'une lourde obligation positive d'assurer la subsistance des citoyens.

Compte tenu de mes conclusions relatives au par. 15(1) et à l'art. 7 de la *Charte canadienne*, la

under s. 1 does not arise. Nor does the issue of *Canadian Charter* remedies arise.

C. *Does the Social Assistance Scheme Violate Section 45 of the Quebec Charter?*

Section 45 of the *Quebec Charter* provides that every person in need has a right to “measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living”.

Ms. Gosselin argues that s. 45 creates a right to an acceptable standard of living and that Quebec’s social assistance scheme breached that right. On this issue, she substantially echoes the position of Robert J.A., dissenting, in the Quebec Court of Appeal. She further argues that a remedy for this alleged breach ought to be available under s. 49 of the *Quebec Charter*, a proposition that Robert J.A. rejected.

There can be no doubt that s. 45 purports to create a right. However, determining the scope and content of that right presents something of a challenge, as s. 45 is ambiguous, admitting of two possible interpretations. According to the first interpretation, by providing a right to “measures provided for by law, susceptible of ensuring . . . an acceptable standard of living”, s. 45 requires courts to review social assistance measures adopted by the legislature to determine whether or not they succeed in ensuring an acceptable standard of living. This is the approach urged upon us by the appellant.

A second interpretation reads s. 45 as creating a far more limited right. On this view, s. 45 requires the government to provide social assistance measures, but it places the adequacy of the particular measures adopted beyond the reach of judicial review. The phrase “susceptible of ensuring . . . an acceptable standard of living” serves to identify the measures that are the subject matter of the entitlement, i.e. to specify the kind of measures the state is obliged to provide, but it cannot ground a review of their adequacy. In my view, several considerations militate in favour of this second interpretation, as I indicate below.

question de la justification au regard de l’article premier ne se pose pas, ni d’ailleurs celle des réparations fondées sur la *Charte canadienne*.

C. *Le régime d’aide sociale viole-t-il l’art. 45 de la Charte québécoise?*

L’article 45 de la *Charte québécoise* dispose que toute personne dans le besoin a droit « à des mesures d’assistance financière et à des mesures sociales, prévues par la loi, susceptibles de lui assurer un niveau de vie décent ».

Madame Gosselin affirme que l’art. 45 crée le droit à un niveau de vie décent et que le régime d’aide sociale du Québec a porté atteinte à ce droit. Sur cette question, elle reprend essentiellement la position dissidente du juge Robert de la Cour d’appel du Québec. Elle avance également que cette prétendue atteinte donne ouverture à une réparation prévue par l’art. 49 de la *Charte québécoise*, argument qu’a rejeté le juge Robert.

Il ne fait aucun doute que l’art. 45 est censé créer un droit. Toutefois, la détermination du contenu et de l’étendue de ce droit présente certaines difficultés, puisque l’art. 45 est ambigu et admet deux interprétations. Suivant la première, en créant le droit à des « mesures [. . .] prévues par la loi, susceptibles [d’]assurer un niveau de vie décent », l’art. 45 obligerait les tribunaux à examiner les mesures d’aide sociale adoptées par le législateur pour déterminer si elles assurent ou non un niveau de vie décent. C’est la démarche que prône l’appelante.

Suivant la deuxième interprétation, l’art. 45 crée un droit beaucoup plus limité. Il oblige le gouvernement à établir des mesures d’aide sociale, mais soustrait au pouvoir de contrôle des tribunaux la question de savoir si ces mesures sont adéquates. L’expression « susceptibles [d’]assurer un niveau de vie décent » sert à identifier les mesures qui constituent l’objet du droit, c’est-à-dire qu’elle précise le type de mesures que l’État est tenu d’offrir, mais elle ne peut être invoquée pour fonder l’examen du caractère adéquat de telles mesures. À mon avis, comme je l’indique ci-après, plusieurs facteurs militent en faveur de la deuxième interprétation.

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Attention to the other provisions of Chapter IV of the *Quebec Charter*, entitled “Economic and Social Rights”, helps to put s. 45 in context, and sheds considerable light on the interpretive issue. Some of the provisions in Chapter IV deal with rights as between individuals, and do not directly implicate the state at all. For example, s. 39 provides that “[e]very child has a right to the protection, security and attention that his parents or the persons acting in their stead are capable of providing”. However, most of Chapter IV’s provisions do implicate the state, including s. 45. Of these provisions implicating the state, all but two deal with “positive rights”. That is, the rights described correspond to obligations for the state to do, or to provide, something. These include s. 40 (right to free public education); s. 41 (right to religious or moral education); and s. 44 (right to information).

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Most of the provisions creating positive rights contain limiting language sharply curtailing the scope of the right. For example, the right to free public education provided at s. 40 is stated in the following terms: “[e]very person has a right, to the extent and according to the standards provided for by law, to free public education” (emphasis added). It would be misleading to characterize that right as creating a free-standing entitlement to free public education, in light of this limitation. Rather, the language of the provision suggests that the particulars of the regime enacted by the legislature in order to provide free education are beyond judicial review of their sufficiency.

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This same structure applies to other key provisions in Chapter IV. For example:

**41.** Parents or the persons acting in their stead have a right to require that, in the public educational establishments, their children receive a religious or moral education in conformity with their convictions, within the framework of the curricula provided for by law.

**42.** Parents or the persons acting in their stead have a right to choose private educational establishments for their children, provided such establishments comply

L’examen des autres dispositions du chapitre IV de la *Charte québécoise*, intitulé « Droits économiques et sociaux », aide à bien cerner le contexte de l’art. 45 et jette un éclairage considérable sur son interprétation. Certaines dispositions du chapitre IV portent sur les droits des personnes physiques entre elles et ne visent directement l’État d’aucune façon. Par exemple, l’art. 39 précise que « [t]out enfant a droit à la protection, à la sécurité et à l’attention que ses parents ou les personnes qui en tiennent lieu peuvent lui donner ». Cependant, la plupart des dispositions du chapitre IV, y compris l’art. 45, appellent l’intervention de l’État. De ces dispositions, toutes sauf deux visent des « droits positifs », c’est-à-dire des droits correspondant à une obligation pour l’État de faire ou d’offrir quelque chose. C’est le cas, notamment, de l’art. 40 (droit à l’instruction publique gratuite), de l’art. 41 (droit à l’enseignement religieux ou moral) et de l’art. 44 (droit à l’information).

La plupart des dispositions créant des droits positifs renferment des termes limitatifs, qui restreignent nettement la portée des droits en question. Par exemple, le droit à l’instruction publique visé à l’art. 40 est formulé ainsi : « [t]oute personne a droit, dans la mesure et suivant les normes prévues par la loi, à l’instruction publique gratuite » (je souligne). Compte tenu de cette restriction, il serait erroné d’affirmer que ce droit crée un droit indépendant à l’instruction publique gratuite. Au contraire, le libellé de cette disposition donne à penser que les modalités du régime établi par le législateur pour assurer l’instruction gratuite ne sont pas susceptibles de contrôle judiciaire quant à savoir si elles sont adéquates.

D’autres dispositions clés du chapitre IV sont structurées de manière analogue. Par exemple :

**41.** Les parents ou les personnes qui en tiennent lieu ont le droit d’exiger que, dans les établissements d’enseignement publics, leurs enfants reçoivent un enseignement religieux ou moral conforme à leurs convictions, dans le cadre des programmes prévus par la loi.

**42.** Les parents ou les personnes qui en tiennent lieu ont le droit de choisir pour leurs enfants des établissements d’enseignement privés, pourvu que ces établissements

with the standards prescribed or approved by virtue of the law.

**44.** Every person has a right to information to the extent provided by law.

**46.** Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being.

In all these cases, the rights provided are limited in such a way as to put the specific legislative measures or framework adopted by the legislature beyond the reach of judicial review. These provisions require the state to take steps to make the Chapter IV rights effective, but they do not allow for the judicial assessment of the adequacy of those steps. Indeed, the only provision creating a positive right that does not display this feature is s. 48, which states that “[e]very aged person and every handicapped person has a right to protection against any form of exploitation”. However, this provision seems distinguishable in that, unlike the other rights discussed above, the right contemplated does not *a priori* require the adoption of a special regime for its fulfilment.

Was s. 45 intended to make the adequacy of a social assistance regime’s specific provisions subject to judicial review, unlike the neighbouring provisions canvassed above? Had the legislature intended such an exceptional result, it seems to me that it would have given effect to this intention unequivocally, using precise language. There are examples of legal documents purporting to do just that. For example, Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, recognizes “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”. Article 22 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), provides that “[e]veryone, as a member of society, has the right to social security” and is “entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”. Article 25(1) provides that:

se conforment aux normes prescrites ou approuvées en vertu de la loi.

**44.** Toute personne a droit à l’information, dans la mesure prévue par la loi.

**46.** Toute personne qui travaille a droit, conformément à la loi, à des conditions de travail justes et raisonnables et qui respectent sa santé, sa sécurité et son intégrité physique.

Dans tous ces cas, les droits prévus sont limités de façon à soustraire au contrôle judiciaire les mesures ou le cadre législatifs précis adoptés par le législateur. Ces dispositions obligent l’État à prendre des mesures pour donner effet aux droits visés par le chapitre IV, mais elles ne permettent pas le contrôle judiciaire de ces mesures. De fait, l’art. 48 est la seule disposition qui crée un droit positif ne comportant pas cet élément : « [t]oute personne âgée ou toute personne handicapée a droit d’être protégée contre toute forme d’exploitation ». Cependant, cette disposition semble pouvoir être distinguée des autres en ce que le droit envisagé, contrairement aux autres droits examinés, ne requiert pas a priori l’adoption d’un régime spécial en vue d’assurer son application.

L’article 45 était-il censé assujettir les modalités particulières d’un régime d’aide sociale au pouvoir des tribunaux d’en contrôler le caractère adéquat, contrairement aux dispositions voisines examinées précédemment? Si le législateur avait voulu un résultat aussi exceptionnel, il me semble qu’il aurait donné effet à cette intention de façon non équivoque, au moyen de termes précis. Il existe des documents juridiques tendant précisément à ce résultat. Par exemple, le par. 11(1) du *Pacte international relatif aux droits économiques, sociaux et culturels*, 993 R.T.N.U. 3, reconnaît « le droit de toute personne à un niveau de vie suffisant pour elle-même et sa famille, y compris une nourriture, un vêtement et un logement suffisants, ainsi qu’à une amélioration constante de ses conditions d’existence ». L’article 22 de la *Déclaration universelle des droits de l’homme*, A.G. Rés. 217 A (III), Doc. A/810 N.U., p. 71 (1948), précise que : « [t]oute personne, en tant que membre de la société, a droit à la sécurité sociale » et « est fondée à obtenir la satisfaction des droits économiques, sociaux et culturels indispensables à sa dignité et au libre développement de sa personnalité ». Le paragraphe 25(1) prévoit :

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

In contrast to these provisions, which unambiguously and directly define the rights to which individuals are entitled (even though they may not be actionable), s. 45 of the *Quebec Charter* is highly equivocal. Indeed, s. 45 features two layers of equivocation. Rather than speaking of a right to an acceptable standard of living, s. 45 refers to a right to measures. Moreover, the right is not to measures that ensure an acceptable standard of living, but to measures that are susceptible of ensuring an acceptable standard of living. In my view, the choice of the term “susceptible” underscores the idea that the measures adopted must be oriented toward the goal of ensuring an acceptable standard of living, but are not required to achieve success. In other words, s. 45 requires only that the government be able to point to measures of the appropriate kind, without having to defend the wisdom of its enactments. This interpretation is also consistent with the respective institutional competence of courts and legislatures when it comes to enacting and fine-tuning basic social policy.

94 For these reasons, I am unable to accept the view that s. 45 invites courts to review the adequacy of Quebec’s social assistance regime. The *Social Aid Act* provides the kind of “measures provided for by law” that satisfy s. 45. I conclude that there was no breach of s. 45 of the *Quebec Charter* in this case.

95 Notwithstanding my conclusion that there is no breach of s. 45, I wish to make a brief comment on the issue of remedies. I agree with much that my colleague Bastarache J. says on the question of remedies. In particular, I agree that a breach of s. 45 cannot give rise to a declaration of invalidity, since such a remedy is available only under s. 52 of the *Quebec Charter*, which applies exclusively to s. 1 to

Toute personne a droit à un niveau de vie suffisant pour assurer sa santé, son bien-être et ceux de sa famille, notamment pour l’alimentation, l’habillement, le logement, les soins médicaux ainsi que pour les services sociaux nécessaires; elle a droit à la sécurité en cas de chômage, de maladie, d’invalidité, de veuvage, de vieillesse ou dans les autres cas de perte de ses moyens de subsistance par suite de circonstances indépendantes de sa volonté.

Contrairement à ces dispositions, qui définissent directement et de manière non équivoque le droit qui est reconnu aux individus (bien qu’il ne donne peut-être pas ouverture à un recours judiciaire), l’art. 45 de la *Charte québécoise* est très ambigu. En effet, l’art. 45 comporte deux niveaux d’ambiguïté. Plutôt que de parler du droit à un niveau de vie décent, l’art. 45 parle du droit à des mesures. En outre, il ne s’agit pas du droit à des mesures assurant un niveau de vie décent, mais de mesures susceptibles d’assurer un niveau de vie décent. À mon avis, le choix du terme « susceptibles » fait ressortir l’idée que les mesures adoptées doivent tendre à assurer un niveau de vie décent, mais n’ont pas à y parvenir. En d’autres mots, l’art. 45 exige seulement que le gouvernement puisse établir l’existence de mesures du type approprié, sans l’obliger à défendre la sagesse de ces mesures. Cette interprétation est aussi compatible avec la compétence institutionnelle respective des tribunaux et des législatures en ce qui concerne l’établissement de politiques sociales fondamentales et leur ajustement dans les moindres détails.

Pour ces motifs, je ne puis souscrire à l’opinion que l’art. 45 invite les tribunaux à contrôler le caractère adéquat du régime d’aide sociale du Québec. La *Loi sur l’aide sociale* comporte le type de « mesures [. . .] prévues par la loi » que vise l’art. 45. Je conclus en l’espèce à l’absence de violation de l’art. 45 de la *Charte québécoise*.

Malgré cette conclusion de conformité avec l’art. 45, je tiens à commenter brièvement la question des réparations. Je souscris en grande partie aux propos de mon collègue le juge Bastarache sur cette question. Tout particulièrement, je reconnais que la violation de l’art. 45 ne peut donner lieu à une déclaration d’invalidité, puisqu’une telle réparation ne peut être obtenue qu’en vertu de l’art. 52 de la

s. 38. I further agree that s. 49 finds no application to a case such as this. However, I must respectfully disagree with Bastarache J. that it follows from the foregoing considerations that determining whether s. 45 has been breached is superfluous.

While it is true that courts lack the power to strike down laws that are inconsistent with the social and economic rights provided in Chapter IV of the *Quebec Charter*, it does not follow from this that courts are excused from considering claims based upon these rights. Individuals claiming their rights have been violated under the *Charter* are entitled to have those claims adjudicated, in appropriate cases. The *Quebec Charter* is a legal document, purporting to create social and economic rights. These may be symbolic, in that they cannot ground the invalidation of other laws or an action in damages. But there is a remedy for breaches of the social and economic rights set out in Chapter IV of the *Quebec Charter*: where these rights are violated, a court of competent jurisdiction can declare that this is so.

## V. Conclusion

I would dismiss the appeal. I conclude that Quebec's social assistance scheme, as it stood from 1987 to 1989, did not violate s. 7 or s. 15(1) of the *Canadian Charter*, or s. 45 of the *Quebec Charter*. Accordingly, I would answer the constitutional questions as follows:

1. Did s. 29(a) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?

No.

2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

*Charte québécoise*, qui s'applique exclusivement aux art. 1 à 38. Je reconnais également que l'art. 49 ne s'applique pas en l'espèce. Cependant, je ne peux, en toute déférence, me rallier au point de vue du juge Bastarache selon lequel il serait superflu, en raison des facteurs qui précèdent, de déterminer s'il y a eu violation de l'art. 45.

Bien que les tribunaux n'aient pas le pouvoir d'invalider des lois qui sont incompatibles avec les droits sociaux et économiques prévus au chapitre IV de la *Charte québécoise*, il ne s'ensuit pas que les tribunaux sont de ce fait dispensés de connaître des demandes fondées sur ces droits. La personne qui prétend avoir été victime d'une atteinte aux droits que lui garantit la *Charte québécoise* a le droit de s'adresser aux tribunaux dans les cas opportuns. La *Charte québécoise* est un document juridique, censé créer des droits sociaux et économiques. Ces droits sont peut-être symboliques en ce qu'ils ne peuvent servir de fondement à l'invalidation d'autres lois ni à une action en dommages-intérêts. Cependant, il existe une réparation pour les atteintes aux droits sociaux et économiques énoncés au chapitre IV de la *Charte québécoise*. En cas de violation de ces droits, un tribunal compétent peut prononcer un jugement déclaratoire constatant cette violation.

## V. Conclusion

Je rejetterais le pourvoi. J'estime que le régime d'aide sociale du Québec en vigueur de 1987 à 1989 ne contrevenait ni à l'art. 7 et au par. 15(1) de la *Charte canadienne*, ni à l'art. 45 de la *Charte québécoise*. En conséquence, voici comment je répondrais aux questions constitutionnelles :

1. Le paragraphe 29a) du *Règlement sur l'aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, adopté en vertu de la *Loi sur l'aide sociale*, L.R.Q., ch. A-16, violait-il le par. 15(1) de la *Charte canadienne des droits et libertés* pour le motif qu'il établissait une distinction discriminatoire fondée sur l'âge relativement aux personnes seules, aptes au travail, âgées de 18 à 30 ans?

Non.

2. Dans l'affirmative, cette violation est-elle justifiée dans le cadre d'une société libre et démocratique, en vertu de l'article premier de la *Charte canadienne des droits et libertés*?

In view of the answer to Question 1, it is not necessary to answer this question.

3. Did s. 29(a) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?

No.

4. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

In view of the answer to Question 3, it is not necessary to answer this question.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting) —

#### I. Introduction

98 This appeal raises the question of the constitutionality of s. 29(a) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1 (since repealed). In my opinion, s. 29(a) does violate ss. 15 and 7 of the *Canadian Charter of Rights and Freedoms* (the “*Canadian Charter*”) without justification, as well as s. 45 of the *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 (“*Quebec Charter*”). Accordingly, I would allow the appeal.

99 In reaching these conclusions, I agree with my colleagues Bastarache and LeBel JJ., in the result, as to the violation of s. 15, and with my colleague Arbour J.’s reasons as to the violation of s. 7 of the *Charter*. As to s. 45 of the *Quebec Charter*, I am basically in agreement with the dissenting opinion of Robert J.A. (now Chief Justice) of the Quebec Court of Appeal ([1999] R.J.Q. 1033), and therefore disagree with the opinion of LeBel J. on this issue.

Compte tenu de la réponse à la question 1, il n’est pas nécessaire de répondre à cette question.

3. Le paragraphe 29a) du *Règlement sur l’aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, adopté en vertu de la *Loi sur l’aide sociale*, L.R.Q., ch. A-16, violait-il l’art. 7 de la *Charte canadienne des droits et libertés* pour le motif qu’il portait atteinte au droit à la sécurité des personnes qu’il visait, et ce d’une façon incompatible avec les principes de justice fondamentale?

Non.

4. Dans l’affirmative, cette violation est-elle justifiée dans le cadre d’une société libre et démocratique, en vertu de l’article premier de la *Charte canadienne des droits et libertés*?

Compte tenu de la réponse à la question 3, il n’est pas nécessaire de répondre à cette question.

Version française des motifs rendus par

LE JUGE L'HEUREUX-DUBÉ (dissidente) —

#### I. Introduction

Le présent pourvoi soulève la question de la constitutionnalité de l’al. 29a) du *Règlement sur l’aide sociale*, R.R.Q. 1981, ch. A-16, r. 1 (abrogé depuis). À mon avis, l’al. 29a) contrevient sans justification aux art. 15 et 7 de la *Charte canadienne des droits et libertés* (la « *Charte canadienne* ») ainsi qu’à l’art. 45 de la *Charte des droits et libertés de la personne*, L.R.Q., ch. C-12 (la « *Charte québécoise* »). En conséquence, j’accueillerais le pourvoi.

En tirant ces conclusions, je souscris aux motifs de mes collègues les juges Bastarache et LeBel quant au résultat concernant la violation de l’art. 15, ainsi qu’aux motifs de ma collègue le juge Arbour pour ce qui est de la violation de l’art. 7 de la *Charte canadienne*. En ce qui concerne l’art. 45 de la *Charte québécoise*, je suis fondamentalement d’accord avec le juge Robert, dissident, de la Cour d’appel du Québec (maintenant Juge en chef) ([1999] R.J.Q. 1033), et ne souscris donc pas à l’opinion du juge LeBel sur cette question.

Since I have some reservations and comments on each of the above analyses I set out the following remarks.

## II. Analysis

### A. *Section 15*

The present facts provide this Court with an opportunity to revisit the fundamental objectives of, and reaffirm its commitment to, the *Canadian Charter's* equality guarantee.

The purpose of a s. 15 inquiry is to determine whether the claimant has received substantive equality or equal benefit before and under the law. Equality is denied when the claimant suffers the pernicious effects of a distinction drawn on the basis of an irrelevant characteristic. Such a distinction may be drawn on an enumerated or analogous ground and appear on the face of the law. Alternatively, the distinction may be facially neutral and the negative effects may uniquely be visited upon individuals who possess a personal characteristic that corresponds to the enumerated or analogous grounds. In either case, discrimination is the result.

The *Canadian Charter's* structure dictates that even a finding that the claimant has been denied substantive equality is not the final step of the inquiry; it is possible for the infringement of s. 15 to be justified under s. 1. It is important to remember that the s. 15 inquiry precedes, and must always be kept distinct from, the s. 1 analysis. The evaluation of a s. 15 claim must always remain focussed on the particular claimant and his or her experience of the law.

The above comments should be uncontroversial, grounded as they are in this Court's equality jurisprudence. Yet it appears necessary to recall what the purposes of s. 15 are, and what they are not. Presumptively excluding from s. 15's protection groups which clearly fall within an enumerated category does not serve the purposes of the equality guarantee. Abstract discussion about the nature of

Puisque j'ai certaines réserves et commentaires à l'égard de chacune des analyses susmentionnées, je tiens à formuler les remarques qui suivent.

## II. Analyse

### A. *L'article 15*

Les faits à l'origine de ce pourvoi offrent à la Cour l'occasion de réexaminer les objectifs fondamentaux de la garantie d'égalité prévue à la *Charte canadienne* et de réaffirmer son attachement à cette garantie.

Le but de l'examen que requiert l'art. 15 est de déterminer si le droit de la partie demanderesse à l'égalité réelle devant la loi et au même bénéfice de la loi a été respecté. Il y a atteinte à l'égalité lorsque cette partie subit les effets pernicioeux d'une distinction fondée sur une caractéristique non pertinente. Une telle distinction peut être fondée sur un motif énuméré ou analogue et ressortir du texte même de la législation. Mais elle peut aussi, sous une neutralité apparente, produire des effets négatifs uniquement sur les personnes qui possèdent un attribut personnel correspondant aux motifs énumérés ou analogues. Dans les deux cas, il y a discrimination.

Compte tenu de l'économie générale de la *Charte canadienne*, même la conclusion que la partie demanderesse a été privée d'une égalité réelle ne constitue pas l'étape finale de l'analyse; l'atteinte à l'art. 15 peut être justifiée au regard de l'article premier. Il importe de rappeler que l'analyse fondée sur l'art. 15 précède et doit demeurer distincte de l'analyse effectuée sous le régime de l'article premier. L'examen d'une demande fondée sur l'art. 15 doit toujours être centré sur la partie demanderesse en l'instance et sur la façon dont une législation l'affecte.

Les commentaires qui précèdent devraient faire l'unanimité, car ils s'appuient sur la jurisprudence de la Cour en matière d'égalité. Il semble néanmoins nécessaire de rappeler quels sont les objets que vise l'art. 15 et quels sont ceux qu'il ne vise pas. Exclure a priori de la protection de l'art. 15 des groupes qui appartiennent clairement à une catégorie énumérée ne sert pas les fins de la garantie d'égalité. Un

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particular grounds does not serve the purposes of s. 15. Blurring the division between the rights provisions and s. 1 of the *Canadian Charter*, by incorporating the perspective of the legislature in a s. 15 analysis, is at odds with this Court's approach to equality and surely does not serve the purposes of s. 15.

discours abstrait sur la nature de certains motifs particuliers ne sert pas non plus les fins de l'art. 15. Affaiblir le cloisonnement entre les dispositions constitutives de droits et l'article premier de la *Charte canadienne*, par une prise en considération du point de vue du législateur dans l'analyse fondée sur l'art. 15, va à l'encontre de l'approche que la Cour a adoptée en matière d'égalité et ne sert certainement pas les objectifs de l'art. 15.

105 A majority of this Court has held that the objective of s. 15 is to affirm the dignity of individuals and groups by protecting them from unfair governmental action, which differentiates on the basis of characteristics that can be changed, if at all, only at great personal cost: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 13. The characteristics which fall within the scope of s. 15's protective ambit have been expressly enumerated by the legislature, or found to be analogous grounds by the judiciary: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

La Cour a statué à la majorité que l'art. 15 a pour objectif de renforcer la dignité des personnes et des groupes, en les protégeant contre une intervention gouvernementale injuste qui établit une distinction fondée sur des caractéristiques modifiables seulement à un prix considérable, si tant est qu'elles puissent être modifiées : *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203, par. 13. Les caractéristiques visées par la protection que garantit l'art. 15 ont été énumérées expressément par le législateur ou reconnues par les tribunaux comme des motifs analogues : *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497.

106 This Court has previously been divided over the question of whether certain characteristics should be recognized as analogous grounds. See, e.g., *Miron v. Trudel*, [1995] 2 S.C.R. 418, on the question of whether marital status constitutes an analogous ground. In the present case, we are in the unusual circumstance of disagreeing about whether to respect s. 15's express wording. Those who would "typically" exclude youth from protection under the ground of age ignore both the plain language of the *Canadian Charter*, and the method that this Court has adopted for s. 15 inquiries.

La Cour a déjà exprimé des avis partagés quant à savoir si certaines caractéristiques devraient être reconnues comme des motifs analogues. Voir par exemple l'arrêt *Miron c. Trudel*, [1995] 2 R.C.S. 418, sur la question de savoir si l'état matrimonial constitue un motif analogue. En l'espèce, nous nous trouvons dans la situation inhabituelle où nous divergeons de vues sur l'application du texte même de l'art. 15. Ceux qui excluraient « habituellement » les jeunes de la protection contre la discrimination fondée sur l'âge écartent à la fois le libellé clair de la *Charte canadienne* et la méthode déjà retenue par la Cour pour procéder à une analyse fondée sur l'art. 15.

107 Under the *Law* test, the presence of a distinction made on the basis of an analogous ground is essentially a threshold question that leads to the heart of the inquiry, the question of whether the distinction infringes human dignity and contradicts the purposes of s. 15. It would appear that some are reluctant to accept that an explicit legislative distinction

Selon le test formulé dans l'arrêt *Law*, l'existence d'une distinction fondée sur un motif analogue est essentiellement un test préliminaire qui nous amène au cœur de l'analyse, à savoir si la distinction porte atteinte à la dignité humaine et va à l'encontre des objectifs de l'art. 15. Il semble que certains hésitent à admettre qu'une distinction législative établie

drawn on the basis of an enumerated ground satisfies the threshold requirement that permits courts to proceed to a detailed contextual analysis under the third stage of the *Law* inquiry.

Age is an enumerated ground. This Court has concluded that once recognized, an analogous ground remains a permanent marker of suspect distinction in all contexts: *Corbiere, supra*. It would seem to follow that grounds explicitly enumerated in s. 15 were similarly permanent markers. Admittedly, the Constitution ousts the protection afforded by this ground in specific contexts. See *Constitution Act, 1867*, ss. 23, 29 and 99, and the discussion in P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 52-47. However, the *Canadian Charter* could have contained a general provision which excluded those below a certain age threshold from protection against discrimination, as provincial human rights codes have done. See, e.g., Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 10(1) “age”. The *Canadian Charter* contains no such provision.

Any attempt to read the limited range of provincial human rights codes’ age protections into s. 15 must fail. Provincial human rights codes in the employment context expressly exclude those 65 and over from protection on the grounds of age: Ontario *Human Rights Code*, ss. 5(1) and 10(1) “age”. This Court has declined to follow this example in its s. 15 jurisprudence. It has held that those the age of 65 and over fall within the scope of s. 15’s protection, although government action that discriminates on this basis may be saved under s. 1: *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. This Court’s jurisprudence on age discrimination has respected the express wording of s. 15, even in the face of contrary tendencies in quasi-constitutional statutes.

explicitement sur le fondement d’un motif énuméré satisfait au critère préliminaire qui permet aux tribunaux de procéder à une analyse contextuelle détaillée à la troisième étape de l’examen décrit dans *Law*.

L’âge est un motif énuméré. La Cour a conclu, par ailleurs, qu’un motif analogue, une fois reconnu, constitue un indicateur permanent de l’existence d’une distinction suspecte dans tous les contextes : *Corbiere*, précité. Il devrait s’ensuivre que les motifs énumérés explicitement à l’art. 15 constituent également des indicateurs permanents. Il faut reconnaître que, dans des contextes précis, la Constitution écarte la protection offerte à l’égard de ce motif. Voir la *Loi constitutionnelle de 1867*, art. 23, 29 et 99, et l’analyse de P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 2, p. 52-47. Toutefois, la *Charte canadienne* aurait pu comprendre une disposition générale excluant de la protection contre la discrimination les personnes n’ayant pas atteint un certain âge minimal, comme l’ont fait des codes provinciaux sur les droits de la personne. Voir par exemple, le *Code des droits de la personne* de l’Ontario, L.R.O. 1990, ch. H.19, par. 10(1) « âge ». La *Charte canadienne* ne renferme pas de telle disposition.

Toute tentative de tenir pour incluses implicitement dans l’art. 15 les limites à la protection contre la discrimination fondée sur l’âge établies dans les codes provinciaux sur les droits de la personne doit être rejetée. Dans le contexte de l’emploi, les codes provinciaux excluent explicitement les personnes de 65 ans ou plus de la protection liée à l’âge : *Code des droits de la personne* de l’Ontario, par. 5(1) et 10(1) « âge ». La Cour a refusé de suivre cet exemple dans sa jurisprudence relative à l’art. 15. En effet, la Cour a statué que les personnes de 65 ans ou plus bénéficiaient de la protection de l’art. 15, bien que l’action gouvernementale discriminatoire sur ce fondement puisse se justifier sous le régime de l’article premier : *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229; *Harrison c. Université de la Colombie-Britannique*, [1990] 3 R.C.S. 451; *Stoffman c. Vancouver General Hospital*, [1990] 3 R.C.S. 483; et *Tétreault-Gadoury c. Canada (Commission de l’emploi et de l’immigration)*,

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I see no principled reason to depart from this history of fidelity to the *Canadian Charter's* text and aspirations.

110 Moreover, any attempt to presumptively exclude youth from s. 15 protection, for the reason that age is a unique ground, misplaces the focus of a s. 15 inquiry. The proper focus of analysis is on the effects of discrimination, and not on the categorizing of grounds. In *Egan v. Canada*, [1995] 2 S.C.R. 513, at paras. 48 and 53, I wrote:

We must remember that the grounds in s. 15, enumerated and analogous, are instruments for finding discrimination. They are a means to an end. By focussing almost entirely on the nature, content and context of the disputed ground, however, we have begun to approach it as an end, in and of itself. . . .

We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than on specific effects. [Emphasis deleted.]

111 I recently restated this position in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, at para. 166. I remain convinced that a discrimination claim should be evaluated primarily in terms of an impugned distinction's effects, as they would have been experienced by a reasonable person in the claimant's position. The point of departure should not lie in abstract generalizations about the nature of grounds.

112 Since courts engaged in a s. 15 analysis should focus on the effects of an impugned distinction, they should also refrain from relying on the viewpoint of the legislature. At the s. 15 stage, courts should not be concerned with whether the legislature was well-intentioned. This Court has long recognized that an intention to discriminate is not a necessary condition for a finding of discrimination: *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985]

[1991] 2 R.C.S. 22. Dans ses arrêts sur la discrimination fondée sur l'âge, la Cour a respecté le texte de l'art. 15, même en présence de tendances contraires dans des lois quasi constitutionnelles. Je ne vois aucune raison de principe de nous écarter de la fidélité au texte et aux aspirations de la *Charte canadienne* dont la Cour a historiquement fait preuve.

Par ailleurs, toute tentative d'exclure a priori les jeunes de la protection de l'art. 15 parce que l'âge est un motif particulier déplace le véritable focus sur lequel doit porter l'analyse de l'art. 15. L'accent doit être mis sur les effets de la discrimination et non sur le classement des motifs dans une catégorie. Dans *Egan c. Canada*, [1995] 2 R.C.S. 513, par. 48 et 53, j'ai écrit :

Nous devons nous rappeler que les motifs énumérés à l'art. 15 et ceux qui y sont analogues sont des instruments à l'aide desquels on peut conclure à la discrimination. Ils sont un moyen d'atteindre une fin. Or, en nous limitant presque exclusivement à la nature, au contenu et au contexte du motif contesté, nous l'avons traité comme une fin en soi . . .

Nous ne réglerons jamais complètement le problème de la discrimination et nous ne réussirons pas à la démasquer sous toutes ses formes si nous continuons d'insister sur des catégories abstraites et des généralisations plutôt que sur des effets précis. [Soulignement supprimé.]

J'ai récemment reformulé cette position dans l'arrêt *Dunmore c. Ontario (Procureur général)*, [2001] 3 R.C.S. 1016, 2001 CSC 94, par. 166. Je demeure convaincue que l'examen d'une allégation de discrimination doit porter fondamentalement sur les effets de la distinction alléguée, tels que vécus par une personne raisonnable placée dans la situation de la partie demanderesse. Le point de départ ne doit pas se situer dans des généralisations abstraites sur la nature des motifs.

Puisque les tribunaux, dans leur analyse sous l'art. 15, doivent centrer leur attention sur les effets d'une distinction alléguée, ils doivent également s'abstenir de prendre appui sur l'intention du législateur. À l'étape de l'analyse fondée sur l'art. 15, les tribunaux ne doivent pas se préoccuper de savoir si le législateur était bien intentionné. La Cour a depuis longtemps établi qu'une intention de discriminer n'est pas nécessaire pour

2 S.C.R. 536; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; and *Andrews, supra*, at pp. 173-74. By necessary implication, the fact that a legislature intends to assist the group or individual adversely affected by the impugned distinction also does not preclude a court from finding discrimination. Nor is it determinative, where a distinction produces prejudicial effects, that a legislature intends to provide an incentive for the affected individuals to alter their conduct or to change themselves in ways that the legislature believes would ultimately be beneficial for them: *Lavoie v. Canada*, [2002] 1 S.C.R. 769, 2002 SCC 23, at paras. 5, *per* McLachlin C.J. and L'Heureux-Dubé J., dissenting, and 51, *per* Bastarache J.

Of course, benign legislative intent may aid in saving a discriminatory distinction at s. 1, but that is a separate inquiry. In the earliest moments of its *Canadian Charter* jurisprudence, this Court insisted that the analysis of the right at issue should be kept separate from the inquiry into an impugned distinction's justification: *R. v. Oakes*, [1986] 1 S.C.R. 103; *Andrews, supra*, at p. 182. As we enter the third decade of the *Canadian Charter's* existence, I see no reason to depart from this fundamental division. Moreover, I am unable to imagine how a departure could result in anything but a weakening of the equality guarantee.

#### The Law Test

This Court has repeatedly affirmed the importance of protecting individuals and groups from the negative effects of discrimination, as these are defined from the perspective of the reasonable person in the claimant's position. The *Law* test is one such affirmation. I turn now to the question of how that test should be interpreted to ensure that

conclure à la discrimination : *Commission ontarienne des droits de la personne c. Simpsons-Sears Ltd.*, [1985] 2 R.C.S. 536; *Compagnie des chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne)*, [1987] 1 R.C.S. 1114; *Brooks c. Canada Safeway Ltd.*, [1989] 1 R.C.S. 1219; et *Andrews*, précité, p. 173-174. Il s'ensuit nécessairement que le fait qu'un législateur ait l'intention d'aider le groupe ou la personne sur lesquels la distinction alléguée a un effet préjudiciable n'empêche pas non plus un tribunal de conclure à la discrimination. Lorsqu'une distinction entraîne des effets préjudiciables, il n'est pas non plus déterminant qu'un législateur ait, selon lui, eu l'intention d'inciter les personnes touchées par cette législation à changer leur comportement de façon à ce qu'elles en bénéficient en bout de ligne : *Lavoie c. Canada*, [2002] 1 R.C.S. 769, 2002 CSC 23, par. 5, le juge en chef McLachlin et le juge L'Heureux-Dubé, dissidentes, et par. 51, le juge Bastarache.

Certes, le fait que le législateur ait eu une intention inoffensive peut contribuer à valider une distinction discriminatoire par application de l'article premier, mais il s'agit là d'une étape distincte. Dans les tout premiers arrêts relatifs à la *Charte canadienne*, la Cour a insisté sur le fait que l'analyse de la législation en cause doit demeurer distincte de l'examen portant sur la justification de la distinction alléguée : *R. c. Oakes*, [1986] 1 R.C.S. 103; *Andrews*, précité, p. 182. À l'aube de la troisième décennie de l'existence de la *Charte canadienne*, je ne vois aucun motif de déroger à ce cloisonnement fondamental. Qui plus est, je ne peux voir comment une telle dérogation pourrait produire un résultat autre que l'affaiblissement de la garantie d'égalité.

#### Le test de l'arrêt Law

La Cour a affirmé à maintes reprises l'importance de protéger les personnes et les groupes contre les effets négatifs de la discrimination, définis du point de vue de la personne raisonnable placée dans la situation de la partie demanderesse. Le test énoncé dans l'arrêt *Law* en est un exemple. J'examinerai maintenant l'interprétation qu'il faut donner à ce

human dignity remains the fundamental reference point for any evaluation of a s. 15 claim.

115 It is undisputed that s. 29(a) draws a distinction on an enumerated ground. All that remains under the *Law* test is to determine whether the impugned provision denies human dignity in purpose or effect. I begin by setting out two broad principles which should animate any application of *Law*: (1) discrimination need not involve stereotypes, and (2) the reasonable claimant is the perspective from which to evaluate a s. 15 claim.

(a) *Discrimination Without Stereotypes*

116 In addressing the question of stereotypes, it is worth quoting in full the unanimous Court in *Law*'s consolidation of various interpretive approaches to s. 15 (at para. 51):

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristic, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. [Emphasis added.]

This passage presents the application of stereotypical characteristics, and the “effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition” as alternative bases for finding discrimination. The presence of a stereotype is therefore not a necessary condition for a finding of discrimination and support for this

test pour avoir l'assurance que la dignité humaine demeure le point de référence fondamental de toute évaluation d'une demande fondée sur l'art. 15.

Il n'est pas contesté que l'al. 29a) établit une distinction fondée sur un motif énuméré. En application du test énoncé dans *Law*, il ne reste qu'à déterminer si la disposition attaquée, dans son objet ou son effet, porte atteinte à la dignité humaine. Je soulignerai d'abord deux grands principes qui devraient guider l'application de l'arrêt *Law* : 1) la discrimination n'implique pas nécessairement des stéréotypes et 2) une demande fondée sur l'art. 15 doit s'apprécier du point de vue d'un demandeur raisonnable.

a) *La discrimination en l'absence de stéréotypes*

Pour trancher la question des stéréotypes, il convient de citer intégralement la décision unanime de la Cour dans *Law*, qui consolide les diverses méthodes d'interprétation de l'art. 15 (au par. 51) :

On pourrait affirmer que le par. 15(1) a pour objet d'empêcher toute atteinte à la dignité et à la liberté humaines essentielles par l'imposition de désavantages, de stéréotypes et de préjugés politiques ou sociaux, et de favoriser l'existence d'une société où tous sont reconnus par la loi comme des êtres humains égaux ou comme des membres égaux de la société canadienne, tous aussi capables, et méritant le même intérêt, le même respect, et la même considération. Une disposition législative qui produit une différence de traitement entre des personnes ou des groupes est contraire à cet objectif fondamental si ceux qui font l'objet de la différence de traitement sont visés par un ou plusieurs des motifs énumérés ou des motifs analogues et si la différence de traitement traduit une application stéréotypée de présumées caractéristiques personnelles ou de groupe ou que, par ailleurs, elle perpétue ou favorise l'opinion que l'individu concerné est moins capable, ou moins digne d'être reconnu ou valorisé en tant qu'être humain ou que membre de la société canadienne. [Je souligne.]

Ce passage présente l'application de caractéristiques stéréotypées et le fait de « perpétue[r] ou favorise[r] l'opinion que l'individu concerné est moins capable, ou moins digne d'être reconnu » comme deux fondements différents pouvant, l'un ou l'autre, étayer une conclusion de discrimination. La présence d'un stéréotype ne constitue donc pas une condition

proposition can be found throughout this Court's equality jurisprudence.

In *Andrews*, McIntyre J. rejected the Court of Appeal's attempt to "define discrimination under s. 15(1) as an unjustifiable or unreasonable distinction" (p. 181), and reasoned that such a definition would undermine the division between s. 15 and s. 1 (p. 182). A distinction that is stereotypical is necessarily unjustifiable or unreasonable. Consequently, the presence of a stereotype is not determinative of a finding of a discrimination.

One may object that McIntyre J.'s assertion only demonstrates that the presence of a stereotype is not sufficient grounds for a finding of discrimination. However, both *Andrews* itself and this Court's subsequent jurisprudence on adverse effect discrimination make clear that the presence of stereotypes is also not a necessary condition for a finding of discrimination.

The distinction drawn in *Andrews* was discriminatory because it was irrelevant and singled out a group that was understood to fall within the ambit of s. 15's concern. McIntyre J. held (at p. 183):

A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would, in my view, infringe s. 15 equality rights.

McIntyre J. reached his conclusion without considering the question of stereotypes, and this Court's jurisprudence demonstrates that stereotypes need not be present for a finding of adverse effect discrimination.

A distinction that results in adverse effect discrimination need not, of course, include an intention to discriminate. In this Court's definitive

nécessaire à la conclusion qu'il y a une discrimination et toute la jurisprudence de la Cour en matière d'égalité appuie cet énoncé.

Dans l'arrêt *Andrews*, le juge McIntyre a rejeté la tentative de la Cour d'appel de « définir la discrimination au sens du par. 15(1) comme une distinction injustifiable ou déraisonnable » (p. 181), et il a affirmé qu'une telle définition affaiblirait le cloisonnement des processus propres à l'art. 15 et à l'article premier (p. 182). Une distinction qui s'appuie sur un stéréotype est nécessairement injustifiable ou déraisonnable. Par conséquent, la présence d'un stéréotype n'est pas déterminante quant à savoir s'il y a une discrimination.

On pourrait objecter que l'affirmation du juge McIntyre démontre uniquement que la présence d'un stéréotype ne constitue pas un motif suffisant pour conclure à la discrimination. Cependant, l'arrêt *Andrews* ainsi que la jurisprudence subséquente de la Cour sur la discrimination par suite d'un effet préjudiciable établissent clairement que l'existence de stéréotypes ne constitue pas non plus une condition nécessaire pour conclure à la discrimination.

La distinction en cause dans l'affaire *Andrews* était discriminatoire parce qu'elle n'était pas pertinente et visait un groupe censé bénéficier de la protection de l'art. 15. Le juge McIntyre a affirmé, à la p. 183 :

À mon avis, une règle qui exclut toute une catégorie de personnes de certains types d'emplois pour le seul motif qu'elles n'ont pas la citoyenneté et sans égard à leurs diplômes et à leurs compétences professionnelles ou sans égard aux autres qualités ou mérites d'individus faisant partie du groupe, porte atteinte aux droits à l'égalité de l'art. 15.

Le juge McIntyre est arrivé à cette conclusion sans examiner la question des stéréotypes, et les arrêts de la Cour démontrent qu'il n'est pas indispensable que des stéréotypes soient en cause pour que l'on puisse conclure à l'existence de discrimination par suite d'un effet préjudiciable.

Il n'est évidemment pas nécessaire d'établir une intention de discriminer lorsqu'une distinction engendre une discrimination par suite d'un effet

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statement on indirect discrimination, McLachlin J. (as she then was) held that adverse effects are “unwitting, accidental” (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, at para. 49). A neutral distinction, or one that “unwittingly” yields negative effects, is by definition not premised on a negative stereotype. Such distinctions yield, without justification, disproportionately negative impacts on groups recognized as being within the scope of an equality provision’s protection. In *BCGSEU*, McLachlin J. held (at para. 33):

The standard itself is discriminatory precisely because it treats some individuals differently from others, on the basis of a prohibited ground: see generally *Toronto Dominion Bank*, *supra*, at paras. 140-41, *per* Roberston J.A. As this Court held in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 66, if a rule has a substantively discriminatory effect on a prohibited ground, it should be characterized as such regardless of whether the claimant is a member of a majority or minority group.

In *BCGSEU*, the facially neutral standard was discriminatory because it had the effect of disproportionately excluding women. As in *Andrews*, *supra*, an analysis of stereotypes was simply not necessary for the disposition of the case. Prejudicial effects giving rise to a s. 15 claim may result when a legislature simply fails to turn its mind to the particular needs and abilities of individuals or groups so as to provide equal benefit under the law to all members of society: *BCGSEU*, at para. 33; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

(b) *Dignity Through the Eyes of the Reasonable Claimant*

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If a stereotype is not a necessary or sufficient condition for a finding of discrimination, there must be other relevant indicators. *Law* listed four contextual factors to which a claimant can refer

préjudiciable. Lorsque la Cour s’est prononcée de façon définitive sur la discrimination indirecte, le juge McLachlin (maintenant Juge en chef) a statué que la discrimination par suite d’un effet préjudiciable est « involontaire, accidentelle » (*Colombie-Britannique (Public Service Employee Relations Commission) c. BCGSEU*, [1999] 3 R.C.S. 3, par. 49). Par définition, une distinction neutre ou une distinction qui produit « involontairement » des effets négatifs n’est pas fondée sur un stéréotype négatif. De telles distinctions entraînent sans justification des répercussions négatives disproportionnées sur des groupes reconnus comme protégés par une disposition garantissant l’égalité. Dans l’arrêt *BCGSEU*, le juge McLachlin a conclu, au par. 33 :

La norme elle-même est discriminatoire justement parce qu’elle traite certains individus différemment des autres pour un motif prohibé : voir, de manière générale, l’arrêt *Banque Toronto Dominion*, précité, aux par. 140 et 141, le juge Robertson. Comme notre Cour l’a statué dans *Law c. Canada (Ministre de l’Emploi et de l’Immigration)*, [1999] 1 R.C.S. 497, au par. 66, si une règle a un effet discriminatoire réel pour un motif prohibé, elle devrait être qualifiée de discriminatoire peu importe que le demandeur appartienne à un groupe majoritaire ou à un groupe minoritaire.

Dans l’arrêt *BCGSEU*, la norme neutre à première vue était discriminatoire parce qu’elle avait pour effet d’exclure les femmes dans une mesure disproportionnée. Comme dans l’affaire *Andrews*, précitée, il était tout simplement inutile de procéder à une analyse des stéréotypes pour trancher le pourvoi. L’omission par le législateur de tenir compte des capacités et des besoins particuliers de personnes ou de groupes pour assurer le même bénéfice de la loi à tous les membres de la société peut entraîner des effets préjudiciables donnant ouverture à une demande fondée sur l’art. 15 : *BCGSEU*, par. 33; *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624.

b) *La dignité aux yeux du demandeur raisonnable*

Si un stéréotype n’est pas une condition nécessaire ou suffisante pour qu’il y ait discrimination, il doit exister d’autres indicateurs pertinents. L’arrêt *Law* énumère quatre facteurs contextuels sur

to demonstrate that a distinction has the effect of demeaning his or her dignity. Before considering these, it would be helpful to revisit *Law's* understanding of human dignity. I reproduce in full a particularly illuminating passage (at para. 53):

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

This passage serves as a reminder that discrimination can arise in circumstances other than in the presence of stereotypes, and removes an ambiguity in the previously cited discussion of equality (see above, at para. 116). On one reading, the phrase “or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition”, taken together with the phrase “stereotypical application of presumed group or personal characteristic” (see above, at para. 116), may be understood to suggest that discrimination only arises where there has been a message sent to the community at large that is demeaning to the claimant. By contrast, the present passage unequivocally reveals that dignity can be infringed even if the “message” is conveyed only to the claimant.

The passage makes clear that if individual interests including physical and psychological

lesquels peut se fonder un demandeur pour démontrer qu’une distinction a pour effet de porter atteinte à sa dignité. Avant de les examiner, il m’apparaît utile de revoir l’interprétation que l’arrêt *Law* attribue à la dignité humaine. Je reproduis intégralement un passage particulièrement éclairant de cet arrêt (au par. 53) :

La dignité humaine signifie qu’une personne ou un groupe ressent du respect et de l’estime de soi. Elle relève de l’intégrité physique et psychologique et de la prise en main personnelle. La dignité humaine est bafouée par le traitement injuste fondé sur des caractéristiques ou la situation personnelles qui n’ont rien à voir avec les besoins, les capacités ou les mérites de la personne. Elle est rehaussée par des lois qui sont sensibles aux besoins, aux capacités et aux mérites de différentes personnes et qui tiennent compte du contexte sous-jacent à leurs différences. La dignité humaine est bafouée lorsque des personnes et des groupes sont marginalisés, mis de côté et dévalorisés, et elle est rehaussée lorsque les lois reconnaissent le rôle à part entière joué par tous dans la société canadienne. Au sens de la garantie d’égalité, la dignité humaine n’a rien à voir avec le statut ou la position d’une personne dans la société en soi, mais elle a plutôt trait à la façon dont il est raisonnable qu’une personne se sente face à une loi donnée. La loi traite-t-elle la personne injustement, si on tient compte de l’ensemble des circonstances concernant les personnes touchées et exclues par la loi?

Ce passage rappelle qu’il peut y avoir discrimination dans d’autres circonstances qu’en présence de stéréotypes et il élimine une ambiguïté dans l’analyse de l’égalité mentionnée précédemment (voir le par. 116). On pourrait croire que les mots « par ailleurs, [la différence de traitement] perpétue ou favorise l’opinion que l’individu concerné est moins capable, ou moins digne d’être reconnu » lus de concert avec les mots « une application stéréotypée de présumées caractéristiques personnelles ou de groupe » (voir le par. 116), laissent entendre qu’il n’y a discrimination que s’il y a transmission à l’ensemble de la population d’un message qui porte atteinte à la partie demanderesse. Au contraire, le passage ci-dessus révèle sans équivoque qu’il peut y avoir atteinte à la dignité même si le « message » en cause est transmis seulement au demandeur.

Ce passage établit clairement que la dignité humaine est violée s’il y a atteinte aux intérêts

integrity are infringed, a harm to dignity results. Such infringements undermine the individual's self-respect and self-worth. They communicate to the individual that he or she is not a full member of Canadian society. Moreover, this passage proposes a reasonableness standard when it discusses what the claimant "legitimately feels when confronted with a particular law". In these descriptions of human dignity, one can hear echoes of my position in the 1995 trilogy. In *Egan, supra*, I held (at para. 56) that the examination of whether a distinction is discriminatory

should be undertaken from a subjective-objective perspective: i.e. from the point of view of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member.

This Court has recently expressed its continuing support for this "reasonable claimant" standard in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37, at para. 55. See also *Corbiere, supra*, at para. 65; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28, at para. 81; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at para. 75.

124 These preliminary remarks about *Law* serve as reminders that stereotypes are not needed to find a distinction to be discriminatory, and that the reasonable claimant is the perspective from, and the standard by which to evaluate a discrimination claim. With these remarks in mind, it is now time to turn to a consideration of the *Law* factors.

(c) *Putting Effects First in Law*

125 The four factors in *Law* are: (1) pre-existing disadvantage, (2) relationship between grounds and the claimant's characteristics or circumstances, (3) ameliorative purposes or effects, and (4) the nature of the interest affected.

individuels, dont l'intégrité physique et psychologique. Ces atteintes minent le respect et l'estime de soi de la personne. De plus, elles transmettent à l'individu l'idée qu'il n'est pas un membre à part entière de la société canadienne. Par ailleurs, ce passage propose une norme du caractère raisonnable lorsqu'il parle de la « façon dont il est raisonnable [que le demandeur] se sente face à une loi donnée ». Ces descriptions de la dignité humaine reprennent la position que j'avais exposée dans la trilogie de 1995. Dans l'arrêt *Egan*, précité, j'ai affirmé, au par. 56, que l'analyse visant à déterminer si une distinction est discriminatoire

devrait être effectuée suivant une norme subjective-objective, c'est-à-dire du point de vue de la personne raisonnable, objective et bien informée des circonstances, dotée d'attributs semblables et se trouvant dans une situation semblable au groupe auquel appartient la personne qui invoque le droit.

La Cour a récemment exprimé son appui constant à l'égard de la norme de la « personne raisonnable » dans les arrêts *Lovelace c. Ontario*, [2000] 1 R.C.S. 950, 2000 CSC 37, par. 55. Voir aussi *Corbiere*, précité, par. 65; *Granovsky c. Canada (Ministre de l'Emploi et de l'Immigration)*, [2000] 1 R.C.S. 703, 2000 CSC 28, par. 81; *Winko c. Colombie-Britannique (Forensic Psychiatric Institute)*, [1999] 2 R.C.S. 625, par. 75.

Ces remarques préliminaires au sujet de l'arrêt *Law* servent à rappeler qu'une distinction peut être discriminatoire même si elle ne repose pas sur des stéréotypes et qu'une allégation de discrimination sera évaluée dans la perspective et suivant le critère du demandeur raisonnable. En gardant ces remarques à l'esprit, je procéderai maintenant à l'examen des facteurs énoncés dans *Law*.

c) *Le rôle de premier plan des effets dans l'arrêt Law*

Quatre facteurs sont énumérés dans l'arrêt *Law* : 1) le désavantage préexistant, 2) le rapport entre les motifs de discrimination et les caractéristiques ou la situation personnelles du demandeur, 3) l'objet ou l'effet d'amélioration et 4) la nature du droit touché.

Although this Court made clear in *Law* that it is not necessary that all four factors be present for there to be a finding that a claimant's human dignity has been infringed, and indeed that the presence or absence of no factor is determinative, subsequent applications of the *Law* test have typically attempted to either refute or establish every factor. See e.g., *Corbiere, supra*, and *Lovelace, supra*.

In addition, although the Court in *Law* held that “the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group” (para. 63), it insisted that “although a distinction drawn on such a basis is an important *indicium* of discrimination, it is not determinative” (para. 65). Therefore, although pre-existing disadvantage is the factor the presence of which will most likely weigh in favour of a finding that human dignity is infringed, its absence does not inexorably lead to the conclusion that dignity has not been infringed.

Courts applying *Law* must keep these reservations in mind. Since not all the factors must be shown to exist, and since pre-existing disadvantage is a compelling, but not necessary condition, it is conceivable that the sole presence of another factor may be sufficient to establish an infringement of dignity. Moreover, given that the effects of an impugned distinction should be the focal point of a discrimination analysis, and that stereotypes are not necessary for a finding of discrimination, the severe impairment of an extremely important interest may be sufficient to ground a claim of discrimination. I foresaw this possibility in *Egan, supra*, when I wrote (at para. 65):

[T]he more fundamental the interest affected or the more serious the consequences of the distinction, the more likely that the impugned distinction will have a

Bien que, dans *Law*, la Cour ait indiqué clairement qu'il n'est pas nécessaire que ces quatre facteurs soient réunis pour qu'il y ait atteinte à la dignité humaine de la partie demanderesse et, en fait, que la présence ou l'absence d'aucun de ces facteurs n'est déterminante, pratiquement chaque fois où le test énoncé dans *Law* a été appliqué par la suite on a tenté de réfuter ou d'établir chacun de ces facteurs. Voir par exemple, *Corbiere*, précité, et *Lovelace*, précité.

En outre, si on a statué dans l'arrêt *Law* que « le facteur qui sera probablement le plus concluant pour démontrer qu'une différence de traitement imposée par une disposition législative est vraiment discriminatoire sera, le cas échéant, la préexistence d'un désavantage, de vulnérabilité, de stéréotypes ou de préjugés subis par la personne ou par le groupe » (par. 63), elle a insisté sur le fait que « même si une distinction fondée sur un tel élément est un indice important de discrimination, elle n'est pas déterminante » (par. 65). Par conséquent, bien que la préexistence d'un désavantage soit le facteur le plus susceptible de jouer en faveur de la conclusion qu'il y a eu atteinte à la dignité humaine, l'absence de ce facteur ne mène pas inexorablement à la conclusion qu'il n'y a pas eu atteinte à la dignité.

Dans leur application de l'arrêt *Law*, les tribunaux doivent garder ces réserves à l'esprit. Puisqu'il n'est pas nécessaire de démontrer l'existence de tous les facteurs et que le désavantage préexistant constitue une condition impérieuse, mais non impérative, on peut concevoir que la seule présence d'un autre facteur pourrait suffire à établir une atteinte à la dignité. Par ailleurs, étant donné que, d'une part, l'examen d'une allégation de discrimination devrait être centré sur les effets de la distinction contestée et, d'autre part, l'existence de stéréotypes n'est pas nécessaire pour appuyer une conclusion de discrimination, il se peut qu'une atteinte grave à un droit extrêmement important suffise pour justifier une allégation de discrimination. J'ai envisagé cette possibilité dans *Egan*, précité, lorsque j'ai écrit, au par. 65 :

[P]lus le droit touché est fondamental ou plus les conséquences de la distinction sont graves, plus il est probable que la distinction en cause aura un effet discriminatoire,

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discriminatory impact even with respect to groups that occupy a position of advantage in society.

It may be that particularly severe negative effects, as assessed under the fourth contextual factor in the third step of the *Law* test, may alone qualify a distinction as discriminatory. It is at least conceivable that negative effects severe enough would signal to a reasonable person possessing any personal characteristics, with membership in any classificatory group, that he or she is being less valued as a member of society. Therefore, even if we accept for the moment that youth are generally an advantaged group, if a distinction were to severely harm the fundamental interests of youth and only youth, that distinction would be found to be discriminatory.

129 These are the facts that are before this Court.

130 As a result of s. 29(a), adults under 30 were uniquely exposed by the legislative scheme to the threat of living beneath what the government itself considered to be a subsistence level of income. Of those eligible to participate in the programs, 88.8 percent were unable to increase their benefits to the level payable to those 30 and over. Ms. Gosselin was exposed to the risk of severe poverty as a sole consequence of being under 30 years of age. Ms. Gosselin's psychological and physical integrity were breached. There is little question that living with the constant threat of poverty is psychologically harmful. There is no dispute that Ms. Gosselin lived at times below the government's own standard of bare subsistence. In 1987, the monthly cost of proper nourishment was \$152. The guaranteed monthly payment to young adults was \$170. I cannot imagine how it can be maintained that Ms. Gosselin's physical integrity was not breached.

131 The sole remaining question is whether a reasonable person in Ms. Gosselin's position, apprised of all the circumstances, would perceive that her

même à l'égard des groupes qui occupent une position privilégiée dans la société.

Il se peut que des effets négatifs particulièrement graves, mesurés dans le cadre de l'évaluation du quatrième facteur contextuel à la troisième étape du test énoncé dans *Law*, permettent à eux seuls de qualifier une distinction de discriminatoire. Il est à tout le moins concevable que des effets négatifs suffisamment graves puissent indiquer à une personne raisonnable possédant une caractéristique personnelle quelconque, appartenant à un groupe quelconque, qu'elle est moins valorisée en tant que membre de la société. Par conséquent, même en convenant pour l'instant que les jeunes constituent généralement un groupe favorisé, une distinction qui porterait gravement atteinte aux droits fondamentaux des jeunes, et seulement des jeunes, serait jugée discriminatoire.

J'exposerai maintenant les faits portés à la connaissance de la Cour.

En conséquence de l'application de l'al. 29a), le régime législatif a exposé uniquement les adultes de moins de 30 ans à la menace de vivre en-deçà de ce que le gouvernement considérerait lui-même comme le niveau de subsistance. Les personnes admissibles à participer aux programmes n'ont pas pu, dans une proportion de 88,8 p. 100, hausser le montant de leurs prestations au niveau de celles des 30 ans et plus. Madame Gosselin était exposée au risque d'une grande pauvreté du seul fait qu'elle avait moins de 30 ans. Il y a eu atteinte à l'intégrité psychologique et physique de M<sup>me</sup> Gosselin. Il ne fait aucun doute qu'il est psychologiquement préjudiciable de vivre avec la menace constante de la pauvreté. Il n'est pas contesté que M<sup>me</sup> Gosselin a parfois vécu en-deçà du niveau de subsistance minimal fixé par le gouvernement même. En 1987, il en coûtait 152 \$ par mois pour se nourrir adéquatement. Le paiement mensuel garanti aux jeunes adultes s'élevait à 170 \$. Je ne peux imaginer comment il est possible de soutenir que l'intégrité physique de M<sup>me</sup> Gosselin n'a pas été atteinte.

La seule question qui reste à trancher est de savoir si une personne raisonnable placée dans la situation de M<sup>me</sup> Gosselin et informée de toutes les

dignity had been threatened. The reasonable claimant would have been informed of the legislature's intention to help young people enter the marketplace. She would have been informed that those 30 and over have more difficulty changing careers, and that those under 30 run serious social and personal risks if they do not enter the job market in a timely manner. She would have been told that the long-term goal of the legislative scheme was to affirm her dignity.

The reasonable claimant would also likely have been a member of the 88.8 percent who were eligible for the programs and whose income did not rise to the levels available to all adults 30 years of age and over. Even if she wished to participate in training programs, she would have found that there were intervals between the completion of one program and the starting of another, during which the amount of her social assistance benefit would have plunged. The reasonable claimant would have made daily life choices in the face of an imminent and severe threat of poverty. The reasonable claimant would likely have suffered malnourishment. She might have turned to prostitution and crime to make ends meet. The reasonable claimant would have perceived that as a result of her deep poverty, she had been excluded from full participation in Canadian society. She would have perceived that her right to dignity was infringed as a sole consequence of being under 30 years of age, a factor over which, at any given moment, she had no control. While individuals may be able to strive to overcome the detriment imposed by merit-based distinctions, Ms. Gosselin was powerless to alter the single personal characteristic that the government's scheme made determinative for her level of benefits.

The reasonable claimant would have suffered, as Ms. Gosselin manifestly did suffer, from discrimination as a result of the impugned legislative distinction. I see no other conclusion but that Ms. Gosselin would have reasonably felt that she was being less valued as a member of society than people 30 and

circonstances estimerait que sa dignité a été menacée. Le demandeur raisonnable aurait su que le législateur avait l'intention d'aider les jeunes à accéder au marché du travail. Il aurait également su que les 30 ans et plus ont davantage de difficulté à changer de carrière et que les moins de 30 ans courent de graves risques sociaux et personnels s'ils n'entrent pas sur le marché du travail en temps opportun. Enfin, il aurait été informé du fait que l'objectif à long terme du régime législatif était de renforcer sa dignité.

Le demandeur raisonnable aurait aussi probablement fait partie des 88,8 p. 100 de personnes qui étaient admissibles aux programmes et dont le revenu n'atteignait pas le niveau des prestations accordées à tous les adultes de 30 et plus. Même s'il avait voulu participer aux programmes de formation, il aurait constaté qu'il s'écoulait un délai entre la fin d'un programme et le début d'un autre et le montant de ses prestations d'aide sociale aurait chuté pendant ce délai. Le demandeur raisonnable aurait effectué des choix quotidiens pour contrer une menace imminente et grave de pauvreté. Il aurait probablement souffert de malnutrition. Il aurait pu se tourner vers la prostitution et le crime pour joindre les deux bouts. Le demandeur raisonnable aurait eu le sentiment qu'en raison de sa grande pauvreté, il avait été exclu d'une pleine participation à la société canadienne. Il aurait estimé que son droit à la dignité était violé pour le seul motif qu'il avait moins de 30 ans, alors qu'il n'était pas en mesure de faire quoi que ce soit, à quelque moment que ce soit, pour modifier ce facteur. Bien qu'une personne puisse faire des efforts pour surmonter le désavantage imposé par des distinctions fondées sur le mérite, M<sup>me</sup> Gosselin n'avait pas le pouvoir de changer l'unique caractéristique personnelle qui, selon le régime législatif, était déterminante quant au niveau de ses prestations.

Le demandeur raisonnable aurait été victime de discrimination, comme ce fut manifestement le cas de M<sup>me</sup> Gosselin, en raison de la distinction législative alléguée. Je n'ai d'autre choix que de conclure que M<sup>me</sup> Gosselin devait avoir le sentiment raisonnable, d'une part, qu'elle était moins valorisée

over and that she was being treated as less deserving of respect.

(d) *Law's Other Factors*

134 Since I have concluded that finding an individual or group to have suffered a severe harm to a fundamental interest, as a result of a legislative distinction drawn on either an enumerated or analogous ground, is sufficient for a court to conclude that the distinction was discriminatory, it is unnecessary to discuss the remaining *Law* factors. I will, however, do so briefly.

135 In respect of the second factor, there should be a strong presumption that a legislative scheme which causes individuals to suffer severe threats to their physical and psychological integrity as a result of their possessing a characteristic which cannot be changed does not adequately take into account the needs, capacity or circumstances of the individual or group in question. In the present circumstances, the impugned legislation sought to alleviate young adults' experience of poverty by providing them with training. However, the reason that young adults experienced poverty was not a lack of training, but rather a lack of available employment. In any case, a legislative scheme that exposes the members of an enumerated or analogous category, and only those members, to severe poverty *prima facie* does not take into consideration the needs of that category's members.

136 In respect of the third factor, I would like to address an apparent confusion. *Law* states at para. 72:

An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation.

This passage makes clear that the ameliorative purpose must be for the benefit of a group less advantaged than the one targeted by the impugned

comme membre de la société que les personnes de 30 ans et plus et, d'autre part, qu'elle était traitée comme si elle était moins digne de respect.

d) *Les autres facteurs énoncés dans l'arrêt Law*

Puisque j'ai conclu qu'il suffit qu'un tribunal soit d'avis qu'une personne ou un groupe a été victime d'une grave atteinte à un droit fondamental, en raison d'une distinction législative fondée sur un motif énuméré ou analogue, pour lui permettre de statuer que la distinction est discriminatoire, je n'ai pas à examiner les autres facteurs énoncés dans l'arrêt *Law*. J'en ferai cependant un survol.

En ce qui concerne le deuxième facteur, il devrait exister une forte présomption voulant qu'un régime législatif qui menace sérieusement l'intégrité physique et psychologique de certaines personnes, simplement parce qu'elles possèdent un attribut qui ne peut être changé, ne tienne pas adéquatement compte des besoins, des capacités et de la situation de la personne ou du groupe en cause. En l'espèce, la disposition contestée cherchait à réduire la pauvreté chez les jeunes adultes en leur offrant des programmes de formation. Cependant, la raison pour laquelle les jeunes adultes connaissaient la pauvreté n'était pas attribuable à un manque de formation, mais plutôt à un manque d'emplois. Quoi qu'il en soit, un régime législatif qui expose les membres d'une catégorie énumérée ou analogue, et seulement ceux-ci, à une grande pauvreté ne tient pas compte à première vue des besoins des membres de cette catégorie.

En ce qui concerne le troisième facteur, il semble exister une certaine confusion, que j'aimerais dissiper. L'arrêt *Law* affirme, au par. 72 :

Un objet ou un effet apportant une amélioration qui est compatible avec l'objet du par. 15(1) de la *Charte* ne violera vraisemblablement pas la dignité humaine de personnes plus favorisées si l'exclusion de ces personnes concorde largement avec les besoins plus grands ou la situation différente du groupe défavorisé visé par les dispositions législatives.

Ce passage établit clairement qu'un objectif d'amélioration doit être à l'avantage d'un groupe moins favorisé que celui visé par la distinction alléguée.

distinction. The relevant ameliorative purpose under the third factor is not defined with reference to the group that suffers the disadvantage imposed by the impugned distinction.

I stipulated above that youth do not suffer pre-existing disadvantage for the purpose of showing that in circumstances such as the present, a severe negative effect under the fourth factor would be sufficient to establish an infringement of dignity. I did not concede the point, nor do I believe that it should be conceded. The motivation behind the present legislative scheme was precisely to help a young adult population that was in disadvantaged circumstances. If 23 percent of young adults were unemployed by comparison with 14 percent of the general active population, and if an unprecedented number of young people were entering the job market at a time when federal social assistance programs were faltering, I fail to see how young adults did not suffer from a pre-existing disadvantage.

It may be argued that in the long view of history, young people have not suffered disadvantage, and therefore, for the purposes of an equality analysis, a court need not consider young people to suffer from pre-existing disadvantage. This is, however, inconsistent with a basic premise of discrimination law. In *Brooks, supra*, this Court held that a disadvantage need not be shared by all members of a group for there to be a finding of discrimination, if it can be shown that only members of that group suffered the disadvantage. This Court held that a distinction drawn on the basis of pregnancy could be found to discriminate against women, since although not all women would become pregnant, only women could. The same conclusion was reached in *Egan, supra*, where it did not matter whether the particular claimants would have made net gains by being included in the governmental pension regime at issue. What mattered was that where there was a disadvantage, it fell solely on the basis of sexual orientation.

L'objectif d'amélioration pertinent dont il est question dans le troisième facteur n'est pas défini par rapport au groupe qui est victime du désavantage imposé par la distinction contestée.

J'ai dit plus haut que les jeunes ne souffrent pas d'un désavantage préexistant dans le but de démontrer que l'existence d'un effet négatif grave selon le quatrième facteur suffirait, dans des circonstances comme celles qui nous occupent, pour établir une atteinte à la dignité. Je n'ai pas concédé ce point et je ne crois pas qu'il devrait l'être. La raison qui a poussé à l'origine le législateur à édicter le régime législatif actuel était précisément sa volonté d'aider une population de jeunes adultes se trouvant dans une situation défavorisée. Si le taux de chômage chez les jeunes adultes était de 23 p. 100 contre 14 p. 100 pour l'ensemble de la population active et si un nombre record de jeunes entrait sur le marché du travail à une époque où les programmes fédéraux d'aide sociale étaient chancelants, je ne vois pas comment on peut conclure que les jeunes adultes n'étaient pas victimes d'un désavantage préexistant.

Si on remonte assez loin dans le cours de l'histoire, on pourrait faire valoir que les jeunes ne sont pas victimes d'un désavantage et qu'un tribunal ne doit donc pas, dans le cadre d'un examen de l'égalité, les considérer victimes d'un désavantage préexistant. Cette prétention est toutefois incompatible avec un principe élémentaire du droit en matière de discrimination. Dans l'arrêt *Brooks*, précité, la Cour a statué qu'il n'est pas nécessaire que le désavantage frappe tous les membres d'un groupe pour qu'il y ait discrimination, à condition qu'il puisse être démontré que seuls des membres de ce groupe sont victimes du désavantage. La Cour a statué que l'on pouvait conclure qu'une distinction fondée sur la grossesse était discriminatoire envers les femmes parce que, bien que toutes les femmes ne soient pas ou ne deviennent pas enceintes, seules les femmes peuvent le devenir. La Cour est arrivée à la même conclusion dans *Egan*, précité, où la question de savoir si les demandeurs en cause auraient ou non réalisé un gain net du fait de leur inclusion dans le régime gouvernemental de pensions n'avait pas d'importance. Ce qui importait, c'était que le désavantage subi, le cas échéant, reposait uniquement sur l'orientation sexuelle.

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139 A unique constellation of circumstances caused a crisis of unemployment, at the historical moment in question, which threatened human dignity in ways that were particularly grievous for young adults. Only youth would suffer from the long-term harms to self-esteem that attend not participating in the workforce at a young age. The reasoning in *Brooks*, *supra*, applied to the present circumstances should lead to the conclusion that while not all members of the class “young adults throughout time” suffered the particular threats to self-esteem that attend youth unemployment, only members of that class, or only “young adults at the relevant time”, did. Application of the reasoning in *Brooks* should lead to the conclusion that young adults suffered from a pre-existing disadvantage.

140 The breach of s. 15 was not justified under s. 1 and I concur entirely with my colleague Bastarache J.’s s. 1 analysis on this point.

#### B. Section 7

141 I concur in my colleague Arbour J.’s thorough analysis of s. 7 of the *Canadian Charter* and for the reasons she expresses, I agree that s. 29(a) of the Regulation does violate s. 7. I would, however, like to offer a clarification. It is true that the legislature is in the best position to make the allocative choices necessary to implement a policy of social assistance. For a wide variety of reasons, courts are not in the best position to make such choices, and this is why this Court has historically shown judicial deference to governments in these matters. See, e.g., *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839; and *Eldridge*, *supra*.

142 However, although governments should in general make policy implementation choices, other actors may aid in determining whether social programs are necessary. In the present case, the government

Un ensemble unique de circonstances a provoqué une crise de l’emploi, à l’époque précise ici en cause, et cette crise menaçait de façon particulièrement grave la dignité humaine des jeunes adultes. Seuls les jeunes subiraient les effets négatifs à long terme sur leur estime de soi par suite de leur non-intégration à la population active à un jeune âge. Le raisonnement adopté dans *Brooks*, précité, appliqué aux circonstances de l’espèce, devrait mener à la conclusion que même si tous les membres de la catégorie des « jeunes adultes de toutes les époques » ne voyaient pas leur estime de soi menacée par le chômage des jeunes, seuls les membres de cette catégorie de personnes, ou de la catégorie des « jeunes adultes à l’époque en cause » étaient menacés. L’application du raisonnement suivi dans l’arrêt *Brooks* devrait mener à la conclusion que les jeunes adultes étaient touchés par un désavantage préexistant.

La violation de l’art. 15 n’était pas justifiée au regard de l’article premier et je souscris entièrement à l’analyse de mon collègue le juge Bastarache sur ce point.

#### B. L’article 7

Je souscris à l’analyse approfondie que ma collègue le juge Arbour fait de l’art. 7 de la *Charte canadienne* et, pour les motifs qu’elle exprime, je suis d’avis que l’al. 29(a) du Règlement contrevient à l’art. 7. J’aimerais toutefois apporter une précision. Certes, c’est le législateur qui est le mieux placé pour faire les choix d’affectation des ressources nécessaires à la mise en œuvre d’une politique d’aide sociale. Pour une vaste gamme de raisons, les tribunaux ne sont pas les mieux placés pour faire ces choix, et c’est pourquoi la Cour a historiquement fait preuve de retenue judiciaire envers les gouvernements en cette matière. Voir par exemple les arrêts *Mahe c. Alberta*, [1990] 1 R.C.S. 342; *Renvoi relatif à la Loi sur les écoles publiques (Man.)*, art. 79(3), (4) et (7), [1993] 1 R.C.S. 839; et *Eldridge*, précité.

Toutefois, bien qu’il revienne en général aux gouvernements de faire les choix qui concernent la mise en œuvre des politiques, d’autres acteurs peuvent aider à déterminer si des programmes sociaux

stated what it considered to be a minimal level of assistance but a claimant can also establish with adequate evidence what a minimal level of assistance would be. An analogy with the jurisprudence on minority language rights instruction may be helpful. In such cases, plaintiffs are able to establish whether “numbers warrant” the provision of minority language instruction even though legislatures and executives are generally given deference with respect to the operational choices that result in facilities being provided. See e.g., *Mahe, supra*. The same logic should apply in cases such as the present one.

As regards s. 1, I do not share my colleague Arbour J.’s contextual analysis in all its refinements (paras. 349-58), and prefer the approach to legislative context offered by Gonthier J. in *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68. The latter wrote (at para. 98):

The role of this Court, when faced with competing social or political philosophies and justifications dependent on them, is therefore to define the parameters within which the acceptable reconciliation of competing values lies. [Emphasis in original.]

Nonetheless, substantially for the reasons Arbour J. expressed as well as those of Robert J.A.’s dissent in the Quebec Court of Appeal, I agree that the present violation of s. 7 was not justified.

### C. Section 7 and Section 15

In another context, s. 15 concerns informed my analysis of s. 7. This was appropriate because the provisions of the *Canadian Charter* are to be understood as mutually reinforcing (see, e.g., *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 326; *R. v. Tran*, [1994] 2 S.C.R. 951, at p. 976). In addition, the equality provision is of foundational importance in the *Canadian Charter*. As McIntyre J. wrote in *Andrews, supra*, at p. 185:

sont nécessaires. En l’espèce, le gouvernement a établi ce qu’il considérait être le niveau minimal d’aide, mais un demandeur peut aussi établir, au moyen d’une preuve suffisante, ce qui serait un niveau minimal d’aide. Il pourrait s’avérer utile d’établir une analogie avec la jurisprudence sur le droit à l’instruction dans la langue de la minorité. Dans ce type de cause, un demandeur peut établir si « le nombre justifie » la prestation de l’instruction dans la langue de la minorité, même si l’on fait généralement preuve de retenue envers la législature et l’exécutif pour ce qui est des choix opérationnels de fournir des établissements. Voir par exemple l’arrêt *Mahe*, précité. La même logique devrait s’appliquer dans les affaires semblables au présent pourvoi.

En ce qui concerne l’article premier, je ne souscris pas à l’analyse contextuelle exposée par ma collègue le juge Arbour dans toutes ses subtilités (par. 349-358) et je préfère aborder le contexte législatif selon la méthode exposée par le juge Gonthier dans *Sauvé c. Canada (Directeur général des élections)*, [2002] 3 R.C.S. 519, 2002 CSC 68, par. 98 :

Face à des philosophies sociales ou politiques opposées et à des justifications fondées sur elles, la Cour est donc appelée à définir les paramètres d’une conciliation acceptable des différentes valeurs en cause. [Souligné dans l’original.]

Néanmoins je conviens, essentiellement pour les motifs exposés par le juge Arbour et par le juge Robert de la Cour d’appel du Québec, dans sa dissidence, que l’atteinte portée en l’espèce au droit garanti par l’art. 7 n’était pas justifiée.

### C. Les articles 7 et 15

Dans un autre contexte, les préoccupations fondées sur l’art. 15 ont éclairé mon analyse de l’art. 7. Il s’agissait d’une démarche appropriée, car il faut considérer les dispositions de la *Charte canadienne* comme se renforçant mutuellement (voir par exemple, *R. c. Lyons*, [1987] 2 R.C.S. 309, p. 326; *R. c. Tran*, [1994] 2 R.C.S. 951, p. 976). En outre, la disposition garantissant l’égalité revêt une importance fondamentale dans la *Charte canadienne*. Pour reprendre les propos du juge McIntyre dans l’arrêt *Andrews*, précité, p. 185 :

The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*.

Consequently, in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, I brought the lens of the equality guarantee to the appellant's s. 7 claim to state-funded counsel in hearings where the Minister of Health and Community Services sought an extension of a custody order. I found that the claim could only be adequately addressed in light of the appellant's status as a single mother. I wrote (at para. 113):

This case raises issues of gender equality because women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings. . . .

145 Conversely, in the present and similar fact situations, judicial interpretations of s. 15 can be informed by s. 7. To explain why, I revisit my reasons in *Egan*. I wrote (at para. 63):

[T]he nature, quantum and context of an economic prejudice or denial of such a benefit are important factors in determining whether the distinction from which the differing economic consequences flow is one which is discriminatory. If all other things are equal, the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*.

If, as in the present case, a harm is visited uniquely upon members of an analogous or enumerated group and is severe enough to give rise to a s. 7 claim, then there will be *prima facie* grounds for a s. 15 claim. This conclusion must follow from the above s. 15 analysis, which places individuals' experience of discrimination at the centre of judicial attention.

La garantie offerte par le par. 15(1) est la plus générale de toutes. Elle s'applique et sert d'appui à tous les autres droits garantis par la *Charte*.

Par conséquent, dans l'arrêt *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, j'ai examiné sous l'éclairage de la garantie d'égalité la revendication fondée sur l'art. 7 que l'appelante avait déposée pour obtenir les services d'un avocat rémunéré par l'État au cours des audiences relatives à une demande de prorogation d'une ordonnance de garde présentée par le ministre de la Santé et des Services communautaires. J'ai conclu qu'il fallait tenir compte de la situation de mère célibataire de l'appelante pour trancher convenablement sa revendication. J'ai alors affirmé ce qui suit, au par. 113 :

La présente affaire soulève des questions relatives à l'égalité des sexes, car les femmes, notamment les mères célibataires, sont touchées, de façon disproportionnée et particulière, par les procédures relatives à la protection des enfants . . .

À l'inverse, en l'espèce et dans des affaires similaires, l'art. 7 peut éclairer l'interprétation judiciaire de l'art. 15. Pour expliquer mon raisonnement, je reprends ce que j'ai écrit dans l'arrêt *Egan*, par. 63 :

[L]a nature, l'importance et le contexte du préjudice économique ou de la négation de ce bénéfice sont des facteurs importants pour déterminer si la distinction qui entraîne ces conséquences économiques différentes est discriminatoire. Toutes autres choses étant par ailleurs égales, plus les conséquences économiques ressenties par le groupe touché sont graves et localisées, plus il est probable que la distinction qui en est la cause soit discriminatoire au sens de l'art. 15 de la *Charte*.

Si, comme en l'espèce, un préjudice ne touche que les membres d'un groupe analogue ou énuméré et est suffisamment grave pour donner ouverture à une demande fondée sur l'art. 7, il existera à première vue des motifs justifiant une revendication fondée sur l'art. 15. Cette conclusion découle nécessairement de l'analyse qui précède relativement à l'art. 15, laquelle place la discrimination ressentie par une personne au cœur de l'examen effectué par les tribunaux.

#### D. *Section 45 of the Quebec Charter*

I subscribe entirely to the exhaustive analysis of s. 45 of the *Quebec Charter* undertaken by Robert J.A. in his dissenting opinion in the Quebec Court of Appeal. For the reasons he expresses, I conclude as he does as to a violation of s. 45 of the *Quebec Charter* in the present case.

As Robert J.A. states (at p. 1092): [TRANSLATION] “Section 45 of the Quebec Charter thus bears a very close resemblance to article 11 of the *International Covenant on Economic, Social and Cultural Rights*”, which, as the Court of Appeal notes, para. 10 of the *Report on the Fifth Session* of the United Nations Committee on Economic, Social and Cultural Rights further specifies as containing: “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels [of subsistence needs and the provision of basic services]” (*ibid.*, at p. 1093).

I am also in agreement that the *Quebec Charter* [TRANSLATION] “was intended to establish a domestic law regime that reflects Canada’s international commitments” (p. 1099) and that (at p. 1101)

[TRANSLATION] the quasi-constitutional right guaranteed by section 45 to social and economic measures susceptible of ensuring an acceptable standard of living includes, at the very least, the right of every person in need to receive what Canadian society objectively considers sufficient means to provide the basic necessities of life.

#### III. Conclusion

In the result, I agree with the result reached by each of my colleagues Bastarache, Arbour and LeBel JJ. and would allow the appeal with costs throughout.

The following are the reasons delivered by

BASTARACHE J. (dissenting) —

#### I. Introduction

This case involves the constitutional review of a provision that existed in the regulations under

#### D. *L'article 45 de la Charte québécoise*

Je souscris entièrement à l'analyse exhaustive que le juge Robert de la Cour d'appel du Québec fait de l'art. 45 de la *Charte québécoise* dans son opinion dissidente. Pour les motifs qu'il exprime, je conclus, comme lui, à la violation en l'espèce des dispositions de l'art. 45 de la *Charte québécoise*.

Comme l'affirme le juge Robert de la Cour d'appel, à la p. 1092 : « L'article 45 de la charte québécoise montre ainsi une parenté irréfutable avec l'article 11 du *Pacte international relatif aux droits économiques, sociaux et culturels* », qui prévoit également, selon le par. 10 du *Rapport sur la cinquième session* du Comité des droits économiques, sociaux et culturels des Nations Unies, comme la Cour d'appel l'a mentionné, « l'obligation fondamentale minimum d'assurer, au moins, la satisfaction de l'essentiel [des besoins de subsistance et la prestation de services de base] » (*ibid.*, p. 1093).

Je suis également d'avis que la *Charte québécoise* « a voulu établir un régime de droit interne qui reflète les engagements internationaux du Canada » (p. 1099) et que (à la p. 1101)

le droit quasi constitutionnel garanti par l'article 45 à des mesures sociales et économiques susceptibles d'assurer un niveau de vie décent comprend à tout le moins le droit pour toute personne dans le besoin d'obtenir ce que la société canadienne considère, de façon objective, comme des moyens suffisants pour subvenir aux nécessités essentielles de la vie.

#### III. Conclusion

En conséquence, je suis d'accord quant au résultat avec chacun de mes collègues les juges Bastarache, Arbour et LeBel et je suis d'avis d'accueillir le pourvoi avec dépens dans toutes les cours.

Version française des motifs rendus par

LE JUGE BASTARACHE (dissident) —

#### I. Introduction

Le présent pourvoi porte sur le contrôle de la constitutionnalité d'une disposition d'un règlement

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Quebec's *Social Aid Act*, R.S.Q., c. A-16, between 1984 and 1989. That provision fixed the maximum benefits to be received by single adults under the age of 30 at a level approximately one third that of those 30 years of age and over.

151 The appellant has offered this Court a number of constitutional issues to consider. She claims, on behalf of herself and all single recipients of welfare in the province of Quebec who were under the age of 30 at some point between 1985 and 1989, that the benefits provision violates the right not to be deprived of security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms* ("Canadian Charter" or "Charter"), the right to equal treatment before and under the law, protected by s. 15 of the *Canadian Charter*, as well as the right to be provided with a decent level of support, guaranteed by s. 45 of the *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*").

152 In making her claim, the appellant is seeking a declaration from this Court that the provision was constitutionally invalid pursuant to s. 52 of the *Constitution Act, 1982* and s. 45 of the *Quebec Charter*, as well as damages in the amount of \$388,563,316 for benefits denied to the members of the appellant's group, pursuant to s. 24(1) of the *Canadian Charter* and the joint operation of ss. 45 and 49 of the *Quebec Charter*, from March 1985 to July 31, 1989.

153 In the end, I conclude that s. 29(a) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, violated the appellant's s. 15 right to equal benefit of the law, and that such discrimination was not justified under s. 1.

## II. Legislative History

154 At issue in this case is the differential treatment of social assistance recipients under 30 years of age. This differential treatment is prescribed by s. 29(a) of the *Regulation respecting social aid*. To properly determine whether s. 29(a) is discriminatory, it is

d'application de la *Loi sur l'aide sociale*, L.R.Q., ch. A-16. Suivant cette disposition, qui a été en vigueur de 1984 à 1989, les prestations maximales accordées aux bénéficiaires de moins de 30 ans vivant seuls correspondaient environ au tiers de celles accordées aux personnes de 30 ans et plus.

L'appelante a demandé à notre Cour d'examiner un certain nombre de questions constitutionnelles. En son nom et au nom de toutes les personnes seules qui recevaient de l'aide sociale au Québec et qui avaient moins de 30 ans au cours de la période de 1985 à 1989, elle soutient que la disposition touchant les prestations porte atteinte au droit des bénéficiaires à la sécurité de leur personne que garantit l'art. 7 de la *Charte canadienne des droits et libertés* (la « *Charte canadienne* » ou la « *Charte* »), au droit à l'égalité devant la loi protégé par l'art. 15 de la *Charte canadienne*, ainsi qu'au droit à des mesures d'assistance susceptibles d'assurer un niveau de vie décent, garanti par l'art. 45 de la *Charte des droits et libertés de la personne* du Québec, L.R.Q., ch. C-12 (la « *Charte québécoise* »).

Dans son action, l'appelante demande à notre Cour de déclarer la disposition contestée invalide par application de l'art. 52 de la *Loi constitutionnelle de 1982* et de l'art. 45 de la *Charte québécoise*, et de lui accorder, en vertu du par. 24(1) de la *Charte canadienne* et par l'effet conjugué des art. 45 et 49 de la *Charte québécoise*, des dommages-intérêts de 388 563 316 \$ au titre des prestations qui, de mars 1985 au 31 juillet 1989, ont été refusées aux membres du groupe dont elle fait partie.

En définitive, j'estime que l'al. 29a) du *Règlement sur l'aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, a porté atteinte au droit de l'appelante à l'égalité de bénéfice de la loi que lui garantit l'art. 15, et que la discrimination résultant de cette atteinte n'était pas justifiée au regard de l'article premier.

## II. L'historique législatif

Le point litigieux en l'espèce est le traitement différent réservé aux bénéficiaires d'aide sociale âgés de moins de 30 ans. Ce traitement différent est prescrit par l'al. 29a) du *Règlement sur l'aide sociale*. Pour être en mesure de déterminer si cet alinéa a un

necessary to look at the section in its historical context as well as the context of its governing legislation and regulations.

The *Social Aid Act* of 1984 grew out of reforms to Quebec social policy that dated back to the late 1960s. The first *Social Aid Act* in Quebec was brought into force in 1970. Prior to that time, Quebec social policy focussed, through a variety of legislative Acts, on the needs of those citizens who were unable to work. The guiding principle for this combination of Acts was that the more incapable one was of working, the greater one's benefits would be. Even at that time, however, some benefits were provided to able-bodied persons. Under this regime, distinctions were made and benefits were based on whether or not one lived with one's parents, and whether one was under 30 years of age. For instance, under the pre-1970 law, a person under 30 who lived with his or her parents would receive \$30 a month, while a person who lived on his or her own would receive \$55. For those 30 and over, the benefits also varied based on whether they lived in a rural or urban setting. A person 30 and over living alone in the city would be eligible for a \$65 benefit, while one living with a parent would receive only \$55.

The reforms of 1969-1970 sought to change the foundational principles of Quebec social policy, moving from a regime based on degree of incapacity to one based on need. Despite this emphasis on need, the distinction between those under 30 and those 30 and over was maintained and incorporated into the new legislation. Whereas the benefits of those 30 and over varied depending on whether or not they lived with their parents (from \$75 to \$106), those under 30 received only the \$75 amount. In other words, those under 30 were deemed to be living with their parents, regardless of their actual circumstances.

caractère discriminatoire, il est nécessaire de l'examiner dans son contexte historique ainsi que dans le contexte de la législation et de la réglementation pertinentes.

La *Loi sur l'aide sociale* de 1984 est le fruit de réformes apportées en matière de politique sociale au Québec à la fin des années 60. Au Québec, la première *Loi sur l'aide sociale* est entrée en vigueur en 1970. Jusque-là, la politique sociale du Québec s'était attachée, par diverses mesures législatives, à répondre aux besoins des citoyens inaptes au travail. Le principe directeur de ce train de mesures était le suivant : plus la personne était inapte au travail, plus ses prestations étaient élevées. Cependant, même durant cette période, des personnes physiquement aptes au travail recevaient certaines prestations. Ce régime établissait des distinctions et le montant des prestations variait selon que le bénéficiaire vivait ou non chez ses parents ou selon qu'il était ou non âgé de moins de 30 ans. Par exemple, en vertu du régime législatif antérieur à 1970, les personnes de moins de 30 ans vivant chez leurs parents recevaient 30 \$ par mois, alors que celles vivant seules touchaient 55 \$. Pour les bénéficiaires de 30 ans et plus, le montant des prestations variait également selon que la personne vivait en milieu rural ou en milieu urbain. Les personnes de 30 ans et plus vivant seules en milieu urbain avaient droit à des prestations de 65 \$, alors que celles habitant avec leurs parents ne recevaient que 55 \$.

Les réformes de 1969 et 1970 visaient à modifier les principes fondamentaux de la politique sociale du Québec, et substituaient à un régime fondé sur le degré d'inaptitude un régime axé sur les besoins. Même si on mettait désormais l'accent sur les besoins, la distinction entre les personnes de moins de 30 ans et celles de 30 ans et plus était maintenue et incorporée à la nouvelle législation. Alors que les prestations touchées par les personnes de 30 ans et plus variaient (de 75 \$ à 106 \$) selon qu'elles vivaient ou non chez leurs parents, les personnes de moins de 30 ans ne recevaient que 75 \$. En d'autres mots, les personnes de moins de 30 ans étaient présumées vivre chez leurs parents, indépendamment de leur situation réelle.

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157 Over the course of the next decade, the benefits for those 30 or over grew at a much faster rate than those for single persons under 30. Apart from several slight adjustments, the under-30 benefits remained stable, while the reforms of 1974 increased the benefits for those 30 and over by 45 percent. Other amendments made in 1975 indexed benefits for those 30 and over to the rate of inflation. By the time the under-30 benefits were indexed, in 1979, they had fallen to 36 percent of those of a similarly situated person 30 and over. In 1969, they had represented 84 percent of the full amount.

158 In the early 1980s, the Quebec government, responding to a deep and long-lasting crisis in the North American economy, once again considered reforming its *Social Aid Act*. Between 1981 and 1983, unemployment in Quebec had skyrocketed from traditional levels of around 8 percent to approximately 14 percent. Among young people, the levels of unemployment were even more pronounced. Youth unemployment in 1982 was 23 percent. The difference between youth unemployment and the rate for the general population had never been higher. During this period, the government was also concerned by a change in the composition of social assistance recipients. Between 1975 and 1983, the number of people under 30 on social assistance rose six-fold, to 85 000. This resulted in the proportion of social assistance recipients under 30 rising from 3 to 12 percent. The government was also witnessing an increase in the percentage of able-bodied recipients; it went from 41 percent in 1974 to 75 percent in 1983. At the same time, the government was seeing an increase in the number of recipients with a relatively high level of education.

159 In response to this grim picture, the government chose to focus on providing young people with the skills and education required for them to get jobs. At the centre of this new approach were three new programs designed to provide people on social assistance with work experience and education. These

Au cours de la décennie qui a suivi, les prestations accordées aux personnes de 30 ans et plus ont progressé à un rythme beaucoup plus rapide que celles accordées aux personnes de moins de 30 ans. Exclusion faite de plusieurs ajustements mineurs, les prestations accordées à ces dernières sont demeurées stables, alors que les réformes de 1974 ont majoré de 45 p. 100 les prestations des 30 ans et plus. D'autres modifications apportées en 1975 ont eu pour effet d'indexer sur le taux d'inflation les prestations des 30 ans et plus. Lorsqu'elles ont été indexées en 1979, le montant des prestations accordées aux moins de 30 ans ne représentait que 36 p. 100 de celles touchées par les 30 ans et plus dans la même situation. En 1969, elles s'élevaient à 84 p. 100 du plein montant.

Au début des années 80, en réponse à une longue et profonde crise économique en Amérique du Nord, le gouvernement du Québec a de nouveau envisagé de réformer sa *Loi sur l'aide sociale*. De 1981 à 1983, le taux de chômage au Québec, qui oscillait normalement aux alentours de 8 p. 100, avait grimpé en flèche, s'établissant approximativement à 14 p. 100. Chez les jeunes, il était encore plus élevé, atteignant 23 p. 100 en 1982. L'écart entre le taux de chômage chez les jeunes et celui de l'ensemble de la population n'avait jamais été aussi grand. Durant cette période, le gouvernement était également préoccupé par le changement dans la composition du groupe des bénéficiaires d'aide sociale. De 1975 à 1983, le nombre de bénéficiaires d'aide sociale de moins de 30 ans avait sextuplé, atteignant 85 000, faisant passer leur pourcentage de 3 à 12 p. 100. De plus, le gouvernement avait observé un accroissement du nombre des prestataires physiquement aptes au travail, dont le pourcentage avait grimpé de 41 p. 100 en 1974 à 75 p. 100 en 1983. À la même époque, le gouvernement avait constaté une hausse du nombre de bénéficiaires d'aide sociale possédant un niveau de scolarité relativement élevé.

Devant ce sombre tableau, le gouvernement a décidé de s'attacher à fournir aux jeunes les moyens d'acquérir les compétences et les connaissances requises pour se trouver un emploi. Cette nouvelle approche reposait sur trois nouveaux programmes destinés à offrir aux bénéficiaires formation et

programs were, quite practically, entitled Remedial Education, Community Work and On-the-job Training. Under s. 29(a) of the new Regulation, social assistance beneficiaries under 30 would continue to receive a lower level of support (as of 1987 they received \$170 per month) than their older counterparts (who were receiving \$466 per month), but could have their benefits raised by participating in one of these programs.

The Remedial Education Program was designed to help social assistance recipients return to school to get their high school diploma. For admission to the program, one had to be a recipient of social assistance who had been out of school for more than nine months and who had been financially independent of his or her parents for at least six months. There is evidence that the illiterate were also excluded. While participating in a Remedial Education Program, the beneficiary would receive an increase of \$196 per month in his or her social assistance benefits; the participant under 30 years of age was therefore left with \$100 less than the base amount for the social assistance beneficiary 30 and over.

The On-the-job Training Program was designed to provide social assistance recipients with real job experience. A participant would be paired with a private or public organization and work for it on a full-time basis. During that time, he or she would receive specialized training. In order to qualify for this program, the potential participant must have been out of school for at least 12 months. Holders of CEGEP or university degrees were excluded from the program. This placement would last one year. During the time that they participated, social assistance beneficiaries would receive an increase of \$296 in their benefits, \$100 of which was paid by their employer. This increase would leave a person under 30 with the same amount of benefits per month as the base amount for a person 30 and over.

In the Community Work Program, social assistance beneficiaries were paired with community organizations or governmental agencies in order

expérience professionnelle. Ces programmes étaient appelés, fort pertinemment : Rattrapage scolaire, Travaux communautaires et Stages en milieu de travail. En vertu de l'al. 29a) du nouveau Règlement, les bénéficiaires de moins de 30 ans continuaient de recevoir une aide inférieure (ils recevaient 170 \$ par mois en 1987) à celle accordée à leurs aînés (qui recevaient 466 \$ par mois), mais ils pouvaient faire hausser leurs prestations en participant à l'un de ces programmes.

Le programme Rattrapage scolaire visait à permettre aux bénéficiaires d'aide sociale de retourner aux études afin qu'ils obtiennent leur diplôme d'études secondaires. Pour être admissibles à ce programme, les candidats devaient être des bénéficiaires d'aide sociale qui avaient abandonné leurs études depuis plus de neuf mois et être financièrement indépendants de leurs parents depuis au moins six mois. La preuve révèle que les personnes analphabètes étaient elles aussi exclues. Les bénéficiaires qui participaient à ce programme voyaient leurs prestations d'aide sociale être haussées de 196 \$ par mois; les participants de moins de 30 ans touchaient donc 100 \$ de moins que le montant de base accordé aux bénéficiaires de 30 ans et plus.

Le programme Stages en milieu de travail quant à lui visait à fournir aux bénéficiaires d'aide sociale de véritables expériences de travail. Le participant était jumelé à un organisme privé ou public pour lequel il travaillait à temps plein. Durant cette période, il recevait une formation spécialisée. Afin d'être admissible à ce programme, le candidat devait avoir quitté les études depuis au moins 12 mois. Les personnes possédant un diplôme d'études collégiales (CÉGEP) ou universitaires étaient exclues de ce programme. Le stage durait un an. Au cours de cette période, les prestations d'aide sociale du bénéficiaire étaient haussées de 296 \$, dont une tranche de 100 \$ était payée par son employeur. Cet accroissement permettait aux personnes de moins de 30 ans de toucher une somme égale au montant de base accordé aux personnes de 30 ans et plus.

Dans le cadre du programme Travaux communautaires, le bénéficiaire d'aide sociale était jumelé à un organisme communautaire ou gouvernemental

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to complete simple tasks. The goal of this program was to provide more rudimentary work-related skills, such as learning to show up on time, to dress properly for work, to file documents and to answer the telephone. Priority for admission to the program was given to those who had been on social assistance for at least one year. As in the case of the On-the-job Training Program, participants received a \$296 increase in their benefits, \$100 of which was paid by the community organization or government agency.

pour lequel il accomplissait des tâches simples. Ce programme visait à permettre aux participants d'acquérir des habiletés professionnelles plus rudimentaires : apprendre à être ponctuel, à se vêtir correctement pour aller travailler, à classer des documents et à répondre au téléphone. L'admissibilité au programme était accordée en priorité aux personnes qui recevaient de l'aide sociale depuis au moins un an. Tout comme dans le cas du programme Stages en milieu de travail, les participants recevaient des prestations supplémentaires de 296 \$, dont une partie — 100 \$ — était versée par l'organisme communautaire ou gouvernemental.

163 While all three of these programs were ostensibly designed for social assistance recipients under 30, at least one of the programs was in fact open to some persons 30 and over, who received the same increase in their benefits when they participated. Thus, a recipient under 30 would never receive the same amount as some similarly situated persons 30 and over, since the older person would receive the same extra benefit over and above the base benefit.

Bien que ces trois programmes aient manifestement été conçus pour les bénéficiaires d'aide sociale de moins de 30 ans, il demeure qu'au moins un de ces programmes était également offert à certaines personnes âgées de 30 ans et plus, qui bénéficiaient elles aussi de la même majoration de leurs prestations, lorsqu'elles y participaient. Par conséquent, les bénéficiaires de moins de 30 ans ne recevaient jamais la même somme que certaines personnes de 30 ans et plus se trouvant dans une situation analogue, puisque celles-ci recevaient également la prestation supplémentaire en sus de leur prestation de base.

### III. Factual Background

164 It was under this legislative and regulatory framework that the claimant and class representative in this case, Ms. Gosselin, received assistance between 1984 and her 30th birthday, in 1989. Louise Gosselin was born on July 9, 1959. Her life has not been an easy one. Much of her formative years was spent moving back and forth between her mother's home and various centres d'accueil and foster homes. Health problems, both physical and psychological, also constituted a burden. Despite her desire to finish school, her attempts always seemed to come up short.

### III. Les faits

C'est pendant que ce régime législatif et réglementaire était en vigueur que la demanderesse et représentante du groupe en l'espèce, M<sup>me</sup> Gosselin, a reçu de l'aide sociale, soit de 1984 jusqu'à la date de son trentième anniversaire de naissance, en 1989. Louise Gosselin est née le 9 juillet 1959. Elle n'a pas eu la vie facile. Durant la majeure partie de sa période de développement, elle a été ballottée entre la maison de sa mère et divers centres d'accueil et foyers nourriciers. Des problèmes de santé, tant du point de vue physiologique que psychologique, ajoutaient également à son fardeau. Malgré son désir de terminer l'école, ses efforts en ce sens semblent avoir toujours été infructueux.

165 On the job market, Ms. Gosselin's success was not any more marked. At various times she worked as a nurse's assistant and a waitress but, owing to physical or mental exhaustion, these jobs never

Madame Gosselin n'a pas eu davantage de succès sur le marché du travail. À divers moments, elle a travaillé comme aide-infirmière et serveuse, mais à cause d'épuisement physique ou mental, elle n'a

lasted for long. Suicides were attempted, alcohol was abused, jobs were hard to come by, and depression ensued. Thus, from the time she was 18 Ms. Gosselin was, for the most part, reliant on social assistance — as was her mother, with whom she often lived.

In March of 1985, at the age of 25, Ms. Gosselin contacted her local CLSC (local community service centre) to find out how she might go about finding friends her own age. It was at that time that she was first informed of a program known as “Community Work”. In May 1985, she applied and was accepted into the program, working for an organization called “Réveil des assistés sociaux”. Through this program she became involved in various committees in which she learned about social assistance law and about the types of programs that were available to assist her. Her participation in the program helped her to meet people and to have more social interactions. However, the program only lasted one year. After she had completed it, she fell back onto the reduced amount and was forced to move back in with her mother. No one suggested another program to her.

Living with her mother at the age of 27 was not a comfortable situation; Ms. Gosselin hoped desperately that her luck would turn around. In October of 1986, she was forced, following a change in the building’s by-laws, to move out of her mother’s one-bedroom apartment. She lived in a variety of rooming houses, and maisons d’accueil, where she faced various types of harassment. At one point, she was able to get a job cleaning homes, but was unable to continue after she was overcome with the fear of being fired. She reluctantly moved back in with her mother.

In November of 1986, she was granted a medical certificate due to her mental state; this allowed her

jamais gardé ces emplois pendant longtemps. Elle a tenté à quelques reprises de se suicider, elle a fait une consommation abusive d’alcool, elle a éprouvé de la difficulté à trouver du travail et elle a souffert de dépression. Par conséquent, à partir de l’âge de 18 ans, M<sup>me</sup> Gosselin a, la plupart du temps, vécu de l’aide sociale — tout comme sa mère avec qui elle a souvent habité.

En mars 1985, alors âgée de 25 ans, M<sup>me</sup> Gosselin s’est adressée à son CLSC (centre local de services communautaires) pour demander comment elle pourrait se faire des amis de son âge. C’est à ce moment qu’elle a été mise au courant de l’existence du programme « Travaux communautaires ». En mai 1985, à la suite de sa demande de participation à ce programme, elle a travaillé pour un organisme appelé « Réveil des assistés sociaux ». Dans le cadre de ce programme, elle a commencé à participer aux activités de divers comités, acquérant ainsi des connaissances sur le droit relatif à l’aide sociale et sur les divers programmes existants en la matière et susceptibles de l’aider. Sa participation à ce programme lui a permis de rencontrer des gens et de profiter de plus d’occasions d’interaction sociale. Toutefois, ce programme ne durait qu’un an. Au terme de sa participation à ce programme, ses prestations ont été ramenées à la somme qu’elle recevait avant et elle a dû retourner vivre chez sa mère. Personne ne lui a suggéré de participer à un autre programme.

Le fait, à 27 ans, de vivre avec sa mère n’était pas une situation facile. Madame Gosselin espérait désespérément que sa chance tourne. En octobre 1986, à la suite d’une modification du règlement intérieur de l’immeuble qu’habitait sa mère, elle fut contrainte de quitter l’appartement de celle-ci, qui comptait une seule chambre à coucher. Elle a ensuite vécu dans des maisons de chambres et des maisons d’accueil où elle a subi divers types de harcèlement. À un certain moment, elle a décroché un poste de femme de ménage à domicile qu’elle a toutefois été incapable de continuer à occuper, ne pouvant surmonter la crainte d’être congédiée. À contrecœur, elle a de nouveau emménagé chez sa mère.

En novembre 1986, elle a obtenu un certificat médical en raison de son état psychologique, ce

to collect the full benefit under the regulations. She moved out of her mother's apartment in December of that year. A few months later, by happenstance, her father's neighbour offered to arrange a placement for her at Revenu Travail-Quebec as part of the On-the-job Training Program. She worked there for three months, before switching placements to work at a pet store, where she had wanted to work because of her love of animals. Unfortunately, allergies quickly became a problem and she had to leave after only a couple of weeks.

169 At this point, she fell back onto the reduced benefit and was hospitalized at a psychiatric hospital for two months. Released from the hospital in January 1988, she was once again considered able-bodied and allocated the reduced benefit. She moved through several rooming homes, paying \$170 per month for rent while receiving only \$188 per month in benefits. In March of 1988, she got her own apartment, paying a rent of \$235 per month. To pay for it, she cleaned homes, earning extra money. In order to make ends meet, she ate most of her meals at her mother's house, but sometimes had to resort to soup kitchens. In May of 1988, she hurt her back and was granted a medical certificate.

170 In September of 1988, she enrolled in the Remedial Education Program and went back to school. While this raised her benefits to \$100 less than the base amount, she was terrified that she would not succeed and would be forced back onto the reduced rate. After paying her rent and phone, she was left with only \$150 per month, which she had to stretch scrupulously in order to buy food and bus tickets. Finally, in July of 1989, she turned 30 and was allocated the full social assistance benefit. When that benefit was added to the money she received for participating in the Remedial Education Program, her total monthly benefits rose to \$739 per month.

qui lui a permis de percevoir le plein montant des prestations prévu par le règlement. Elle a quitté l'appartement de sa mère en décembre. Quelques mois plus tard, par hasard, le voisin de son père l'a aidée à obtenir un stage à Revenu Travail-Québec dans le cadre du programme Stages en milieu de travail. Elle y est restée pendant trois mois et a ensuite commencé à travailler dans une animalerie où elle avait voulu travailler en raison de son amour pour les animaux. Malheureusement, elle a commencé à souffrir d'allergies et a dû quitter ce travail après seulement quelques semaines.

Elle a alors recommencé à toucher des prestations réduites et été hospitalisée dans un établissement psychiatrique pendant deux mois. Après avoir obtenu son congé de l'hôpital en janvier 1988, elle a à nouveau été considérée physiquement apte au travail et s'est vue accorder les prestations réduites. Elle a vécu dans plusieurs maisons de chambres, où elle payait un loyer mensuel de 170 \$, alors que ses prestations ne s'élevaient qu'à 188 \$. En mars 1988, elle a loué son propre appartement, dont le loyer mensuel était de 235 \$. Pour le payer, elle faisait des ménages pour ajouter à son revenu. Afin de joindre les deux bouts, elle prenait la plupart de ses repas chez sa mère, mais devait parfois aller dans des cuisines populaires. En mai 1988, elle s'est blessée au dos et a obtenu un certificat médical.

En septembre 1988, M<sup>me</sup> Gosselin s'est inscrite au programme Rattrapage scolaire et est retournée à l'école. Bien que cette mesure ait eu pour effet de faire hausser ses prestations, qui étaient alors inférieures de 100 \$ au montant de base, elle était terrifiée à l'idée d'échouer et d'être contrainte de nouveau de toucher les prestations réduites. Après avoir payé le loyer et les frais de téléphone, il ne lui restait que 150 \$ par mois, somme qu'elle devait dépenser parcimonieusement pour s'acheter de la nourriture et des billets d'autobus. Finalement, en juillet 1989, elle a eu 30 ans et a eu droit au plein montant de l'aide sociale, somme qui, majorée de celle qui lui était versée au titre de sa participation au programme Rattrapage scolaire, a fait grimper ses prestations mensuelles à 739 \$.

IV. Relevant Statutory and Constitutional Provisions

*Social Aid Act*, R.S.Q., c. A-16, as amended by *An Act to amend the Social Aid Act*, S.Q. 1984, c. 5 (repealed by *An Act respecting income security*, S.Q. 1988, c. 51, s. 92)

5. . . .

Ordinary needs are food, clothing, household and personal requirements and any other costs relating to the habitation of a house or lodging.

All other needs are special needs.

**6.** Social aid shall meet the ordinary and special needs of any family or individual lacking means of subsistence.

**11.** The Minister may propose a recovery plan to a family or individual who is receiving or who applies for social aid.

The recovery plan may include, in particular, the participation of an individual or a member of a family in a program of work activities or a training program established by the Minister in view of developing the recipient's qualifications for an employment.

The criteria of eligibility to a program established under the second paragraph may take the recipient's age into account.

**11.1** The Government, by regulation, shall designate to which work activities programs or training programs sections 11.2 to 11.4 apply.

**11.2** In the case of an individual or a family having no dependent child, needs relating to a recipient's participation in a designated program are special needs to the extent determined by regulation for each program.

In all other cases, needs described in the first paragraph are special needs to the extent determined by the Minister for each recipient, but not in excess of the amount determined by regulation.

**31.** In addition to the other regulatory powers assigned to it by this act, the Gouvernement [*sic*], subject to the provisions of this act, may make regulations respecting:

. . . .

IV. Les dispositions législatives et constitutionnelles pertinentes

*Loi sur l'aide sociale*, L.R.Q., ch. A-16, modifiée par la *Loi modifiant la Loi sur l'aide sociale*, L.Q. 1984, ch. 5 (abrogée par la *Loi sur la sécurité du revenu*, L.Q. 1988, ch. 51, art. 92)

5. . . .

Sont des besoins ordinaires la nourriture, le vêtement, les nécessités domestiques et personnelles ainsi que les autres frais afférents à l'habitation d'une maison ou d'un logement.

Tous les autres besoins sont des besoins spéciaux.

**6.** L'aide sociale comble les besoins ordinaires et spéciaux d'une famille ou personne seule qui est privée de moyens de subsistance.

**11.** Le ministre peut proposer un plan de relèvement à une famille ou à une personne seule qui reçoit l'aide sociale ou en fait la demande.

Ce plan de relèvement peut notamment comprendre la participation d'une personne seule ou d'un membre d'une famille à un programme d'activités de travail ou de formation établi par le ministre en vue de développer l'aptitude des bénéficiaires à occuper un emploi.

Les critères d'admissibilité à un tel programme peuvent tenir compte de l'âge du bénéficiaire.

**11.1** Le gouvernement désigne par règlement les programmes d'activités de travail ou de formation auxquels s'appliquent les articles 11.2 à 11.4.

**11.2** Dans le cas d'une personne seule ou d'une famille sans enfant à charge, les besoins relatifs à la participation d'un bénéficiaire à un programme désigné constituent des besoins spéciaux dans la mesure déterminée par règlement pour chaque programme.

Dans les autres cas, ils constituent des besoins spéciaux dans la mesure déterminée par le ministre pour chaque bénéficiaire, sans toutefois excéder le montant déterminé par règlement.

**31.** En outre des autres pouvoirs de réglementation qui lui sont conférés par la présente loi, le gouvernement peut, sous réserve des dispositions de la présente loi, adopter des règlements concernant :

. . . .

(e) the extent to which the ordinary needs of a family or individual may be met through social aid and the methods whereby such needs must be proven and appraised; in determining what the aid shall be, account may be taken of the age or capacity for work of an individual or of the members of a family having no dependent children, having had no children who are deceased, or the fact that a family or individual is living with a relative or a child;

*Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1

(This is the text of the pertinent sections of the Regulation as it appeared on April 17, 1985.)

**23.** The ordinary needs of a household shall be determined in terms of its members, each month, according to the following scale:

<i>Adults</i>	<i>Dependent children</i>	<i>Ordinary needs</i>
1	0	357 \$
1	1	488
1	2 and over	526
2	0	568
2	1	615
2	2 and over	651

However, the ordinary needs can be accorded only insofar as the costs a household incurs for lodging on a monthly basis within the meaning of section 27 are equal to or greater than 85 \$ for a family and 65 \$ for a single person. The ordinary needs are reduced by the amount by which these costs fall short of these amounts.

**29.** Aid for ordinary needs shall not exceed:

(a) 121 \$ per month, in the case of an individual capable of working and less than 30 years of age;

(b) twice the monthly amount prescribed in subparagraph *a* for a family without dependent children, where both consorts are able-bodied and under 30 years of age.

In the case of a family without children receiving uninterrupted aid following an application made before 1 July 1984, subparagraph *b* of the first paragraph does not apply if the said family had a child who died before 1 July 1984.

e) la mesure dans laquelle les besoins ordinaires d'une famille ou d'une personne seule peuvent être comblés au moyen de l'aide sociale et les méthodes suivant lesquelles ces besoins doivent être prouvés et évalués; dans la détermination de l'aide, il peut être tenu compte de l'âge, de l'aptitude au travail d'une personne seule ou des membres d'une famille sans enfant à charge ou n'en ayant pas eu qui soit décédé, ainsi que du fait qu'une famille ou une personne seule vit chez un parent ou un enfant;

*Règlement sur l'aide sociale*, R.R.Q. 1981, ch. A-16, r. 1

(Ceci est le texte des articles pertinents du Règlement au 17 avril 1985.)

**23.** Les besoins ordinaires d'un ménage sont établis en fonction des personnes qui le composent, chaque mois, d'après les barèmes qui suivent :

<i>Adultes</i>	<i>Enfants à charge</i>	<i>Besoins ordinaires</i>
1	0	357 \$
1	1	488
1	2 et plus	526
2	0	568
2	1	615
2	2 et plus	651

Cependant, les besoins ordinaires ne peuvent être accordés que dans la mesure où les frais qu'un ménage encourt pour se loger sur une base mensuelle au sens de l'article 27 sont égaux ou supérieurs à 85 \$ pour une famille et à 65 \$ pour une personne seule. Les besoins ordinaires sont réduits de la somme par laquelle ces frais sont inférieurs à ces montants.

**29.** L'aide pour besoins ordinaires ne peut excéder :

a) 121 \$ par mois, pour une personne seule apte au travail et de moins de 30 ans;

b) 2 fois le montant prévu au paragraphe *a* par mois, pour une famille sans enfant à charge, si les deux conjoints sont aptes au travail et ont moins de 30 ans.

Dans le cas d'une famille sans enfant qui reçoit de l'aide sans interruption suite à une demande faite avant le 1<sup>er</sup> juillet 1984, le paragraphe *b* du premier alinéa ne s'applique pas si cette famille a eu un enfant qui est décédé avant le 1<sup>er</sup> juillet 1984.

For the month in which the application was made, the amounts prescribed in the first paragraph represent the ordinary needs of the household. The latter are apportioned in the manner indicated in section 10.

**35.0.1** Sections 11.2 to 11.4 of the Act shall apply to the following programs established by the Minister under section 11 of the Act:

- (a) On-the-job Training Program;
- (b) Community Work Program.

Section 11.2 of the Act shall also apply to the Remedial Education Program.

**35.0.2** In order to develop employability, an amount of 150 \$ is granted to the single person or to the adult of a family without dependent children for a complete month during which he participates in a program subject to section 35.0.1.

In the case of a participant in the Remedial Education Program whose work load established by the school is less than 60 hours per month, an amount of 150 \$ is deducted on the basis of the number of hours of work in relation to 60.

**35.0.5** The amount provided in section 35.0.2 or determined by the Minister under section 35.0.3, except for child care expenses, is reduced on the basis of unauthorized hours of absence under programs subject to section 35.0.1 for the said month with respect to the required hours of participation.

In the case of the Remedial Education Program, the deduction is established according to unauthorized hours of absence from classes under this program with respect to the monthly number of class hours.

**35.0.6** No reduction is made when the unauthorized hours of absence do not exceed 5 % of the hours of participation established for a participant during the month.

**35.0.7** The aid shall also meet the cost required by a person attending a vocational training course that makes this person eligible for an allowance under the National Vocational Training Program Act (S.C., 1980-81-82-83, c. 109).

This cost is equal to the amount of the allowance paid, as reduced under subparagraph *f* of section 40.

For recipients covered by section 29, the cost is equal to the same amount less the difference between ordinary needs under section 23 and the amount prescribed in section 29.

However, it shall not exceed:

Pour le mois de la demande, les montants prévus au premier alinéa représentent les besoins ordinaires du ménage. Ceux-ci sont fractionnés de la manière indiquée à l'article 10.

**35.0.1** Les articles 11.2 à 11.4 de la Loi s'appliquent aux programmes suivants établis par le ministre en vertu de l'article 11 de la Loi :

- a) le programme Stages en milieu de travail;
- b) le programme Travaux communautaires.

L'article 11.2 de la Loi s'applique en outre au programme Rattrapage scolaire.

**35.0.2** En vue de développer son aptitude à occuper un emploi, un montant de 150 \$ est versé à la personne seule ou à l'adulte d'une famille sans enfant à charge pour un mois complet de participation à un programme visé à l'article 35.0.1.

Dans le cas d'un participant au programme Rattrapage scolaire dont la charge de travail établie par l'institution scolaire est inférieure à 60 heures par mois, le montant de 150 \$ est réduit au prorata du nombre d'heures de charge de travail par rapport à 60.

**35.0.5** Le montant prévu à l'article 35.0.2 ou déterminé par le ministre en vertu de l'article 35.0.3, sauf quant aux frais de garde, est réduit au prorata des heures d'absence non autorisée en vertu des programmes visés à l'article 35.0.1 au cours de ce mois par rapport aux heures de participation exigées.

Dans le cas du programme Rattrapage scolaire, la réduction est établie en fonction des heures d'absence non autorisée aux cours en vertu de ce programme par rapport au nombre d'heures de cours par mois.

**35.0.6** Aucune réduction n'est faite si les heures d'absence non autorisée ne totalisent pas plus de 5 % des heures de participation fixées pour un participant au cours de ce mois.

**35.0.7** L'aide comble également le coût nécessité par le fait qu'une personne suive un cours de formation professionnelle qui la rend admissible à une allocation visée dans la Loi constituant un programme national de formation professionnelle (S.C., 1980-81-82-83, chap. 109).

Ce coût est égal au montant de l'allocation versée, telle que réduite en vertu du paragraphe *f* de l'article 40.

Dans le cas des bénéficiaires visés à l'article 29, ce coût est égal au même montant, duquel on soustrait la différence entre les besoins ordinaires déterminés à l'article 23 et le montant prévu à l'article 29.

Dans tous les cas, ce coût ne peut toutefois excéder :

i. for a family, 40 \$ plus 5 \$ per dependent child, plus 50 \$ in the case of a family including only one adult;

ii. for a single person, 25 \$;

The maximum provided in the fourth paragraph shall not apply to the month in which courses begin if aid for ordinary needs has been granted for at least 3 consecutive months without this paragraph having been applied during the six preceding months.

Section 35.0.2 was amended, effective August 1, 1985, by O.C. 1542-85, 24 July 1985, (1985) 117 O.G. II 3690, s. 1 as follows:

**35.0.2** To assist in developing aptitudes for work, an amount is granted as a special need to the single person or to a spouse in a family without dependent children, for a complete month of participation in a program subject to section 35.0.1.

This amount is equal to the amount obtained when 100 \$ is subtracted from the difference between the amount paid subject to the first paragraph of section 23, taking into account section 31, to a single person under 30 years of age and the maximum amount paid under section 29, taking into account section 31, to a single person under 30 years of age.

In the case of a participant in the Remedial Education Program whose course schedule is under 60 hours per month, the amount is reduced to a prorata of the number of actual course hours with respect to 60.

The Regulation was amended, effective April 30, 1986, by *Regulation respecting social aid (Amendment)*, O.C. 555-86, 23 April 1986, (1986) 118 O.G. II 605, ss. 1, 3:

**23.** The ordinary needs of a household shall be determined in terms of its members, each month, according to the following scale:

<i>Adults</i>	<i>Dependent children</i>	<i>Ordinary needs</i>
1	0	448
1	1	609
1	2 and over	659
2	0	712
2	1	769
2	2 and over	815

i. pour une famille, un montant égal à 40 \$ plus 5 \$ par enfant à charge, plus 50 \$ dans le cas d'une famille comprenant un seul adulte;

ii. Pour une personne seule, un montant égal à 25 \$;

Le maximum prévu au quatrième alinéa ne s'applique pas pour le mois où débutent les cours si l'aide pour besoins ordinaires est versée depuis au moins trois mois consécutifs sans que le présent alinéa ne se soit appliqué dans les six mois précédents.

L'article 35.0.2 a été modifié par le décret 1542-85, le 24 juillet 1985, (1985) 117 G.O. II 5318, art. 1, et la modification est entrée en vigueur le 1<sup>er</sup> août 1985 :

**35.0.2** En vue de développer son aptitude à occuper un emploi, un montant est versé à titre de besoin spécial à la personne seule ou à l'adulte d'une famille sans enfant à charge pour un mois complet de participation à un programme visé à l'article 35.0.1.

Ce montant est égal au montant obtenu en soustrayant 100 \$ à la différence entre le montant versé suivant le premier alinéa de l'article 23, compte tenu de l'article 31, à une personne seule de 30 ans et plus et le montant maximum versé suivant l'article 29, compte tenu de l'article 31, à une personne seule de moins de 30 ans.

Dans le cas d'un participant au programme Rattrapage scolaire dont la charge de travail établie par l'institution scolaire est inférieure à 60 heures par mois, ce montant est réduit au prorata du nombre d'heures de charge de travail par rapport à 60.

Le Règlement a été modifié par le *Règlement modifiant le Règlement sur l'aide sociale*, pris par le décret 555-86, le 23 avril 1986, (1986) 118 G.O. II 1193, art. 1, 3, et la modification est entrée en vigueur le 30 avril 1986 :

**23.** Les besoins ordinaires d'un ménage sont établis en fonction des personnes qui le composent, chaque mois, d'après le barème qui suit :

<i>Adultes</i>	<i>Enfants à charge</i>	<i>Besoins ordinaires</i>
1	0	448
1	1	609
1	2 et plus	659
2	0	712
2	1	769
2	2 et plus	815

However, the ordinary needs of a household living with a parent or a child are reduced by 85 \$.

In all other cases, the ordinary needs are reduced by the amount by which the costs incurred by the household for lodging on a monthly basis within the meaning of section 27 are less than 85 \$ for a family or less than 65 \$ for a single person.

**29.** Aid for ordinary needs shall not exceed:

(a) 163 \$ per month, in the case of an individual capable of working and less than 30 years of age;

(b) twice the monthly amount prescribed in subparagraph *a* for a family without dependent children, where both consorts are able-bodied and under 30 years of age.

The amounts provided for in the first paragraph are increased by 8 \$ per adult except:

(a) when the household lives with a parent or child;

(b) when a single person lives with a foster family;

(c) when the household lives in housing administered by a municipal housing bureau constituted under the Act respecting the Société d'habitation du Québec (R.S.Q., c. S-8).

In the case of a family without children receiving uninterrupted aid following an application made before 1 July 1984, subparagraph *b* of the first paragraph does not apply if the said family had a child who died before 1 July 1984.

For the month in which the application was made, the amounts prescribed in the first paragraph represent the ordinary needs of the household. The latter are apportioned in the manner indicated in section 10. [Emphasis added.]

*Charter of Human Rights and Freedoms, R.S.Q., c. C-12*

**10.** Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

Toutefois, les besoins ordinaires d'un ménage qui vit chez un parent ou un enfant sont réduits de 85 \$.

Dans les autres cas, les besoins ordinaires sont réduits de la somme par laquelle les frais encourus par le ménage pour se loger sur une base mensuelle au sens de l'article 27 sont inférieurs à 85 \$ pour une famille ou à 65 \$ pour une personne seule.

**29.** L'aide pour besoins ordinaires ne peut excéder :

*a*) 163 \$ par mois, pour une personne seule apte au travail et de moins de 30 ans;

*b*) 2 fois le montant prévu au paragraphe *a* par mois, pour une famille sans enfant à charge, si les deux conjoints sont aptes au travail et ont moins de 30 ans.

Les montants prévus au premier alinéa sont majorés de 8 \$ par adulte sauf :

*a*) lorsque le ménage vit chez un parent ou enfant;

*b*) lorsqu'une personne seule est hébergée dans une famille d'accueil;

*c*) lorsque le ménage habite un logement administré par un office municipal d'habitation constitué en vertu de la Loi sur la Société d'habitation du Québec (L.R.Q., c. S-8).

Dans le cas d'une famille sans enfant qui reçoit de l'aide sans interruption suite à une demande faite avant le 1<sup>er</sup> juillet 1984, le paragraphe *b* du premier alinéa ne s'applique pas si cette famille a eu un enfant qui est décédé avant le 1<sup>er</sup> juillet 1984.

Pour le mois de la demande, les montants prévus au premier alinéa représentent les besoins ordinaires du ménage. Ceux-ci sont fractionnés de la manière indiquée à l'article 10. [Je souligne.]

*Charte des droits et libertés de la personne, L.R.Q., ch. C-12*

**10.** Toute personne a droit à la reconnaissance et à l'exercice, en pleine égalité, des droits et libertés de la personne, sans distinction, exclusion ou préférence fondée sur la race, la couleur, le sexe, la grossesse, l'orientation sexuelle, l'état civil, l'âge sauf dans la mesure prévue par la loi, la religion, les convictions politiques, la langue, l'origine ethnique ou nationale, la condition sociale, le handicap ou d'utilisation d'un moyen pour pallier ce handicap.

Il y a discrimination lorsqu'une telle distinction, exclusion ou préférence a pour effet de détruire ou de compromettre ce droit.

**45.** Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.

**49.** Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

**52.** No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

**53.** If any doubt arises in the interpretation of a provision of the Act, it shall be resolved in keeping with the intent of the Charter.

#### *Canadian Charter of Rights and Freedoms*

**1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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

**15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

**24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

**33.** (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

**45.** Toute personne dans le besoin a droit, pour elle et sa famille, à des mesures d'assistance financière et à des mesures sociales, prévues par la loi, susceptibles de lui assurer un niveau de vie décent.

**49.** Une atteinte illicite à un droit ou à une liberté reconnu par la présente Charte confère à la victime le droit d'obtenir la cessation de cette atteinte et la réparation du préjudice moral ou matériel qui en résulte.

En cas d'atteinte illicite et intentionnelle, le tribunal peut en outre condamner son auteur à des dommages-intérêts punitifs.

**52.** Aucune disposition d'une loi, même postérieure à la Charte, ne peut déroger aux articles 1 à 38, sauf dans la mesure prévue par ces articles, à moins que cette loi n'énonce expressément que cette disposition s'applique malgré la Charte.

**53.** Si un doute surgit dans l'interprétation d'une disposition de la loi, il est tranché dans le sens indiqué par la Charte.

#### *Charte canadienne des droits et libertés*

**1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

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

**15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

**24.** (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

**33.** (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

*Constitution Act, 1982*

**52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

*Act respecting the Constitution Act, 1982, R.S.Q., c. L-4.2*

**1.** Each of the Acts adopted before 17 April 1982 is replaced by the text of each of them as they existed at that date, after being amended by the addition, at the end and as a separate section, of the following:

“This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B of the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom).”

The text so amended of each of these Acts constitutes a separate Act.

No such Act is to be construed as new law except for the purposes of section 33 of the Constitution Act, 1982; for all other purposes, it has force of law as if it were a consolidation of the Act it replaces.

Every provision of such an Act shall have effect from the date the provision it replaces took effect or is to take effect.

Such an Act must be cited in the same manner as the Act it replaces.

**V. Judicial History**

**A. *Quebec Superior Court*, [1992] R.J.Q. 1647**

In his reasons of May 27, 1992, Reeves J. ruled in favour of the defendant government, holding that the legislation in question did not infringe any of the rights claimed by the plaintiff.

With regard to the claim under s. 7 of the *Canadian Charter*, Reeves J. characterized life, liberty and security of the person as rights that do not include purely economic interests. He founded this

(3) La déclaration visée au paragraphe (1) cesse d’avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

*Loi constitutionnelle de 1982*

**52.** (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

*Loi concernant la Loi constitutionnelle de 1982, L.R.Q., ch. L-4.2*

**1.** Chacune des lois adoptées avant le 17 avril 1982 est remplacée par le texte de chacune de ces lois telles qu’elles existaient à cette date, après l’avoir modifiée par l’addition, à la fin et comme article distinct, de ce qui suit :

« La présente loi a effet indépendamment des dispositions des articles 2 et 7 à 15 de la Loi constitutionnelle de 1982 (annexe B de la Loi sur le Canada, chapitre 11 du recueil des lois du Parlement du Royaume-Uni pour l’année 1982). »

Le texte ainsi modifié de chacune de ces lois constitue une loi distincte.

Une telle loi ne fait office de droit nouveau qu’aux fins de l’article 33 de la Loi constitutionnelle de 1982; à toutes autres fins, elle a force de loi comme s’il s’agissait d’une refonte de la loi qu’elle remplace.

Chacune des dispositions d’une telle loi a effet à compter de la date où la disposition qu’elle remplace a pris effet ou doit prendre effet.

Une telle loi doit être citée de la même façon que la loi qu’elle remplace.

**V. Historique des procédures judiciaires**

**A. *Cour supérieure du Québec*, [1992] R.J.Q. 1647**

Dans ses motifs datés du 27 mai 1992, le juge Reeves de la Cour supérieure du Québec a statué en faveur du gouvernement défendeur, estimant que la mesure législative en question ne portait atteinte à aucun des droits invoqués par la demanderesse.

Relativement à la demande fondée sur l’art. 7 de la *Charte canadienne*, le juge Reeves a considéré que le droit d’un individu à la vie, à la liberté et à la sécurité de sa personne ne comporte pas

conclusion on the fact that the right to property was specifically excluded from the *Canadian Charter* at the time of its drafting. Moreover, he noted that s. 7, along with ss. 8 to 14 of the *Canadian Charter*, fell under the heading “Legal Rights”, thus requiring a link to the administration of justice. Finally, he held that the term “security of the person” did not apply to the benefit of social assistance because such a right would require the state to take positive actions. Reeves J. held that s. 7 protects only negative rights, such as the right to be free of any state intrusion upon the security of one’s person.

d’intérêts de nature purement économique. Il a fondé sa conclusion sur le fait que le législateur a écarté de façon particulière l’inscription du droit à la propriété dans la *Charte canadienne*. De plus, le juge Reeves a précisé que l’art. 7 de même que les art. 8 à 14 de la *Charte canadienne* figurent sous la rubrique « Garanties juridiques » et que, de ce fait, il est nécessaire d’établir l’existence d’un lien avec l’administration de la justice. Enfin, il a affirmé que l’expression « sécurité de [l]a personne » ne saurait inclure le droit à l’assistance sociale, puisqu’un tel droit exigerait de l’État qu’il prenne des mesures concrètes. Le juge Reeves a conclu que l’art. 7 ne protège que des droits « négatifs », par exemple le droit de l’individu de ne pas être victime d’atteinte par l’État à la sécurité de sa personne.

174 In analysing the discriminatory nature of the legislation under s. 15 of the *Canadian Charter*, Reeves J. emphasized the fact that not all differences in treatment will result in discrimination. He held that the essence of equality is a respect for differences, and that substantive equality did not necessarily signify uniformity of treatment — different people must sometimes be treated differently. He therefore concluded that the Act was not discriminatory because young adults generally have a better chance of integrating into the job market and need to be encouraged to do so. Moreover, he found that since participation in the employment programs would result, under the law, in an income for young adults equal to that of those 30 or over, equality could be achieved, and thus there was no discrimination.

Dans son analyse du caractère discriminatoire du texte de loi au regard de l’art. 15 de la *Charte canadienne*, le juge Reeves a insisté sur le fait que les différences de traitement n’entraînent pas toutes de la discrimination. Il a estimé que l’essence de l’égalité est le respect des différences, et qu’égalité réelle ne signifie pas nécessairement uniformité de traitement — certaines personnes devant parfois être traitées différemment des autres. Il a en conséquence conclu que le texte de loi contesté n’était pas discriminatoire, étant donné que les jeunes adultes ont généralement de meilleures chances de s’intégrer dans la population active et qu’il faut les encourager à le faire. En outre, il a jugé que, comme la participation aux programmes d’emploi permettait aux jeunes adultes de toucher, en vertu de la loi, un revenu égal à celui des bénéficiaires de 30 ans et plus, l’égalité pouvait être réalisée et que, par conséquent, il y avait absence de discrimination.

175 On the s. 45 of the *Quebec Charter* issue, Reeves J. held that the term “provided for by law” limited the obligation that this section places on the government. As a result of this wording, he held that the government was free to limit the obligations that it undertook in providing financial and social assistance. More importantly, Reeves J. held that since s. 52 stipulates that “No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38”, it does not apply to s. 45. He therefore concluded that s. 45 could not confer the right

En ce qui concerne la question de l’art. 45 de la *Charte québécoise*, le juge Reeves a conclu que l’expression « prévues par la loi » limite l’obligation que cette disposition impose à l’État et que, en conséquence, le législateur était libre de limiter les obligations qu’il prenait en accordant de l’aide financière et sociale. Élément plus important encore, le juge Reeves a estimé que, comme l’art. 52 dispose qu’« [a]ucune disposition d’une loi, même postérieure à la Charte, ne peut déroger aux articles 1 à 38 », cet article ne s’applique pas à l’art. 45. En

to damages and serves only as a general statement of policy by the Quebec legislature.

B. *Quebec Court of Appeal*, [1999] R.J.Q. 1033

The claimant appealed the case to the Quebec Court of Appeal. In its decision of April 23, 1999, the Court of Appeal dismissed the appeal, Robert J.A. dissenting. The court ruled in three separate judgments, each judge deciding differently with regards to the application of s. 15 of the *Canadian Charter*.

The three justices, Robert, Baudouin and Mailhot J.J.A., agreed that s. 7 was not violated. Their primary reason for reaching this conclusion was that s. 7 of the *Canadian Charter* was designed to protect legal rights. Here, they found that there was not a sufficient link between the appellant's claim and the justice system. They also rejected the appellant's argument that the government's institution of a social assistance program had somehow created a right to social assistance protected by the right to security of the person. In taking this position, Robert and Baudouin J.J.A., who both wrote on the issue, held that s. 7 of the *Canadian Charter* only applied to negative rights and not to the positive social rights being claimed by the appellant.

The three justices offered separate analysis of the s. 15 claim. Mailhot J.A. held that under the test set out by this Court in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, the legislation did not constitute an infringement of s. 15. She held that, as in *Law*, the distinction that this legislation made on the basis of age, when viewed in the context of the legislation as a whole, is not an affront to human dignity.

Robert J.A. held that the legislation constituted a violation of s. 15 that was not demonstrably justified under s. 1. Having established that s. 29(a) of the Regulation created a distinction on the basis of the

conséquence, il a jugé que l'art. 45 ne pouvait conférer le droit à des dommages-intérêts et qu'il constitue seulement un énoncé général de politique par le législateur québécois.

B. *Cour d'appel du Québec*, [1999] R.J.Q. 1033

La demanderesse a interjeté appel auprès de la Cour d'appel du Québec, qui l'a déboutée dans une décision rendue le 23 avril 1999, le juge Robert étant dissident. Les trois juges ont exposé des motifs, chacun statuant différemment sur l'application de l'art. 15 de la *Charte canadienne*.

Les juges Robert, Baudouin et Mailhot étaient tous d'avis qu'il n'y avait pas violation de l'art. 7 de la *Charte canadienne*. Cette conclusion reposait principalement sur le fait que cet article vise à protéger les garanties juridiques. En l'espèce, ils ont conclu à l'absence de lien suffisant entre la demande de l'appelante et le système de justice. Ils ont également rejeté l'argument de celle-ci voulant que l'établissement par le gouvernement d'un programme d'aide sociale avait d'une certaine façon créé un droit à l'aide sociale garanti par le droit de l'appelante à la sécurité de sa personne. Les juges Robert et Baudouin, qui ont tous deux écrit sur cette question, ont estimé que l'art. 7 de la *Charte canadienne* ne s'applique qu'aux droits « négatifs » et non aux droits de nature sociale « positifs » revendiqués par l'appelante.

Chaque juge a fait sa propre analyse de l'argument fondé sur l'art. 15. Madame le juge Mailhot a estimé que, suivant le critère formulé par notre Cour dans l'arrêt *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, le texte de loi contesté ne portait pas atteinte aux droits garantis à l'art. 15 et que, tout comme dans cet arrêt, la distinction fondée sur l'âge établie par le texte de loi ne constituait pas un affront à la dignité humaine lorsqu'on l'examinait dans le contexte de l'ensemble de la législation pertinente.

Le juge Robert a conclu que la disposition contestée portait atteinte aux droits garantis par l'art. 15 et que cette atteinte ne pouvait être justifiée suivant l'article premier. Après avoir déterminé que

enumerated characteristic of age, Robert J.A. turned to the question of whether the legislation was substantively discriminatory under the terms of s. 15 of the *Canadian Charter*. In so doing, he examined the effects of the legislation and placed considerable weight on the evidence that 73 percent of all social assistance recipients under the age of 30 received only the reduced benefit. He found that there was enough evidence to show that the effect of the legislation was to deny to those under 30 an advantage of the law enjoyed by those 30 and over.

180 He was also particularly concerned by the fact that there were not enough places available in the programs in order for every young person on social assistance to have participated. Moreover, he found that, even when an individual did take part in one of the educational programs, there were periods, such as when they were on waiting lists, during which they only received the smaller amount. This weighed in favour of a finding of discrimination. He also noted that because the Remedial Education Program provided increased benefits amounting to \$100 less than the base amount, only 11 percent of the young people in the group actually received the base amount allocated to all those 30 and over. He concluded that the legislation was discriminatory and harmful to the dignity of the appellant and members of her group; there was therefore a violation of s. 15 of the *Canadian Charter*.

181 While they agreed on the application of s. 15, Robert and Baudouin J.J.A. differed in their s. 1 analysis. Robert J.A. held that the provision was not demonstrably justifiable in a free and democratic society, while Baudouin J.A. found that the government had met its burden and upheld the law under s. 1.

182 In defining the objective of the legislation, Robert J.A. held that the differentiation served two

l'al. 29a) du Règlement établissait une distinction fondée sur un motif énuméré — l'âge —, le juge Robert s'est demandé si cette disposition était source de discrimination réelle au regard de l'art. 15 de la *Charte canadienne*. Ce faisant, il s'est interrogé sur les effets de la disposition et accordé beaucoup d'importance au fait que 73 p. 100 de tous les bénéficiaires d'aide sociale de moins de 30 ans avaient reçu uniquement les prestations réduites. Il a estimé qu'il y avait suffisamment d'éléments de preuve établissant que la disposition contestée avait eu pour effet de priver les personnes de moins de 30 ans du bénéfice de la loi accordée aux 30 ans et plus.

Le juge Robert était également très préoccupé par le fait qu'il n'y avait pas suffisamment de places pour permettre à tous les prestataires de moins de 30 ans de participer aux programmes. Qui plus est, il a constaté qu'il y avait des périodes où, même si une personne était inscrite à l'un des programmes de formation, elle continuait de recevoir les prestations réduites, par exemple lorsque son nom figurait sur une liste d'attente. Ce facteur incitait à conclure à l'existence de discrimination. Le juge Robert a aussi fait remarquer que, du fait que les prestations majorées versées dans le cadre du programme Rattrapage scolaire étaient inférieures de 100 \$ au montant de base, seulement 11 p. 100 des prestataires de moins de 30 ans dans le groupe avaient reçu le montant de base accordé aux 30 ans et plus. Il a conclu que le texte de loi était discriminatoire et avait porté atteinte à la dignité de l'appelante et à celle des membres de son groupe, et qu'il y avait eu en conséquence violation de l'art. 15 de la *Charte canadienne*.

Bien que d'accord sur l'application de l'art. 15, les juges Robert et Baudouin ont divergé d'opinion dans leur analyse fondée sur l'article premier. Le juge Robert a estimé que la disposition contestée ne pouvait se justifier dans une société libre et démocratique, alors que le juge Baudouin a conclu que le gouvernement s'était acquitté du fardeau de preuve qui lui incombait et il a confirmé la validité de cette disposition au regard de l'article premier.

En définissant l'objectif de la loi, le juge Robert a estimé que la distinction servait deux objectifs, soit

objectives, [TRANSLATION] “(1) to avoid making the program too attractive, and (2) to encourage incitement to work and reintegration into the workplace” (p. 1073). Given the economic situation of the early 1980s, Robert J.A. found that these objectives, particularly that of encouraging integration into the workplace, were pressing and substantial.

Under the heading of minimal impairment, Robert J.A. found that the regime of conditional aid for young people did not limit the right as little as possible. For the most part, he based this finding on the fact that the option of participation in the employment programs was limited by the number of places made available, the lack of information offered to beneficiaries about these programs, and the various criteria which guaranteed that not all those who wished to participate would have that opportunity. The fact that the Remedial Education Program did not result in a complete supplementation of the lower level of assistance was another factor that led him to conclude that the regime was not minimally impairing.

For the legislation to have been upheld at this stage of the *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103), Robert J.A. held that the government would have had to have shown that the criteria for admission to the educational programs were flexible enough to allow anyone under the age of 30 to be admitted and that the government was acting in a reasonable manner in determining the conditions under which a young beneficiary would be able to receive an increase in assistance. In his view, it is reasonable to expect that the government should offer such flexibility given that young adults would otherwise receive assistance that was one third of that received by those 30 or over, well below a subsistence level. Robert J.A. therefore concluded that the distinction in benefits created by s. 29(a) of the Regulation could not be justified under s. 1 of the *Canadian Charter*.

celui « 1) d'éviter l'effet d'attraction au régime et [celui] 2) de favoriser l'incitation et la réintégration au travail » (p. 1073). Compte tenu de la situation économique qui existait au début des années 80, il a jugé que ces objectifs, notamment l'incitation à réintégrer le marché du travail, avaient un caractère urgent et réel.

En ce qui concerne l'atteinte minimale, le juge Robert a conclu que le régime d'aide conditionnelle ne portait pas atteinte le moins possible au droit concerné. Il a fondé sa conclusion en grande partie sur les éléments suivants : le fait que la possibilité de participer aux programmes d'emploi était limitée par le nombre de places disponibles, le peu d'information qui était donné aux prestataires sur ces programmes et l'existence de critères d'admissibilité faisant nécessairement en sorte que les intéressés n'auraient pas tous la chance de participer à ceux-ci. Enfin, le fait que le programme Rattrapage scolaire ne permettait pas aux intéressés de hausser complètement les prestations réduites au niveau de base est un autre facteur qui a amené le juge Robert à conclure que le régime ne satisfaisait pas au critère de l'atteinte minimale.

De conclure le juge Robert, pour que la validité de la disposition contestée soit maintenue à cette étape de l'application du critère établi dans l'arrêt *Oakes* (*R. c. Oakes*, [1986] 1 R.C.S. 103), il aurait fallu que le gouvernement démontre, d'une part, que les conditions d'admissibilité aux programmes de formation étaient suffisamment souples pour que toute personne de moins de 30 ans puisse y participer et, d'autre part, qu'il avait agi de façon raisonnable en fixant les conditions permettant aux jeunes bénéficiaires de toucher des prestations majorées. De l'avis du juge Robert, il était raisonnable de s'attendre à ce que le gouvernement fasse preuve d'une telle souplesse, sinon les jeunes adultes ne recevraient qu'une aide égale au tiers de celle touchée par les prestataires de 30 ans et plus et de ce fait bien inférieure au niveau de subsistance. Le juge Robert a en conséquence conclu que la distinction établie par l'al. 29a) du Règlement relativement au montant des prestations ne pouvait être justifiée au regard de l'article premier de la *Charte canadienne*.

185 Baudouin J.A. disagreed with Robert J.A.'s approach to the minimal impairment issue. He approached the analysis with considerable reticence, given the fact that, in his view, [TRANSLATION] "it is easy for the courts, several years after the alleged infringement, in an entirely different context and without the political, economic and social constraints of governments, to criticize their decisions and set themselves up as legislators" (p. 1045).

186 While he agreed that the educational programs put into place were not a success, he found that the failure of these programs could not be linked to the conditions that were placed on participation. In this case, he placed some responsibility on the members of the group for having chosen not to participate in the programs. Moreover, he disagreed with the importance that Robert J.A. gave to the fact that there were not enough spaces available for all those under 30 to have participated, holding that it would be absurd for the government to have been forced to open 75 000 places when not even the 30 000 available places were filled.

187 Thus, Baudouin J.A. concluded that the government had met its burden of showing that its programs were minimally impairing and that its deleterious effects were reasonably proportional to the salutary effects. In doing so, he emphasized that just because a program is not a success should not be enough for a court to conclude that the means were not proportional to the objective sought.

188 Because he was the only justice to find that there had been a *Canadian Charter* infringement that was not upheld by s. 1, Robert J.A. was the only one to deal with the issue of remedy. He held that the most appropriate remedy would be to declare both ss. 29(a) and 23 of the Regulation invalid, since it was clear that the government would not have adopted that regulation without s. 29(a). However, due to the consequences of such a declaration, he held that it should be suspended for a period.

Le juge Baudouin n'a pas souscrit à l'analyse du juge Robert sur la question de l'atteinte minimale. Il a abordé cette analyse avec beaucoup de circonspection car, à son avis, « il est facile pour les tribunaux, plusieurs années après l'atteinte reprochée, dans un tout autre contexte et sans les contraintes politiques, économiques et sociales des gouvernements, de critiquer leurs décisions et de s'ériger eux-mêmes en législateur » (p. 1045).

Bien que lui aussi d'avis que les programmes de formation mis en place n'avaient pas été un succès, le juge Baudouin a estimé que l'échec de ces programmes ne pouvait être lié aux conditions de participation à ceux-ci. Il a imputé une partie de cet échec aux membres du groupe qui ont choisi de ne pas y participer. De plus, le juge Baudouin a estimé que le juge Robert avait accordé trop d'importance au fait que les programmes n'étaient pas en mesure d'accueillir tous les prestataires de moins de 30 ans, jugeant qu'il aurait été absurde d'obliger le gouvernement à ouvrir 75 000 places alors que les 30 000 places disponibles n'étaient même pas remplies.

Par conséquent, le juge Baudouin a conclu que le gouvernement s'était acquitté du fardeau qui lui incombait d'établir que ses programmes ne constituaient qu'une atteinte minimale et qu'il existait une proportionnalité raisonnable entre les effets préjudiciables et les effets bénéfiques. À cet égard, il a souligné que le seul fait qu'un programme ne soit pas une réussite ne permet pas à un tribunal de conclure à l'absence de proportionnalité entre les moyens utilisés et l'objectif visé.

Ayant été le seul à conclure à l'existence d'une violation de la *Charte canadienne* qui ne pouvait être justifiée suivant l'article premier, le juge Robert a en conséquence été le seul à examiner la question de la réparation. Il a estimé que celle qui convenait le mieux en l'espèce consistait à déclarer inopérants et l'al. 29a) et l'art. 23 du Règlement, puisqu'il était évident que le législateur n'aurait pas pris le texte réglementaire en question sans l'al. 29a). Cependant, vu les conséquences d'une telle déclaration, le juge Robert a conclu qu'il y avait lieu d'en suspendre l'effet pendant un certain temps.

Robert J.A. then rejected the appellant's claim for compensation for herself and the members of her class. In order for damages to be ordered following a s. 52 declaration of unconstitutionality, he held that there had to be some correlation between the remedy ordered under s. 52 and s. 24(1): *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347.

On the issue of s. 45 of the *Quebec Charter's* application to this case, two separate sets of reasons were delivered by the Court of Appeal. Baudouin J.A., Mailhot J.A. concurring, held that s. 45 had not been infringed. In interpreting the wording of the section, Baudouin J.A. held that the legislature would not, through s. 45, have adopted an obligation as massive as that of providing social assistance, while setting out strict limitations for the other economic rights. He therefore held that s. 45, like the other sections in the economic rights chapter of the *Quebec Charter*, only provided Quebec residents with a right to be provided access to whatever social assistance might exist, without discrimination.

Upon examination of the context, as well as the language used in the adjoining sections, Robert J.A. held that s. 45 did in fact create a positive right to social assistance, and that it had been infringed. Whereas the other sections of the economic rights chapter of the *Quebec Charter* were drafted with explicit limitations, such as “to the extent provided by law” (emphasis added) in s. 44, in the case of s. 45 there is a specifically different phrasing that is not used in any other section. Robert J.A. held that these differences must mean something; he found that s. 45 did not contain an internal limitation.

Robert J.A. went on to hold that s. 45 had been infringed. Nevertheless, he found that no award for damages could be awarded under s. 49 because, in order to make such an order, there must be wrongful

Le juge Robert a ensuite rejeté la demande d'indemnisation présentée par l'appelante pour elle-même et pour les membres du groupe qu'elle représente. Pour que des dommages-intérêts puissent être accordés par suite d'une déclaration d'invalidité prononcée en vertu de l'art. 52, le juge a précisé qu'il doit exister une certaine corrélation entre la réparation accordée en vertu de l'art. 52 et celle fondée sur le par. 24(1) : *Schachter c. Canada*, [1992] 2 R.C.S. 679; *Guimond c. Québec (Procureur général)*, [1996] 3 R.C.S. 347.

Relativement à l'application de l'art. 45 de la *Charte québécoise* en l'espèce, deux juges ont exposé des motifs sur la question. Le juge Baudouin, avec l'appui du juge Mailhot, a conclu à l'absence de violation de l'art. 45. Dans son interprétation du libellé de cette disposition, le juge Baudouin a affirmé que le législateur ne se serait pas imposé, au moyen de cet article, une obligation aussi considérable que celle de fournir une assistance financière, tout en assortissant de limites strictes les autres droits économiques. Le juge Baudouin a en conséquence estimé que, à l'instar des autres articles du chapitre relatif aux droits économiques de la *Charte québécoise*, l'art. 45 ne fait que garantir aux résidents du Québec un droit d'accès, sans discrimination, aux mesures d'assistance financière susceptibles d'exister.

Après avoir examiné le contexte, de même que le libellé des dispositions voisines, le juge Robert a conclu que l'art. 45 crée effectivement un droit positif à l'aide sociale et que ce droit avait été violé. Alors que les autres dispositions du chapitre sur les droits économiques de la *Charte québécoise* sont assorties de limites expresses, par exemple les mots « dans la mesure prévue par la loi » (je souligne) à l'art. 44, le texte de l'art. 45 est formulé d'une manière différente de toutes les autres dispositions. Le juge Robert a estimé que ces différences ont forcément une raison d'être et que l'art. 45 ne comporte pas de limite intrinsèque.

Le juge Robert a ensuite conclu à la violation de l'art. 45. Néanmoins, il a jugé que des dommages-intérêts ne pouvaient être accordés en vertu de l'art. 49, puisqu'il n'y a ouverture à cette réparation

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conduct by a party. He held that the fact that a provision is found to be unconstitutional does not amount to a finding of wrongful conduct on the part of the government.

193 The claimant appealed the Quebec Court of Appeal's decision to this Court.

#### VI. Issues

194 The following four constitutional questions were stated by the Chief Justice on November 1, 2000:

1. Did s. 29(a) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?
2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
3. Did s. 29(a) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?
4. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

195 The appellant also makes a claim under s. 45 of the *Quebec Charter*.

#### VII. Analysis

##### A. *Procedural Issues*

196 The history of this case spans three decades. On July 29, 1986, the appellant filed a motion to authorize a class action suit pursuant to art. 1002 of the *Quebec Code of Civil Procedure*, R.S.Q., c. C-25. On December 11, 1986, Reeves J. of the

que si l'atteinte résulte d'un comportement fautif d'une partie. Il a estimé que le fait qu'une disposition soit déclarée inconstitutionnelle ne permet pas automatiquement de conclure à l'existence d'un comportement fautif de la part de l'État.

La demanderesse a interjeté appel à notre Cour contre la décision de la Cour d'appel du Québec.

#### VI. Les questions en litige

Voici les quatre questions constitutionnelles qui ont été formulées par le Juge en chef le 1<sup>er</sup> novembre 2000 :

1. Le paragraphe 29a) du *Règlement sur l'aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, adopté en vertu de la *Loi sur l'aide sociale*, L.R.Q., ch. A-16, violait-il le par. 15(1) de la *Charte canadienne des droits et libertés* pour le motif qu'il établissait une distinction discriminatoire fondée sur l'âge relativement aux personnes seules, aptes au travail, âgées de 18 à 30 ans?
2. Dans l'affirmative, cette violation est-elle justifiée dans le cadre d'une société libre et démocratique, en vertu de l'article premier de la *Charte canadienne des droits et libertés*?
3. Le paragraphe 29a) du *Règlement sur l'aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, adopté en vertu de la *Loi sur l'aide sociale*, L.R.Q., ch. A-16, violait-il l'art. 7 de la *Charte canadienne des droits et libertés* pour le motif qu'il portait atteinte au droit à la sécurité des personnes qu'il visait, et ce d'une façon incompatible avec les principes de justice fondamentale?
4. Dans l'affirmative, cette violation est-elle justifiée dans le cadre d'une société libre et démocratique, en vertu de l'article premier de la *Charte canadienne des droits et libertés*?

L'appelante présente aussi une demande en vertu de l'art. 45 de la *Charte québécoise*.

#### VII. Analyse

##### A. *Les questions d'ordre procédural*

Les faits de la présente affaire couvrent trois décennies. Le 29 juillet 1986, conformément à l'art. 1002 du *Code de procédure civile*, L.R.Q., ch. C-25, l'appelante a déposé une requête visant à obtenir l'autorisation d'exercer un recours

Quebec Superior Court certified the group. He described the group as follows (at p. 1650):

[TRANSLATION] Individuals capable of working, aged 18 to 30 years, who are currently receiving welfare benefits under s. 29(a) of the Regulation respecting social aid adopted under the Social Aid Act (R.S.Q., c. A-16, s. 31) and/or who received welfare benefits under s. 29(a) of the Regulation respecting social aid adopted under the Social Aid Act (R.S.Q., c. A-16, s. 31) during any period since April 17, 1985, and/or who become or will be recipients of welfare benefits under s. 29(a) of the Regulation respecting social aid adopted under the Social Aid Act (R.S.Q., c. A-16, s. 31) from this day until the date of judgment in the present matter.

The final date to exclude one's self from the class was February 8, 1987.

While the legislation in question existed in its disputed form between 1984 and 1989, the operation of Quebec's *Act Respecting the Constitution Act, 1982*, means that the *Social Aid Act* operated notwithstanding the *Canadian Charter* until June 23, 1987. The *Social Aid Act* was amended to make all benefits conditional on July 31, 1989. Thus, it is only between those dates that the *Canadian Charter* applied to the present case. On the other hand, the *Quebec Charter* applied for the entire period. Despite the divergence in applicable dates, I would agree with the holding of Reeves J. that the events that transpired over the entire period may be examined in order to determine the constitutionality of the legislation.

As a result of this case being brought by means of a class action, the respondent raised two preliminary procedural issues before this Court. First, the government argues that a class action is an inappropriate method for bringing a direct action of invalidity. It contends that, pursuant to the holding of Gonthier J. in *Guimond, supra*, an action for damages cannot be coupled with a declaratory action for invalidity and that Reeves J. should not have authorized the bringing of the class action because the facts

collectif. Le 11 décembre 1986, le juge Reeves de la Cour supérieure du Québec a décrit le groupe en ces termes (à la p. 1650) :

Les personnes seules, aptes au travail, âgées de 18 à 30 ans, et qui sont actuellement bénéficiaires de prestations d'aide sociale émises en vertu de l'article 29 paragraphe a) du règlement sur l'aide sociale adopté en vertu de la Loi sur l'aide sociale (L.R.Q., Chap. A-16, art. 31) et/ou qui ont été bénéficiaires de prestations d'aide sociale émises en vertu de l'article 29 paragraphe a) du règlement sur l'aide sociale adopté en vertu de la Loi sur l'aide sociale (L.R.Q., Chap. A-16, art. 31) durant quelque période que ce soit depuis le 17 avril 1985, et/ou qui seront ou deviendront bénéficiaires de prestations d'aide sociale émises en vertu de l'article 29 paragraphe a) du règlement sur l'aide sociale adopté en vertu de la Loi sur l'aide sociale (L.R.Q., Chap. A-16, art. 31) de ce jour jusqu'à la date du jugement à intervenir dans la présente instance.

Les intéressés avaient jusqu'au 8 février 1987 pour se faire exclure du recours collectif.

Bien que le texte de loi en question existât, dans sa forme contestée, de 1984 et 1989, par suite de l'effet de la *Loi concernant la Loi constitutionnelle de 1982*, la *Loi sur l'aide sociale* a produit ses effets indépendamment de la *Charte canadienne* jusqu'au 23 juin 1987. On a modifié la *Loi sur l'aide sociale* et rendu toutes les prestations conditionnelles le 31 juillet 1989. Par conséquent, ce n'est qu'entre ces deux dates que la *Charte canadienne* s'est appliquée à l'espèce. Par contre, la *Charte québécoise* s'est appliquée pendant toute la période pertinente. Malgré les différences entre les périodes visées, je suis d'avis, à l'instar du juge Reeves, que les événements survenus au cours de l'ensemble de la période peuvent être examinés pour statuer sur la constitutionnalité du texte de loi contesté.

Comme la présente affaire est un recours collectif, l'intimé a soulevé devant notre Cour deux questions d'ordre procédural préliminaires. Premièrement, le gouvernement plaide qu'un recours collectif n'est pas le moyen approprié pour intenter une action directe en déclaration d'invalidité. Il affirme d'une part que, selon la conclusion du juge Gonthier dans l'arrêt *Guimond*, précité, une action en dommages-intérêts ne peut être jumelée à une action en déclaration d'invalidité et, d'autre part, que le juge Reeves

alleged did not justify the conclusions sought. However, as Gonthier J. held in *Guimond*, the rule against coupling an action for a s. 24(1) remedy with a direct action under s. 52 is only a general rule. It was certainly within the discretion of Reeves J. to allow the class to be certified. Admittedly, obtaining a s. 24(1) order for damages pursuant to a declaration of invalidity is an unlikely outcome for any *Canadian Charter* complainant. However, rather than creating a bar to litigants who might be seeking one or the other type of remedy, this analysis is best dealt with when determining the appropriate remedy.

n'aurait pas dû autoriser le recours collectif puisque les faits allégués ne justifiaient pas les conclusions recherchées. Toutefois, comme l'a précisé le juge Gonthier dans *Guimond*, la règle interdisant de jumeler une action fondée sur le par. 24(1) à une action directe intentée en vertu de l'art. 52 ne constitue qu'une règle générale. La décision d'autoriser le recours collectif relevait certainement du pouvoir discrétionnaire du juge Reeves. Il faut reconnaître qu'il est peu probable qu'une demande fondée sur la *Charte canadienne* donne lieu au prononcé d'une ordonnance en dommages-intérêts en vertu du par. 24(1) par suite d'une déclaration d'invalidité. Cependant, plutôt que d'interdire d'emblée cette possibilité aux parties qui pourraient demander l'un ou l'autre type de réparation, il est préférable d'analyser cette question au moment de l'examen de la réparation convenable.

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The second preliminary issue argued by the respondent is that the Superior Court was not a competent court to hear the constitutional arguments since the complainants could have, at any time after June 23, 1987, made an application to be heard by the Social Affairs Commission. In support of this, the respondent relies on the holding of this Court that an administrative body that is expressly empowered by legislative mandate to interpret or apply any law necessary to reach its findings has the power to apply the *Canadian Charter: Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.

La deuxième question préliminaire soulevée par l'intimé est que la Cour supérieure n'était pas le tribunal compétent pour connaître des arguments constitutionnels, parce que, en tout temps après le 23 juin 1987, les plaignants auraient pu demander à être entendus par la Commission des affaires sociales. À l'appui de ce moyen, l'intimé fait valoir que notre Cour a jugé qu'un organisme administratif expressément habilité par la loi à interpréter ou à appliquer toute loi nécessaire pour rendre une décision possède le pouvoir d'appliquer la *Charte canadienne : Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570; *Cuddy Chicks Ltd. c. Ontario (Commission des relations de travail)*, [1991] 2 R.C.S. 5; *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22.

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While the above cases stand for the proposition that an administrative body could have jurisdiction to determine constitutional questions, they did not determine that such bodies have exclusive jurisdiction over such matters. In the later case of *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, McLachlin J. (as she then was) held that when an administrative body has been granted the authority to make orders under an Act or collective agreement, such body may constitute a court of competent jurisdiction for the purposes of s. 24(1) of the *Canadian Charter*.

Bien que les arrêts susmentionnés permettent d'affirmer qu'un organisme administratif puisse être compétent pour trancher des questions constitutionnelles, ils n'ont pas établi que ces organismes ont compétence exclusive sur ces questions. Dans l'arrêt ultérieur *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929, le juge McLachlin (maintenant Juge en chef) a conclu qu'un organisme administratif ayant reçu le pouvoir de rendre des ordonnances en vertu d'une loi ou d'une convention collective peut constituer un tribunal compétent

McLachlin J. noted that mandatory arbitration clauses in labour statutes may deprive the courts of concurrent jurisdiction. That case did not, however, deal with the question of whether a declaration of invalidity, such as the one being sought here, can be made by an administrative body. Indeed, La Forest J. held in *Cuddy Chicks*, *supra*, that such a body can only declare an impugned provision invalid for the purposes of the matter before it (p. 17).

In the context of this case, it would be inappropriate to decide what is the scope of the Social Affairs Commission's power to make orders pursuant to s. 24(1). Little, if any evidence has been advanced regarding the powers of the Commission, and the matter was not argued in any depth before this Court. Given that the Superior Court was the only forum that the appellant could choose in order to obtain a general declaration of invalidity, and that prior to 1990 it was considered to be the only appropriate forum for a determination of any of the constitutional questions raised, I do not believe that it would be advisable to halt the process at this late date for procedural reasons.

#### B. *Canadian Charter of Rights and Freedoms*

The appellant advances arguments relating to both s. 7 and s. 15 of the *Charter*. When multiple *Charter* rights are advanced, there is always some question as to the proper manner in which to proceed. While it is generally sufficient to find that one of the rights is infringed and simply state that the other "need not be dealt with", this approach is sometimes unhelpful. Each case must be dealt with separately. In the recent case of *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, for instance, the complainant put forth claims based on both his s. 2(d) associational rights and his s. 15 equality rights. I held for the majority that the burdens imposed by ss. 2(d) and 15(1) differed in the sense that the latter focuses on the

pour l'application du par. 24(1) de la *Charte canadienne*. Le juge McLachlin a souligné que les clauses d'arbitrage obligatoire prévues par les lois sur les relations du travail peuvent priver les tribunaux judiciaires de toute compétence concomitante. Toutefois, cet arrêt ne portait pas sur la question de savoir si un organisme administratif peut rendre une déclaration d'invalidité de la nature de celle demandée en l'espèce. De fait, dans l'arrêt *Cuddy Chicks*, précité, p. 17, le juge La Forest a affirmé qu'un tel organisme est uniquement habilité à déclarer la disposition contestée invalide à l'égard de l'affaire dont il est saisi.

Dans le contexte de la présente affaire, il ne serait pas opportun de décider quel est le pouvoir de la Commission des affaires sociales de rendre des ordonnances en vertu du par. 24(1). On a présenté peu d'éléments de preuve — sinon aucun — quant aux pouvoirs de la Commission, et cette question n'a pas été débattue en profondeur devant notre Cour. Puisque la Cour supérieure était le seul tribunal auquel pouvait s'adresser l'appelante pour obtenir une déclaration générale d'invalidité et que, avant 1990, cette cour était considérée comme le seul tribunal compétent pour trancher les questions constitutionnelles qui étaient soulevées, je ne crois pas qu'il soit souhaitable d'ordonner, à ce stade aussi avancé du litige, la suspension des procédures pour des motifs d'ordre procédural.

#### B. *La Charte canadienne des droits et libertés*

L'appelante avance des arguments fondés sur l'art. 7 de la *Charte* ainsi que d'autres fondés sur l'art. 15 de ce texte. Lorsque, dans une même affaire, plusieurs droits garantis par la *Charte* sont invoqués, il y a toujours lieu de se demander quelle est la façon appropriée d'examiner les divers arguments. Bien qu'il suffise généralement de conclure qu'il y a eu violation de l'un de ces droits et d'affirmer tout simplement qu'il « n'est pas nécessaire d'examiner l'autre droit », cette approche se révèle parfois peu utile. Chaque affaire est un cas d'espèce. Dans le récent arrêt *Dunmore c. Ontario (Procureur général)*, [2001] 3 R.C.S. 1016, 2001 CSC 94, par exemple, le plaignant avait présenté des arguments fondés sur le

effects of underinclusion on human dignity, while the former is concerned with the ability to exercise the fundamental freedom of association (para. 28). In that case, at its core, the appellant's claim was concerned with his capacity to organize. I therefore began with a consideration of that right and, having found an unjustified *Charter* breach, did not have to proceed to a consideration of the s. 15(1) claim.

droit d'association garanti à l'al. 2*d*) et sur les droits à l'égalité prévus par l'art. 15. J'ai conclu que la charge de la preuve imposée par l'al. 2*d*) diffère de celle imposée par le par. 15(1), en ce sens que ce dernier met l'accent sur les effets de la non-inclusion sur la dignité humaine, alors que l'al. 2*d*) vise les effets de la non-inclusion sur la capacité d'exercer la liberté fondamentale d'association (par. 28). Dans cette affaire, le moyen principal avancé par l'appelant touchait à sa capacité de s'organiser. J'ai donc examiné d'abord le droit en question et, ayant conclu à l'existence d'une violation injustifiée de la *Charte*, je n'ai pas eu à me pencher sur l'argument reposant sur le par. 15(1).

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In this case, we are again faced with two *Charter* claims, based on rights that require different approaches. While s. 15 is concerned with the effect of over- or underinclusive legislation on the claimant's human dignity, s. 7 is concerned with the manner in which the state's actions interfere with a free-willed person's ability to enjoy his life, liberty and security interests. Any infringement of those rights by the state must be imposed in accordance with the principles of fundamental justice. Though both sets of rights are protected under the *Charter*, the two protect different interests. While it is important that the *Charter* be interpreted in a consistent fashion, the rights themselves must be interpreted in accordance with their individual terms. In a given situation, one right may be infringed while another is not. "*Charter* values" are an important concept that may help to inform a *Charter* right, but they cannot be invoked to modify the wording of the *Charter* itself.

En l'espèce, nous sommes de nouveau saisis de deux arguments fondés sur la *Charte*, invoquant des droits nécessitant des approches différentes. Bien que l'art. 15 s'intéresse à l'effet des textes de loi de portée excessive ou insuffisante sur la dignité humaine des plaignants, l'art. 7 s'attache à la façon dont les mesures prises par l'État portent atteinte à la capacité d'une personne dotée du libre arbitre de jouir de son droit à la vie, à la liberté et à la sécurité de sa personne. Toute atteinte à ces droits par l'État doit être imposée conformément aux principes de justice fondamentale. Bien que ces deux droits soient protégés par la *Charte*, ils protègent des intérêts différents. S'il importe que la *Charte* soit interprétée de façon uniforme, les droits eux-mêmes doivent cependant être interprétés selon leur spécificité propre. Ainsi, dans une situation donnée, il peut y avoir violation d'un droit, mais non d'un autre. Les « valeurs qui sous-tendent la *Charte* » constituent un concept important et susceptible de nous éclairer sur un droit garanti par celle-ci, mais elles ne peuvent être invoquées pour modifier le texte même de la *Charte*.

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In this case, the different nature of the two rights comes to the fore, and it is for this reason that, even though I have held that the legislation in dispute constitutes an unjustified infringement of s. 15, I have chosen to undertake an examination of s. 7 as well, in order to contrast the particular limits of the two rights.

En l'espèce, la nature différente de ces deux droits revêt une importance prépondérante. Voilà pourquoi, même si j'ai jugé que la disposition contestée constitue une atteinte injustifiée à l'art. 15, j'ai néanmoins décidé d'examiner aussi l'art. 7, de façon à distinguer les limites propres à ces deux droits.

(1) Section 7

Section 7 of the *Charter* provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The appellant in this case argues that the statutory framework that reduced benefits for those under 30 infringed her right to security of the person, since it had the effect of leaving her and the members of her class in a position of abject poverty that threatened both their physical and psychological integrity. In order to establish a s. 7 breach, the claimant must first show that she was deprived of her right to life, liberty or security of the person, and then must establish that the state caused such deprivation in a manner that was not in accordance with the principles of fundamental justice.

The protection provided for by s. 7’s right to life, liberty and security of the person is reflective of our country’s traditional and long-held concern that persons should, in general, be free from the constraints of the state and be treated with dignity and respect. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Dickson C.J. held that security of the person is implicated in the case of “state interference with bodily integrity and serious state-imposed psychological stress” (p. 56).

In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 60, Lamer C.J. held that, for a restriction of the right to security of the person to be made out:

... the impugned state action must have a serious and profound effect on a person’s psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

(1) L’article 7

Aux termes de l’art. 7 de la *Charte* : « [c]hacon a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu’en conformité avec les principes de justice fondamentale. » Dans la présente affaire, l’appelante avance que le cadre législatif pourvoyant au paiement de prestations réduites pour les personnes de moins de 30 ans portait atteinte à son droit à la sécurité de sa personne, puisqu’il avait pour effet de la laisser — elle-même ainsi que les membres de son groupe — dans une situation de misère noire qui compromettrait à la fois leur intégrité physique et leur intégrité psychologique. Pour établir la violation de l’art. 7, la demanderesse doit, dans un premier temps, démontrer qu’il a été porté atteinte à son droit à la vie, à la liberté et à la sécurité de sa personne et, dans un deuxième temps, établir que l’État a causé cette atteinte sans se conformer aux principes de justice fondamentale.

La protection du droit d’un individu à la vie, à la liberté et à la sécurité de sa personne garanti par l’art. 7 reflète le souci traditionnel de la société canadienne de veiller à ce que, en règle générale, les gens ne se voient pas imposer de contraintes par l’État et soient traités avec dignité et respect. Dans l’arrêt *R. c. Morgentaler*, [1988] 1 R.C.S. 30, p. 56, le juge en chef Dickson a estimé que « l’atteinte que l’État porte à l’intégrité corporelle et la tension psychologique grave causée par l’État » constituent une atteinte à la sécurité de la personne.

Dans l’arrêt *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, par. 60, le juge en chef Lamer a conclu que, pour établir l’existence d’une restriction de la sécurité de la personne :

... il faut donc que l’acte de l’État faisant l’objet de la contestation ait des répercussions graves et profondes sur l’intégrité psychologique d’une personne. On doit précéder à l’évaluation objective des répercussions de l’ingérence de l’État, en particulier de son incidence sur l’intégrité psychologique d’une personne ayant une sensibilité raisonnable. Il n’est pas nécessaire que l’ingérence de l’État ait entraîné un choc nerveux ou un trouble psychiatrique, mais ses répercussions doivent être plus importantes qu’une tension ou une angoisse ordinaires.

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208 In this case, the appellant has gone to great lengths to demonstrate that the negative effects of living on the reduced level of support were seriously harmful to the physical and psychological well-being of those affected. Certainly, those who, like the appellant, were living on a reduced benefit were not in a very “secure” position. The remaining question at this first stage of the s. 7 analysis is, however, whether this position of insecurity was brought about by the state.

209 The requirement that the violation of a person’s rights under s. 7 must emanate from a particular state action can be found in the wording of the section itself. Section 7 does not grant a right to security of the person, full stop. Rather, the right is protected only insofar as the claimant is deprived of the right to security of the person by the state, in a manner that is contrary to the principles of fundamental justice. The nature of the required nexus between the right and a particular state action has evolved over time.

210 In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (“*Prostitution Reference*”), Lamer J., as he then was, held that s. 7 was not necessarily limited to purely criminal or penal matters (p. 1175). Nonetheless, he did maintain that, given the context of the surrounding rights and the heading “Legal Rights” under which s. 7 is found, it was proper to conclude that “the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual’s interaction with the justice system, and its administration” (p. 1173).

211 In *G. (J.)*, *supra*, Lamer C.J. again addressed the issue of whether s. 7 rights could be extended beyond the criminal law context, this time, with respect to the right to state-funded counsel for a parent at a custody hearing. In finding that such a right was contemplated by s. 7, he held that the subject matter of s. 7 was “the state’s conduct in the course of enforcing and securing compliance with the law, where the state’s conduct deprives an individual of his or her right to life, liberty, or

Dans l’affaire qui nous occupe, l’appelante s’est donné beaucoup de mal pour démontrer que les effets négatifs de vivre des prestations réduites étaient gravement préjudiciables au bien-être physique et psychologique des personnes touchées. Il est certain que les personnes qui, à l’instar de l’appelante, vivaient des prestations réduites n’étaient pas dans une situation très « sûre ». Cependant, la question qu’il reste à trancher à cette première étape de l’analyse relative à l’art. 7 est de savoir si cette situation d’insécurité était imputable au fait de l’État.

L’exigence selon laquelle la violation des droits garantis à une personne par l’art. 7 doit résulter d’un acte de l’État ressort du texte même de cette disposition. L’article 7 ne garantit pas à l’individu un droit absolu à la sécurité de sa personne, mais plutôt un droit qui n’est protégé que dans la mesure où c’est l’État qui, d’une façon non conforme aux principes de justice fondamentale, le prive du droit à la sécurité de sa personne. La nature du lien requis entre le droit et l’acte de l’État a évolué au fil des ans.

Dans le *Renvoi relatif à l’art. 193 et à l’al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123 (le « *Renvoi relatif à la prostitution* »), le juge Lamer (plus tard Juge en chef) a conclu que l’art. 7 ne s’applique pas nécessairement aux affaires pénales (p. 1175). Néanmoins, il a maintenu que, compte tenu du contexte des droits adjacents et de l’intertitre « Garanties juridiques » sous lequel se trouve l’art. 7, il convenait de conclure que « les restrictions à la liberté et à la sécurité de la personne dont il est question à l’art. 7 sont celles qui découlent des rapports entre un individu, le système judiciaire et l’administration de la justice » (p. 1173).

Dans l’arrêt *G. (J.)*, précité, le juge en chef Lamer a de nouveau examiné la question de savoir si les droits garantis par l’art. 7 pouvaient s’appliquer en dehors du contexte du droit criminel, cette fois-là relativement au droit d’un parent d’obtenir les services d’un avocat rémunéré par l’État au cours d’une audience en matière de garde d’enfants. Concluant qu’un tel droit était visé par l’art. 7, le juge Lamer a estimé que l’objet de l’art. 7 est « le comportement de l’État en tant qu’il fait observer et appliquer la loi,

security of the person” (para. 65). In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, I agreed with this statement of the law and concluded that s. 7 rights could be infringed in the context of an investigation under human rights legislation.

In *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48, the ambit of state action was expanded beyond the confines of a court room. In that case, a mother sought an injunction against the Child and Family Services agency’s decision to apprehend her child without a warrant. While there was no judicial process at issue, she claimed that the action of the state in apprehending her child violated her s. 7 right to security of the person. L’Heureux-Dubé J. held that the claimant had been deprived of her right in accordance with the principles of fundamental justice, recognizing nevertheless that she had satisfied the first part of the s. 7 test. This can be explained by the fact that the seizure of the claimant’s newborn child constituted a determinative government action.

Thus, in certain exceptional circumstances, this Court has found that s. 7 rights may include situations outside of the traditional criminal context — extending to other areas of judicial competence. In this case, however, there is no link between the harm to the appellant’s security of the person and the judicial system or its administration. The appellant was not implicated in any judicial or administrative proceedings, or even in an investigation that would at some point lead to such a proceeding. At the very least, a s. 7 claim must arise as a result of a determinative state action that in and of itself deprives the claimant of the right to life, liberty or security of the person.

lorsque ce comportement prive un individu de son droit à la vie, à la liberté ou à la sécurité de la personne » (par. 65). Dans l’arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, 2000 CSC 44, j’ai souscrit à cet énoncé du droit et jugé qu’il pouvait y avoir violation des droits garantis par l’art. 7 dans le contexte d’une enquête menée en vertu d’une loi relative aux droits de la personne.

Dans l’arrêt *Office des services à l’enfant et à la famille de Winnipeg c. K.L.W.*, [2000] 2 R.C.S. 519, 2000 CSC 48, notre Cour a élargi au-delà du cadre des procédures judiciaires la portée du concept d’acte de l’État. Dans cette affaire, une mère avait déposé une demande d’injonction interdisant à l’Office des services à l’enfant et à la famille de lui retirer sans mandat son enfant. Malgré l’absence de procédures judiciaires, l’appelante soutenait que l’appréhension de l’enfant par l’État contrevenait au droit à la sécurité de sa personne que lui garantit l’art. 7. Le juge L’Heureux-Dubé a conclu que l’appelante avait été privée de ce droit en conformité avec les principes de justice fondamentale, reconnaissant néanmoins qu’elle avait satisfait à la première étape de l’analyse fondée sur l’art. 7, ce qui peut s’expliquer par le fait que l’appréhension du nouveau-né de la plaignante constituait une mesure gouvernementale emportant des conséquences juridiques.

Par conséquent, dans certaines circonstances exceptionnelles, notre Cour a jugé que les droits garantis par l’art. 7 peuvent viser certaines situations en dehors du contexte criminel traditionnel, étendant ainsi leur application à d’autres domaines relevant de la compétence des tribunaux. En l’espèce, cependant, il n’existe pas de lien entre le préjudice causé à la sécurité de la personne de l’appelante et le système judiciaire ou son administration. L’appelante n’était ni partie à quelque instance judiciaire ou administrative, ni même l’objet d’une enquête susceptible d’aboutir à l’engagement d’une telle instance. Une demande fondée sur l’art. 7 doit, à tout le moins, découler d’une mesure gouvernementale emportant des conséquences juridiques, savoir une mesure qui, en soi, prive le demandeur du droit à la vie, à la liberté ou à la sécurité de sa personne.

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Some may find this threshold requirement to be overly formalistic. The appellant, for instance, argues that this Court has found that respect for human dignity underlies most if not all of the rights protected under the *Charter*. Undoubtedly, I agree that respect for the dignity of all human beings is an important, if not foundational, value in this or any society, and that the interpretation of the *Charter* may be aided by taking such values into account. However, this does not mean that the language of the *Charter* can be totally avoided by proceeding to a general examination of such values or that the court can through the process of judicial interpretation change the nature of the right. As held in *Blencoe*, *supra*, “[w]hile notions of dignity and reputation underlie many *Charter* rights, they are not stand-alone rights that trigger s. 7 in and of themselves” (para. 97). A purposive approach to *Charter* interpretation, while coloured by an overarching concern with human dignity, democracy and other such “*Charter* values”, must first and foremost look to the purpose of the section in question. Without some link to the language of the *Charter*, the legitimacy of the entire process of *Charter* adjudication is brought into question.

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In the *Charter*, s. 7 is grouped, along with ss. 8 to 14, under the heading “Legal Rights”, in French, “*Garanties juridiques*”. Given the wording of this heading, as well as the subject matter of ss. 8 to 14, it is apparent that s. 7 has, as its primary goal, the protection of one’s right to life, liberty and security of the person against the coercive power of the state (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 44-9; *Prostitution Reference*, *supra*, per Lamer J.). The judicial nature of the s. 7 rights is also evident from the fact that people may only be deprived of those rights in accordance with the principles of fundamental justice. As Lamer J. held in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, such principles are to be found “in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the

Il est possible que certains considèrent cette condition préliminaire excessivement formaliste. Par exemple, l’appelante soutient que notre Cour a jugé que le respect de la dignité humaine est à la base de la plupart des droits protégés par la *Charte*, voire de tous ces droits. Il ne fait aucun doute, je le reconnais, que le respect de la dignité de tous les êtres humains est une valeur importante, sinon fondamentale, dans toute société et que la prise en considération de telles valeurs peut aider dans l’interprétation de la *Charte*. Toutefois, cela ne signifie pas que l’on peut faire totalement abstraction du texte de la *Charte* en procédant à un examen général de telles valeurs ou que le tribunal peut, par le processus d’interprétation, changer la nature du droit concerné. Comme il a été jugé dans l’arrêt *Blencoe*, précité, « [m]ême si des notions de dignité et de réputation sous-tendent maints droits garantis par la *Charte*, ce ne sont pas des droits distincts qui déclenchent en soi l’application de l’art. 7 » (par. 97). Bien qu’une interprétation téléologique de la *Charte* soit influencée par une préoccupation dominante pour la dignité humaine, la démocratie et les autres « valeurs qui sous-tendent la *Charte* », elle doit d’abord et avant tout s’attacher à l’objet de la disposition en question. En l’absence de quelque lien que ce soit avec le texte même de la *Charte*, la légitimité de tout le processus juridictionnel relatif à la *Charte* est remise en question.

Dans la *Charte*, l’art. 7 ainsi que les art. 8 à 14 figurent sous l’intertitre « Garanties juridiques » dans la version française et « *Legal Rights* » dans la version anglaise. Vu le libellé de l’intertitre ainsi que l’objet des art. 8 à 14, il est évident que l’objectif premier de l’art. 7 est la protection de la vie, de la liberté et de la sécurité d’une personne contre le pouvoir coercitif de l’État (P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 2, p. 44-9; *Renvoi relatif à la prostitution*, précité, le juge Lamer). L’aspect judiciaire des droits garantis par l’art. 7 ressort également du fait qu’il ne peut y être porté atteinte qu’en conformité avec les principes de justice fondamentale. Comme l’a affirmé le juge Lamer dans le *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, p. 503, ces principes font partie des « préceptes

inherent domain of the judiciary as guardian of the justice system” (p. 503). It is this strong relationship between the right and the role of the judiciary that leads me to the conclusion that some relationship to the judicial system or its administration must be engaged before s. 7 may be applied.

To suggest that this nexus is required is not to fossilize s. 7. This Court has already held, in *G. (J.)*, *supra*, *Blencoe*, *supra*, and *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, that this link to the judicial system does not mean that s. 7 is limited to purely criminal or penal matters. In *K.L.W.*, *supra*, it was recognized that there need not be a link to a trial-like process. Individuals who find themselves subject to administrative processes may find that they have been deprived of their right to life, liberty or security of the person. The manner in which these various administrative processes will be reviewed has by no means been calcified. Nor has the interpretation of the “principles of fundamental justice” which apply to these processes. However, at the very least, in order for one to be deprived of a s. 7 right, some determinative state action, analogous to a judicial or administrative process, must be shown to exist. Only then may the process of interpreting the principles of fundamental justice or the analysis of government action be undertaken.

In this case, there has been no engagement with the judicial system or its administration, and thus, the protections of s. 7 are not available. As will be discussed below, I have concluded that s. 29(a) of the Regulation, by treating individuals differently on the basis of their age, constitutes an infringement of the appellant’s equality rights. However, s. 7 does not have the same comparative characteristics as the s. 15 right. The appellant’s situation must be viewed in more absolute terms. In this case, the threat to

fondamentaux de notre système juridique. Ils relèvent non pas du domaine de l’ordre public en général, mais du pouvoir inhérent de l’appareil judiciaire en tant que gardien du système judiciaire ». C’est ce lien solide entre ce droit et le rôle de l’appareil judiciaire qui m’amène à conclure que, pour que puisse s’appliquer l’art. 7, il faut un certain rapport entre le droit invoqué et le système judiciaire ou son administration.

Dire que la présence de ce lien est nécessaire n’a pas pour effet de fossiliser pour autant l’application de l’art. 7. Déjà, notre Cour a jugé dans les arrêts *G. (J.)* et *Blencoe*, précités, ainsi que dans *Suresh c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1, que ce lien avec l’appareil judiciaire ne signifie pas que l’art. 7 se limite nécessairement aux affaires pénales. Dans l’arrêt *K.L.W.*, précité, notre Cour a reconnu qu’il n’est pas nécessaire qu’il y ait un lien avec une instance analogue à un procès. En effet, une personne visée par une procédure administrative peut estimer qu’elle a été privée de son droit à la vie, à la liberté ou à la sécurité de sa personne. Les modalités du contrôle de ces procédures administratives n’ont d’aucune façon été arrêtées définitivement, pas plus que n’ont été interprétés les « principes de justice fondamentale » qui régissent ces procédures. Cependant, pour qu’une personne se trouve privée d’un droit que lui garantit l’art. 7, il faut à tout le moins établir l’existence d’une mesure de l’État — analogue à une instance judiciaire ou administrative — emportant des conséquences juridiques pour cette personne. Ce n’est qu’ensuite que peut avoir lieu l’interprétation des principes de justice fondamentale ou l’analyse de la mesure gouvernementale.

En l’espèce, puisque ni le système judiciaire ni son administration ne sont en jeu, les garanties de l’art. 7 ne peuvent donc être invoquées. Comme je l’indiquerai plus loin, j’ai conclu que, du fait qu’il réserve un traitement différent à certaines personnes sur le fondement de l’âge, l’al. 29a) du Règlement porte atteinte aux droits à l’égalité garantis à l’appelante. Cependant, l’art. 7 n’offre pas les mêmes critères de comparaison que le droit visé à l’art. 15. Il faut considérer la situation de l’appelante d’une

the appellant's right to security of the person was brought upon her by the vagaries of a weak economy, not by the legislature's decision not to accord her more financial assistance or to require her to participate in several programs in order for her to receive more assistance.

218 The appellant and several of the interveners made forceful arguments regarding the distinction that is sometimes drawn between negative and positive rights, as well as that which is made between economic and civil rights, arguing that security of the person often requires the positive involvement of government in order for it to be realized. This is true. The right to be tried within a reasonable time, for instance, may require governments to spend more money in order to establish efficient judicial institutions. However, in order for s. 7 to be engaged, the threat to the person's right itself must emanate from the state.

219 In *G. (J.)*, *supra*, for instance, this Court held that the claimant had the right to be provided with legal aid to assist her during a child custody hearing. To the extent that that order required the government to spend money so as to ensure that the complainant was not deprived of her right to security of the person in a manner that was inconsistent with the principles of fundamental justice, such a right could be construed as "positive" and perhaps "economic". However, what was determinative in that case was that the claimant, pursuant to s. 7, was being directly deprived of her right to security of the person through the action of the state. It was the fact that the state was attempting to obtain custody of the claimant's children that threatened her security. It is such initial state action, one that directly affects and deprives a claimant of his or her right to life, liberty or security of the person that is required by the language of s. 7.

220 The appellant also directed our attention to the dissenting statements of Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*,

façon plus absolue. En l'espèce, le risque de violation de son droit à la sécurité de sa personne découlait des aléas d'une économie chancelante, et non de la décision du législateur de ne pas lui accorder une aide financière plus élevée ou de l'obliger à participer à plusieurs programmes pour recevoir une aide accrue.

L'appelante et plusieurs des intervenants ont présenté de solides arguments sur la distinction qui est parfois établie entre les droits « négatifs » et les droits « positifs », ainsi que sur celle faite entre les droits économiques et les libertés publiques, soutenant que la concrétisation du droit de l'individu à la sécurité de sa personne exige souvent un engagement positif de la part du gouvernement. Cet argument est bien fondé. Par exemple, le droit d'être jugé dans un délai raisonnable peut exiger des gouvernements qu'ils consacrent davantage de fonds à l'établissement d'institutions judiciaires efficaces. Cependant, pour qu'entre en jeu l'application de l'art. 7, c'est l'État qui doit être à l'origine de la menace d'atteinte au droit garanti à l'intéressé.

Par exemple, dans l'arrêt *G. (J.)*, précité, notre Cour a jugé que l'appelante avait droit à l'aide juridique à l'égard d'une audience relative à la garde d'enfants. Dans la mesure où cette ordonnance obligeait le gouvernement à dépenser certaines sommes pour veiller à ce que la plaignante ne soit pas privée de son droit à la sécurité de sa personne d'une manière incompatible avec les principes de justice fondamentale, il est possible de considérer qu'il s'agit d'un droit « positif », voire « économique ». Cependant, le facteur déterminant dans cette affaire était que, suivant l'art. 7, l'appelante était directement privée de son droit à la sécurité de sa personne par un acte de l'État. C'était le fait que l'État tentait d'obtenir la garde des enfants de l'appelante qui menaçait la sécurité de celle-ci. C'est un tel acte initial de l'État, un acte affectant directement la demanderesse et la privant de son droit à la vie, à la liberté ou à la sécurité de sa personne qui est requis par le texte de l'art. 7.

L'appelante a également attiré notre attention sur les commentaires faits par le juge en chef Dickson dans ses motifs de dissidence dans le *Renvoi relatif*

[1987] 1 S.C.R. 313, in which he noted that a conceptual approach in which freedoms are said to involve simply an absence of interference or constraint “may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms” (p. 361). The question of whether a fundamental freedom can be infringed through the lack of government action was canvassed most recently in the case of *Dunmore*, *supra*. In that case, I held that legislation that is underinclusive may, in unique circumstances, substantially impact the exercise of a constitutional freedom (para. 22). I explained that in order to meet the requirement that there be some form of government action as prescribed by s. 32 of the *Canadian Charter*, the legislation must have been specifically designed to safeguard the exercise of the fundamental freedom in question. The affected group was required to show that it was substantially incapable of exercising the freedom sought without the protection of the legislation, and that its exclusion from the legislation substantially reinforced the inherent difficulty to exercise the freedom in question. While the existence of the *Social Aid Act* might constitute sufficient government action to engage s. 32, none of the other factors enumerated in *Dunmore* are present in this case.

In *Dunmore*, I found that the Ontario *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A, instantiated the freedom to organize and that without its protection agricultural workers were substantially incapable of exercising their freedom to associate. The legislation reinforced the already precarious position of agricultural workers in the world of labour relations. In undertaking the underinclusiveness analysis, a complainant must demonstrate that he or she is being deprived of the right itself and not simply the statutory benefit that is being provided to other groups. Here, the *Social Aid Act* seeks to remedy the situation of those persons

à la *Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, où ce dernier a précisé que l’application d’une approche conceptuelle dans laquelle les libertés seraient simplement considérées comme une absence d’intervention ou de contrainte « est peut-être trop étroite étant donné qu’elle ne reconnaît pas l’existence de certains cas où l’absence d’intervention gouvernementale est effectivement susceptible de porter atteinte sensiblement à la jouissance de libertés fondamentales » (p. 361). Plus récemment, dans l’arrêt *Dunmore*, précité, notre Cour s’est demandé si l’absence d’intervention gouvernementale peut porter atteinte à une liberté fondamentale. Dans cette affaire, j’ai conclu qu’une mesure législative ayant un champ d’application trop limité peut, dans des circonstances exceptionnelles, entraver substantiellement l’exercice d’une liberté constitutionnelle (par. 22). J’ai expliqué que, pour que soit satisfaite la condition d’application de l’art. 32 de la *Charte canadienne* requérant l’existence d’une intervention gouvernementale, la mesure législative doit clairement viser à protéger l’exercice de la liberté fondamentale en question. Le groupe touché devait établir qu’il était essentiellement incapable d’exercer sa liberté fondamentale sans la protection du texte de loi et que son exclusion du champ d’application de celui-ci accroissait considérablement la difficulté inhérente à l’exercice de la liberté en question. Bien que l’existence de la *Loi sur l’aide sociale* puisse constituer une intervention gouvernementale suffisante pour déclencher l’application de l’art. 32, aucun des autres facteurs énumérés dans *Dunmore* n’est présent en l’espèce.

Dans cet arrêt, j’ai conclu que la *Loi de 1995 sur les relations de travail*, L.O. 1995, ch. 1, annexe A, donne effet à la liberté syndicale et que sans cette protection les travailleurs agricoles sont essentiellement incapables d’exercer leur liberté d’association. La loi en question exacerbait la situation déjà précaire des travailleurs agricoles dans le monde des relations de travail. Le plaignant qui reproche à un texte de loi d’avoir une portée trop limitative doit démontrer qu’il est privé du droit lui-même et non seulement de l’avantage que la loi accorde à d’autres groupes. En l’espèce, la *Loi sur l’aide sociale* vise à remédier à la situation des personnes qui n’ont pas

who find themselves without work or other assistance by providing them with financial support and job training so that they can integrate to the active workforce. As in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, and *Haig v. Canada*, [1993] 2 S.C.R. 995, the exclusion of people under 30 from the full, unconditional benefit package does not render them substantially incapable of exercising their right to security of the person without government intervention. Leaving aside the possibilities that might exist on the open market, training programs are offered to assist in finding work and to provide additional benefits.

d'emploi ou ne reçoivent aucune autre forme d'assistance, en leur offrant de l'aide financière et des mesures de formation professionnelle pour leur permettre de joindre les rangs de la population active. Comme dans les arrêts *Delisle c. Canada (Sous-procureur général)*, [1999] 2 R.C.S. 989, et *Haig c. Canada*, [1993] 2 R.C.S. 995, l'exclusion des personnes de moins de 30 ans du champ d'application du régime d'avantages complets et inconditionnels ne les rend pas essentiellement incapables d'exercer leur droit à la sécurité de leur personne en l'absence d'intervention gouvernementale. Indépendamment des possibilités susceptibles d'exister sur le marché de l'emploi, les programmes de formation ont été mis sur pied pour aider les intéressés à trouver du travail et pour pourvoir au paiement de prestations additionnelles.

222 The appellant has failed to demonstrate that there exists an inherent difficulty for young people under 30 to protect their right to security of the person without government intervention. Nor has the existence of a higher base benefit for recipients 30 years of age and over been shown to reduce, on its own, or substantially, the potential of young people to exercise their right to security of the person. The fact that the remedial programs instituted by the reforms of 1984 might not have been designed in a manner that was overly favourable to the appellant does not help the appellant in meeting her burden. My concern here is with the ability of the appellant's group to access the right itself, not to benefit better from the statutory scheme. The appellant has failed to show a substantial incapability of protecting her right to security. She has not demonstrated that the legislation, by excluding her, has reduced her security any more than it would have already been, given market conditions.

L'appelante n'a pas démontré que les personnes de moins de 30 ans éprouvent intrinsèquement de la difficulté à exercer leur droit à la sécurité de leur personne en l'absence d'intervention gouvernementale. Elle n'a pas non plus établi que l'existence de prestations de base plus élevées pour les bénéficiaires de 30 ans et plus réduisait en soi ou de manière substantielle la possibilité pour les moins de 30 ans d'exercer leur droit à la sécurité de leur personne. Le fait que les programmes de rattrapage scolaire établis par les réformes de 1984 n'aient peut-être pas été les programmes les mieux conçus n'aide pas l'appelante à s'acquitter de la charge de la preuve qui lui incombe. Le point auquel je m'attache en l'espèce est la capacité du groupe de l'appelante de bénéficier du droit lui-même, et non de profiter davantage du régime établi par la loi. L'appelante n'a pas réussi à établir qu'elle était essentiellement incapable de protéger son droit à la sécurité. Elle n'a pas démontré que, en l'excluant, le texte de loi a réduit sa sécurité à un niveau inférieur à ce qu'elle était déjà, compte tenu de la situation économique.

223 For these reasons, I would hold that s. 29(a) of the Regulation does not infringe s. 7 of the *Canadian Charter*. The threat to the appellant's security of the person was not related to the administration of justice, nor was it caused by any state action, nor did the underinclusive nature of the Regulation substantially prevent or inhibit the

Pour les motifs qui précèdent, j'estime que l'al. 29a) du Règlement ne violait pas l'art. 7 de la *Charte canadienne*. La menace au droit à la sécurité de l'appelante n'était pas liée à l'administration de la justice et ne résultait pas d'une mesure de l'État; de plus, le caractère non inclusif du règlement n'a pas empêché concrètement l'appelante de protéger

appellant from protecting her own security. Such a result should not be unexpected. As I noted in *Dunmore, supra*, total exclusion of a group from a statutory scheme protecting a certain right may in some limited circumstances engage that right to such an extent that it is in essence the substantive right that has been infringed as opposed to the equality right protected under s. 15(1) of the *Charter*. However, the underinclusiveness of legislation will normally be the province of s. 15(1), and so it is to the equality analysis that we must now turn.

## (2) Section 15

Section 15(1) of the *Charter* protects every individual's right to the equal protection and benefit of the law, without discrimination based on, among other grounds, age. As this Court has enunciated on numerous occasions, a purposive approach to this right must take into consideration a concern for the individual human dignity of all those subject to the law. As noted in the s. 7 analysis, while a concern for and understanding of the basic values underlying the *Charter* are important in order to give proper consideration to a *Charter* claim, such principles cannot be allowed to override the language of the *Charter* itself.

Among the grounds of prohibited discrimination enumerated under s. 15(1), age is the one that tends to cause the most theoretical confusion. The source of such confusion in implementing the s. 15(1) guarantee of age equality is rooted in our understanding of substantive equality. In protecting substantive equality, this Court has recognized that like people should be treated alike and, reciprocally, different people must often be treated differently. Most of the grounds enumerated under s. 15(1) tend to be characteristics that our society has deemed to be "irrelevant" to one's abilities. The problem with age is that because we all, as human beings trapped in the continuum of time, experience the process of aging, it is sometimes difficult to assess discriminative behaviour. Health allowing, we all have the

sa propre sécurité. Ce résultat ne devrait surprendre personne. Comme je l'ai souligné dans l'arrêt *Dunmore*, précité, le fait d'exclure totalement un groupe d'un régime légal protégeant un droit donné peut, dans certaines circonstances limitées, porter une atteinte telle à ce droit que c'est alors essentiellement le droit substantiel qui est violé plutôt que le droit à l'égalité garanti par le par. 15(1) de la *Charte*. Cependant, l'examen de la question du champ d'application trop restreint d'un texte de loi se fait normalement dans le cadre de l'analyse fondée sur le par. 15(1) et, en conséquence, je vais maintenant procéder à l'analyse relative à l'égalité.

## (2) L'article 15

Le paragraphe 15(1) de la *Charte* protège le droit de chacun à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment de la discrimination fondée sur l'âge. Comme l'a déclaré notre Cour à maintes reprises, il faut, dans le cadre d'une interprétation téléologique de ce droit, prendre en considération la dignité humaine individuelle de l'ensemble des personnes assujetties à la loi concernée. Comme je l'ai indiqué dans l'analyse fondée sur l'art. 7, bien qu'il soit important de prendre en compte et de bien saisir les valeurs qui sous-tendent la *Charte* pour être en mesure d'examiner adéquatement une demande fondée sur celle-ci, ces principes ne sauraient prendre le pas devant le texte même de la *Charte*.

Parmi les motifs de distinction illicite énumérés au par. 15(1), l'âge est celui qui tend à causer la plus grande confusion sur le plan théorique. Relativement à la concrétisation du droit à l'égalité fondée sur l'âge garanti au par. 15(1), la source de cette confusion découle de l'interprétation que nous donnons à l'égalité réelle. Pour protéger l'égalité réelle, notre Cour a reconnu que des personnes se trouvant dans la même situation doivent être traitées de la même manière et, réciproquement, que celles qui sont dans des situations différentes doivent souvent être traitées différemment. La plupart des motifs énumérés au par. 15(1) sont des caractéristiques qui, dans notre société, sont réputées « non pertinentes » quant aux aptitudes d'une personne. Le problème que présente l'âge tient au fait qu'il

opportunity to be young and foolish as well as old and crotchety. As Professor Hogg, *supra*, argues, “[a] minority defined by age is much less likely to suffer from the hostility, intolerance and prejudice of the majority than is a minority defined by race or religion or any other characteristic that the majority has never possessed and will never possess” (p. 52-54).

est parfois difficile de déterminer ce qui constitue un comportement discriminatoire, puisque — en tant qu’êtres humains prisonniers dans le continuum du temps — nous subissons tous le processus du vieillissement. Si notre santé nous le permet, nous avons tous la possibilité d’être jeunes et fous ainsi que vieux et grincheux. Comme l’affirme le professeur Hogg, *op. cit.*, [TRADUCTION] « [u]ne minorité définie selon l’âge est beaucoup moins susceptible d’être victime de l’hostilité, de l’intolérance et des préjugés de la majorité qu’une minorité définie selon la race ou la religion ou toute autre caractéristique que la majorité n’a jamais possédée et ne possèdera jamais » (p. 52-54).

226 Moreover, whereas distinctions based on most other enumerated or analogous grounds may often be said to be using the characteristic as an illegitimate proxy for merit, distinctions based on age as a proxy for merit or ability are often made and viewed as legitimate. This acceptance of distinctions based on age is due to the fact that at different ages people are capable of different things. Ten-year-olds, in general, do not make good drivers. The same might be said for the majority of centenarians. It is in recognition of these developmental differences that several laws draw distinctions on the basis of age.

Qui plus est, alors qu’on peut souvent affirmer que les distinctions fondées sur la plupart des autres motifs énumérés ou sur des motifs analogues utilisent la caractéristique en question comme un substitut illégitime du mérite, des distinctions fondées sur l’âge sont souvent utilisées à cette fin et considérées comme légitimes. Cette acceptation des distinctions fondées sur l’âge est attribuable au fait que des personnes d’âge différent sont capables d’accomplir des choses différentes. En règle générale, un enfant de dix ans ne fait pas un bon conducteur. On peut dire la même chose de la majorité des personnes centenaires. C’est pour tenir compte de ces différences de développement que plusieurs lois établissent des distinctions fondées sur l’âge.

227 However, despite this apparent recognition that age is of a different sort than the other grounds enumerated in s. 15(1), the fact of the matter is that it was included as a prohibited ground of discrimination in the *Canadian Charter*. Recall that in *Law* Iacobucci J. referred to the remark in *Andrews* that it would be a rare case in which differential treatment based on one or more of the enumerated or analogous grounds would not be discriminatory: *Law*, *supra*, at para. 110. In contrast, some human rights laws do not include age as a ground of discrimination, or limit the ground to discrimination between the ages of 18 and 65: *Human Rights Code*, R.S.B.C. 1996, c. 210; *Quebec Charter*, s. 10. But the *Canadian Charter* does include age, without internal limitation. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R.

Cependant, bien que l’on reconnaisse apparemment que l’âge est un motif différent des autres motifs énumérés au par. 15(1), le fait est qu’il a été inclus comme motif de discrimination illicite dans la *Charte canadienne*. Rappelons que dans *Law*, le juge Iacobucci s’est référé à la remarque énoncée dans l’arrêt *Andrews* et selon laquelle ce n’est que dans de rares cas qu’un traitement différent fondé sur un ou plusieurs motifs énumérés ou analogues ne sera pas discriminatoire : *Law*, précité, par. 110. Par ailleurs, certaines lois sur les droits de la personne n’incluent pas l’âge comme motif de discrimination ou limitent son application à la discrimination visant les personnes âgées de 18 à 65 ans : *Human Rights Code*, R.S.B.C. 1996, ch. 210; *Charte québécoise*, art. 10. Toutefois, l’âge est un motif prévu par la *Charte canadienne*, sans limite intrinsèque. Dans

203, McLachlin J. and I held that the grounds of discrimination enumerated in s. 15(1) “function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making” (para. 7). Legislation that draws a distinction based on such a ground is suspect because it often leads to discrimination and denial of substantive equality. This is the case whether the distinction is based on race, gender or age. While distinctions based on age may often be justified, they are nonetheless equally suspect. While age is a ground that is experienced by all people, it is not necessarily experienced in the same way by all people at all times. Large cohorts may use age to discriminate against smaller, more vulnerable cohorts. A change in economic, historical or political circumstances may mean that presumptions and stereotypes about a certain age group no longer hold true. Moreover, the fact remains that, while one’s age is constantly changing, it is a personal characteristic that at any given moment one can do nothing to alter. Accordingly, age falls squarely within the concern of the equality provision that people not be penalized for characteristics they either cannot change or should not be asked to change.

The fact that the Regulation here makes a distinction based on a personal characteristic that is specifically enumerated under s. 15 should therefore raise serious concerns when considering whether such a distinction is in fact discriminatory. While not creating a presumption of discrimination, a distinction based on an enumerated ground reveals a strong suggestion that the provision in question is discriminatory for the purposes of s. 15. In recent years, this Court has stated that disrespect for human dignity lies at the heart of discrimination: *Egan v. Canada*, [1995] 2 S.C.R. 513, *per* L’Heureux-Dubé J.; *Miron v. Trudel*, [1995] 2 S.C.R. 418, *per* McLachlin J.; *Vriend v. Alberta*, [1998] 1 S.C.R. 493. However, it is worth repeating that the concept of “human

l’arrêt *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203, par. 7, le juge McLachlin et moi avons conclu que les motifs énumérés au par. 15(1) « sont des indicateurs législatifs de l’existence de motifs suspects, associés à des processus décisionnels discriminatoires et fondés sur des stéréotypes ». Une loi qui établit une distinction fondée sur un tel motif est suspecte parce qu’elle entraîne souvent de la discrimination et aboutit au déni du droit à l’égalité réelle. C’est ce qui se produit, que la distinction soit fondée sur la race, le sexe ou l’âge. Bien que les discriminations fondées sur l’âge puissent souvent être justifiées, elles sont néanmoins tout aussi suspectes. Quoique l’âge soit un motif auquel personne n’échappe, tous ne le vivent pas de la même façon à toutes les époques. Ainsi, des cohortes nombreuses peuvent se servir de l’âge pour établir des distinctions contre des cohortes plus petites et plus vulnérables. Par suite de l’évolution de la situation économique, historique ou politique, il est possible que des présomptions et stéréotypes relatifs à un certain groupe d’âge ne soient plus valables. En outre, il n’en demeure pas moins que, quoiqu’on vieillisse sans cesse, l’âge est une caractéristique personnelle à l’égard de laquelle il est impossible de faire quoi que ce soit, et ce à quelque moment que ce soit. En conséquence, l’âge est nettement visé par l’aspect de la disposition relative à l’égalité qui demande qu’on ne pénalise pas un individu pour une caractéristique qu’il ne peut changer ou qu’on ne devrait pas le requérir de changer.

Le fait que le Règlement en litige dans la présente affaire établisse une distinction fondée sur une caractéristique personnelle expressément mentionnée à l’art. 15 devrait donc soulever de sérieuses préoccupations lorsqu’on se demande si cette distinction est, dans les faits, discriminatoire. Bien qu’une distinction fondée sur un motif énuméré ne crée pas une présomption de discrimination, il s’agit toutefois d’une solide indication que la disposition en question est discriminatoire pour l’application de l’art. 15. Au cours des dernières années, notre Cour a affirmé que l’absence de respect pour la dignité humaine est au cœur de la discrimination : *Egan c. Canada*, [1995] 2 R.C.S. 513, le juge L’Heureux-Dubé; *Miron c. Trudel*, [1995] 2 R.C.S. 418, le juge

dignity” has essentially been brought to the fore in an effort to capture the essence of what differential treatment based on one of the grounds in s. 15 captures.

229 The framework for undertaking a s. 15 analysis was put forth most recently by this Court in *Law*, *supra*. In that case, this Court affirmed that the s. 15 analysis is to take place through a three-stage process: Is there differential treatment between the claimant and others, in purpose or effect; is the differential treatment based on one or more of the grounds enumerated under s. 15(1) or a ground analogous to those contained therein; does the law in question have a purpose or effect that is discriminatory within the meaning of the equality guarantee? (*Law*, at para. 88). At each stage of this process, the claimant bears the civil burden of proof. This burden remains constant no matter how serious the claim or how many people are potentially involved.

230 It is evident, in this case, and the respondent does not appear to dispute this point, that s. 29(a) of the Regulation creates a distinction between single social assistance recipients under the age of 30 and those 30 and over. Single recipients under the age of 30 have their base benefits capped at a level one third of that of those 30 and over. While they may participate in certain programs in order to increase their benefits, those 30 and over do not have to do so. This results in the differential treatment of the two groups. Thus, the fundamental question that needs to be dealt with in any depth here is whether the distinction outlined in s. 29(a) is indicative that the government treats social assistance recipients under 30 in a way that is respectful of their dignity as members of our society. Evidence regarding the actual impact of the distinction will also be considered, although I conclude that the regulatory regime is discriminatory on its face.

*McLachlin; Vriend c. Alberta*, [1998] 1 R.C.S. 493. Cependant, il convient de rappeler que le concept de « dignité humaine » a d’abord et avant tout été avancé pour permettre de bien saisir l’essence de la notion de traitement différent fondé sur l’un des motifs prévus par l’art. 15.

Récemment, dans l’arrêt *Law*, précité, notre Cour a exposé le cadre de l’analyse relative à l’art. 15. Dans cette affaire, notre Cour a confirmé que cette analyse comporte trois étapes, qu’on peut décrire au moyen des questions suivantes : Le texte de loi contesté a-t-il pour objet ou pour effet d’imposer une différence de traitement entre le demandeur et d’autres personnes? La différence de traitement est-elle fondée sur un ou plusieurs des motifs énumérés au par. 15(1) ou des motifs analogues? Le texte de loi contesté a-t-il un objet ou un effet discriminatoires au sens de la garantie d’égalité? (*Law*, par. 88). À chaque étape de l’analyse, la charge de la preuve incombe au demandeur, qui doit s’en acquitter suivant la norme de preuve applicable en droit civil. Cette norme ne varie pas, peu importe la gravité de la plainte ou le nombre de personnes susceptibles d’être touchées.

En l’espèce, il est évident — fait que l’intimé ne semble d’ailleurs pas contester — que l’al. 29a) du Règlement crée une distinction entre les personnes seules de moins de 30 ans recevant de l’aide sociale et celles de 30 ans et plus. En effet, le plafond des prestations de base pour les moins de 30 ans représente un tiers de celui des prestations accordées aux 30 ans et plus. Bien que les moins de 30 ans puissent participer à certains programmes dans le but de faire hausser leurs prestations, les 30 ans et plus ne sont par ailleurs pas tenus de le faire. Cette situation entraîne une différence de traitement entre les deux groupes. Par conséquent, la question fondamentale qu’il faut examiner en profondeur est celle de savoir si la distinction établie à l’al. 29a) indique que le gouvernement traite les bénéficiaires d’aide sociale de moins de 30 ans d’une façon qui respecte leur dignité en tant que membres de notre société. La preuve concernant l’effet concret de la distinction sera également considérée, bien que j’estime que le régime réglementaire est à première vue discriminatoire.

In *Law, supra*, Iacobucci J. held that this third inquiry is to be assessed as by a reasonable person in the claimant's circumstances, having regard to several "contextual factors". The factors suggested in *Law*, while not exhaustive, are (1) pre-existing disadvantage, stereotyping, prejudice or vulnerability, (2) correspondence between the distinction drawn and the needs, capacity or circumstances of the claimant or others, (3) any ameliorative purpose or effects of the impugned law upon a more disadvantaged group or person, and (4) the nature and scope of the interest affected by the impugned law. Iacobucci J. noted that the presence or absence of any of these contextual factors is not determinative.

Interestingly, *Law*, also involved a claim that a legislative provision, by offering lower pension benefits to younger people, constituted age discrimination under s. 15. In that case, the claimant argued that provisions of the Canada Pension Plan that gradually reduced the survivor's pension for able-bodied surviving spouses without dependant children by 1/120th of the full rate for each month that the claimant's age was less than 45 at the time of the contributor's death was discriminatory. The effect of the legislation was to make 35 years of age the threshold age for receiving survivor benefits for persons not having attained the retirement age of 65. Those over 45 at the time of their spouse's death would receive full benefits, those under 35 would receive no benefits until they were 65, and those between 35 and 45 would receive a graduated amount until they were 65. After examining the contextual factors enunciated above, Iacobucci J. held that this distinction, though based on the enumerated ground of age, was not substantively discriminatory.

The fact that a certain legislative provision which limited the benefits to those under a certain age was found to be constitutional in one case does not

Dans l'arrêt *Law*, précité, le juge Iacobucci a affirmé qu'il faut examiner la troisième question avec les yeux d'une personne raisonnable se trouvant dans la situation du demandeur, en tenant compte de plusieurs « facteurs contextuels ». Dans *Law*, notre Cour a dressé une liste non exhaustive de ces facteurs : (1) la préexistence d'un désavantage, de stéréotypes, de préjugés ou d'une vulnérabilité; (2) la correspondance entre la distinction qui est établie et les besoins, les capacités ou la situation propres au demandeur ou à d'autres; (3) l'objet ou l'effet améliorateur du texte de loi contesté eu égard à une personne ou à un groupe défavorisés; (4) la nature et l'étendue du droit touché par le texte de loi contesté. Le juge Iacobucci a souligné que la présence ou l'absence de l'un ou l'autre de ces facteurs contextuels n'est pas déterminante.

Il est intéressant de noter que, dans l'arrêt *Law*, on plaide également qu'une disposition législative pourvoyant au versement de prestations de retraite moins élevées aux personnes plus jeunes créait de la discrimination fondée sur l'âge, en contravention de l'art. 15. Dans cette affaire, la demanderesse soulevait le caractère discriminatoire des dispositions du Régime de pensions du Canada qui prévoyaient, dans le cas du conjoint survivant non invalide et sans enfant à charge, une réduction progressive du plein montant de la pension de 1/120 par mois pour le nombre de mois qui reste à courir, au décès du cotisant, avant que le conjoint survivant n'atteigne l'âge de 45 ans. En conséquence, 35 ans était l'âge minimum requis pour toucher des prestations de survivant dans le cas des personnes n'ayant pas atteint l'âge de la retraite de 65 ans. Le conjoint survivant de plus de 45 ans au décès du cotisant recevait le plein montant de la pension, celui de moins de 35 ans ne recevait aucune prestation avant d'avoir atteint 65 ans et le conjoint survivant âgé de 35 à 45 ans recevait un montant progressif jusqu'à l'âge de 65 ans. Après avoir examiné les facteurs contextuels susmentionnés, le juge Iacobucci a conclu que, bien que cette distinction soit fondée sur le motif énuméré de l'âge, elle n'était pas source de discrimination réelle.

Le fait que notre Cour ait jugé constitutionnelle une disposition législative qui limitait le montant des prestations accordées aux personnes n'ayant pas

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necessarily lead to the same conclusion here. In order to determine in this case whether the legislation is respectful of the self-worth and dignity of the appellant, the legislation has to be examined in the context of both its overriding purpose and effects, as well as the situation of the appellant.

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As this Court held in *Law* and *Egan*, *supra*, the s. 15 analysis must be undertaken from the perspective of the appellant. As this Court has previously agreed, the focus of the inquiry is both subjective and objective (*Law*, at para. 59):

... subjective in so far as the right to equal treatment is an individual right, asserted by a specific claimant with particular traits and circumstances; and objective in so far as it is possible to determine whether the individual claimant's equality rights have been infringed only by considering the larger context of the legislation in question, and society's past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances.

Thus, while it is not enough for the appellant to simply claim that her dignity was violated, a demonstration, following the subjective-objective method previously described, that there is a rational foundation for her experience of discrimination will be sufficient to ground the s. 15 claim (*Lavoie v. Canada*, [2002] 1 S.C.R. 769, 2002 SCC 23, at para. 46). The factual basis upon which the court will come to a conclusion on this point is very different from the one that will be considered in the context of a s. 1 justification. The appellant in this case must demonstrate that the legislation treated recipients of social assistance under the age of 30 in a manner that would lead a reasonable person, similarly situated, to feel that he or she was considered less worthy of "recognition . . . as a member of Canadian society": *Law*, *supra*, at para. 88. There is no balancing of interests here. In order to demonstrate that her dignity is affected, the appellant may wish to deal with some of the factors enumerated in *Law*, such as the manner in which the legislation emphasizes a pre-existing disadvantage or stereotype suffered by the appellant's group, the importance or nature of the right that is being withheld from the appellant's group, as well as the degree of care that the

un certain âge ne signifie pas nécessairement que la même conclusion s'impose dans le présent pourvoi. Pour déterminer si, en l'espèce, le texte de loi respectait l'estime de soi et la dignité de l'appelante, il faut l'examiner à la fois au regard de son objet dominant et de ses effets et au regard de la situation particulière de l'intéressée.

Comme a jugé notre Cour dans les arrêts *Law* et *Egan*, précités, l'analyse relative à l'art. 15 doit être effectuée du point de vue du plaignant. En outre, au par. 59 de l'arrêt *Law*, la Cour a précisé que le point central de l'analyse est à la fois subjectif et objectif :

... subjectif dans la mesure où le droit à l'égalité de traitement est un droit individuel, invoqué par un demandeur particulier ayant des caractéristiques et une situation propres; et objectif dans la mesure où on peut déterminer s'il y a eu atteinte aux droits à l'égalité du demandeur simplement en examinant le contexte global des dispositions en question et le traitement passé et actuel accordé par la société au demandeur et aux autres personnes ou groupes partageant des caractéristiques ou une situation semblables.

Par conséquent, bien que l'appelante ne puisse se contenter de plaider qu'on a porté atteinte à sa dignité, pour justifier une allégation formulée en vertu de l'art. 15 il lui sera suffisant d'établir, au moyen de la méthode subjective-objective décrite précédemment, le fondement rationnel de sa perception subjective qu'elle est victime de discrimination (*Lavoie c. Canada*, [2002] 1 R.C.S. 769, 2002 CSC 23, par. 46). L'assise factuelle à partir de laquelle le tribunal tirera sa conclusion sur ce point est très différente de celle qu'il examinera dans le cadre de la justification au regard de l'article premier. En l'espèce, l'appelante doit démontrer en quoi le texte de loi traitait les bénéficiaires d'aide sociale de moins de 30 ans d'une façon qui amènerait une personne raisonnable se trouvant dans une situation analogue à estimer qu'elle est « moins digne d'être reconnu[e] [. . .] en tant [. . .] que membre de la société canadienne » : *Law*, précité, par. 88. Il n'est pas nécessaire de procéder à la mise en équilibre d'intérêts en l'espèce. Afin d'établir qu'on a porté atteinte à sa dignité, l'appelante peut invoquer certains des facteurs énumérés dans l'arrêt *Law*, par exemple la façon dont le texte de loi exacerbe un désavantage ou un stéréotype préexistant dont est victime le groupe

government took in crafting the legislation so as to take into account the actual needs and situation of the group's members.

(i) Pre-existing Disadvantage or Stereotype

The first contextual factor that was considered in *Law* was that of pre-existing disadvantage or prejudice. In *Law*, Iacobucci J. took notice of the fact that young widows are generally better situated to prepare for retirement than are older widows; there is no pre-existing disadvantage in their case. The respondent argues the same thing here, noting that young people are generally not considered to be routinely subjected to the sort of discrimination faced by some of Canada's discrete and insular minorities, and that they are not disadvantaged. While, in general, such a rule of thumb may hold true, it is precisely because of the generality of this type of consideration that distinctions based on enumerated or analogous grounds are suspect. The purpose of undertaking a contextual discrimination analysis is to try to determine whether the dignity of the claimant was actually threatened. In this case, we are not dealing with a general age distinction but with one applicable within a particular social group, welfare recipients. Within that group, the record makes clear that it was not, in fact, easier for persons under 30 to get jobs as opposed to their elders. The unemployment rate in 1982 had risen to 14 percent, with the rate among young people reaching 23 percent. As a percentage of the total population of people on social assistance, those under 30 years of age rose from 3 percent in 1975 to 12 percent in 1983. Thus, the stereotypical view upon which the distinction was based, that the young social welfare recipients suffer no special economic disadvantages, was not grounded in fact; it was based on old assumptions regarding the employability of young people. The creation of the assistance programs themselves demonstrates that the government itself was aware of this disadvantage.

dont elle est membre, l'importance ou la nature du droit dont le groupe en question est privé ainsi que le soin avec lequel le législateur a rédigé le texte de loi de façon à tenir compte des besoins et de la situation véritables des membres du groupe.

(i) La préexistence d'un désavantage ou d'un stéréotype

Le premier facteur contextuel examiné dans l'arrêt *Law* était la préexistence d'un désavantage ou d'un préjudice. Dans cet arrêt, le juge Iacobucci a reconnu le fait qu'une jeune veuve est généralement en meilleure position qu'une veuve plus âgée pour préparer sa retraite; les premières ne souffrent d'aucun désavantage préexistant. L'intimé plaide le même argument en l'espèce, soulignant d'une part que, de façon générale, on ne considère pas que les jeunes sont couramment victimes du genre de discrimination dont souffrent certaines minorités distinctes et isolées, et, d'autre part, qu'ils ne sont pas défavorisés. Bien que cette règle empirique puisse en règle générale se révéler valable, c'est précisément en raison de la généralité de ce type de considération que les distinctions fondées sur des motifs énumérés ou analogues sont douteuses. Une analyse contextuelle de la discrimination a pour objet de déterminer s'il y a eu concrètement menace à la dignité du plaignant. En l'espèce, nous ne sommes pas en présence d'une distinction d'application générale fondée sur l'âge, mais plutôt d'une distinction applicable à un groupe particulier de la société, les bénéficiaires d'aide sociale. Il ressort clairement du dossier que, dans les faits, au sein de ce groupe, il n'était pas plus facile pour les jeunes prestataires de trouver du travail que ce ne l'était pour leurs aînés. En 1982, le taux de chômage avait grimpé à 14 p. 100 et il s'élevait à 23 p. 100 chez les jeunes. Exprimée en pourcentage de l'ensemble des bénéficiaires d'aide sociale, la proportion des personnes de moins de 30 ans est passée de 3 p. 100 en 1975 à 12 p. 100 en 1983. Par conséquent, le stéréotype sur lequel était fondée la distinction, savoir que les jeunes bénéficiaires d'aide sociale ne souffraient d'aucun désavantage économique particulier, ne reposait pas sur des faits, mais plutôt sur de vieilles prémisses relatives à l'aptitude des jeunes au travail. La création même des programmes d'aide sociale démontre que le gouvernement était au fait de ce désavantage.

236 The appellant argues that people on social assistance have always suffered disadvantage because they are victims of stereotypical assumptions regarding the reasons for being welfare recipients, and are therefore marginalized from society. In making such an argument, the appellant is not comparing social assistance recipients under 30 to those 30 and over, but instead, comparing the relative position of young social assistance recipients to members of society as a whole. This raises the question of determining what is the proper comparator.

237 In *Law*, no argument was made that widows, as a category, have been traditionally marginalized. It was recognized, however, that in determining whether a group has suffered previous disadvantage, the analysis need not necessarily adopt the comparator upon which the distinction is first made. The question to be examined here is not whether differential treatment has occurred, which has already been established, but whether the particular group affected has been traditionally marginalized, or has faced unfair stereotyping. In *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37, Iacobucci J. noted that the claimant group (non-registered natives) had faced considerable discrimination, but refused to enter into a “race to the bottom” (para. 69) by deciding who is more disadvantaged. The same approach, should, in my view, be adopted here. There is no compelling evidence that younger welfare recipients, as compared to all welfare recipients, have been traditionally marginalized by reason of their age. But that does not end the inquiry.

238 The concern, when determining whether the differential treatment of a group is discriminatory, must, according to this Court in *Law*, be governed by an overarching concern for human dignity. The fact that people on social assistance are in a precarious, vulnerable position adds weight to the argument that differentiation that affects them negatively may pose a greater threat to their human dignity. The fact that their status as beneficiaries of social assistance was not argued as constituting a new analogous ground

L’appelante soutient que les bénéficiaires d’aide sociale ont toujours été défavorisés parce qu’ils sont victimes d’idées préconçues stéréotypées quant aux raisons de leur état de prestataire, et qu’ils sont en conséquence marginalisés dans la société. Dans son argument, l’appelante ne compare pas les bénéficiaires d’aide sociale de moins de 30 ans à ceux de 30 ans et plus, mais plutôt la situation relative des jeunes bénéficiaires d’aide sociale par rapport à l’ensemble des membres de la société. Ce fait soulève la question de l’élément de comparaison approprié.

Dans l’affaire *Law*, personne n’a prétendu que, en tant que catégorie, les veuves avaient traditionnellement été marginalisées. Il a cependant été reconnu que, dans l’analyse visant à déterminer si un groupe souffre d’un désavantage préexistant, il n’est pas nécessaire d’utiliser l’élément de comparaison sur lequel reposait initialement la distinction. La question qu’il faut se poser en l’espèce n’est pas de savoir s’il y a eu différence de traitement — ce fait a déjà été établi —, mais si le groupe particulier touché a traditionnellement été marginalisé ou victime d’un stéréotype injuste. Dans l’arrêt *Lovelace c. Ontario*, [2000] 1 R.C.S. 950, 2000 CSC 37, le juge Iacobucci a précisé que le groupe demandeur (les Autochtones non inscrits) avait été victime de beaucoup de discrimination, mais il a refusé de s’engager dans une « course vers le bas » (par. 69) et de décider quel groupe est le plus défavorisé. À mon avis, il convient d’adopter la même démarche en l’espèce. Il n’existe aucune preuve décisive indiquant que, comparativement à l’ensemble des bénéficiaires d’aide sociale, les jeunes bénéficiaires ont de tout temps été marginalisés en raison de leur âge. Cette constatation ne clôt toutefois pas l’analyse.

Lorsqu’il faut déterminer si le traitement différent réservé à un groupe donné est discriminatoire, la considération dominante doit être, comme l’a indiqué notre Cour dans l’arrêt *Law*, le respect de la dignité humaine. Le fait que les bénéficiaires d’aide sociale sont dans une situation précaire et vulnérable renforce l’argument selon lequel toute distinction les affectant peut faire peser une menace plus grande sur leur dignité humaine. Le fait qu’on n’ait pas plaidé que leur qualité de bénéficiaires d’aide

should not be a matter of concern at this stage of the analysis, since it has already been determined at the second stage of the *Law* test that the differentiation has been made on the basis of an enumerated ground. The issue, at this stage, is to determine whether, in the context of this case, a differentiation based on an enumerated ground is threatening to the appellant's human dignity. If the vulnerability of the appellant's group as welfare recipients cannot be recognized at this stage, can we really be said to be undertaking a contextual analysis?

(ii) Correspondence Between Grounds Upon Which Claim Is Based and the Actual Needs, Capacity or Circumstances of the Claimant

It is at this stage of the analysis that the contrast between the competing characterizations of the legislation put forth by the appellant and the respondent is most apparent. The appellant claims that the government did not take into account the real circumstances of young adults in crafting its legislation. In arguing this point, she relies on the estimate that, in reality, only 11.2 percent of young adults were able to receive the full amount of assistance.

The respondent, on the other hand, argues that while, as in *Law*, this legislation treated younger adults differently because their prospects for supporting themselves in the future were greater than that of their elders, this regulation, unlike that in *Law*, was specifically designed to assist those under 30. In support of this contention, the respondent presents a considerable amount of evidence demonstrating that the institution of the educational programs constituted a response to an alarmingly high rate of unemployment among young people, and was therefore designed to give them the skills necessary to enter the job market so that they could be more autonomous.

The witnesses for the respondent explained that their intention in developing the new system was to help young people in their particular

sociale constitue un nouveau motif analogue ne saurait être considéré important à cette étape-ci de l'analyse, puisqu'il a déjà été jugé, à la deuxième étape du critère énoncé dans *Law*, que la distinction reposait sur un motif énuméré. À ce stade-ci, il s'agit de déterminer si, dans le contexte de la présente affaire, la dignité humaine de la plaignante est menacée en raison d'une distinction fondée sur un motif énuméré. Si la vulnérabilité des membres du groupe de l'appelante en tant que bénéficiaires d'aide sociale ne peut être reconnue à cette étape-ci, pouvons-nous vraiment dire que nous faisons une analyse contextuelle?

(ii) La correspondance entre les motifs sur lesquels l'allégation est fondée et les besoins, les capacités ou la situation véritables du plaignant

C'est à la présente étape de l'analyse que ressort avec le plus d'acuité le contraste entre les descriptions divergentes qu'ont données du texte de loi l'appelante et l'intimé. L'appelante prétend que le gouvernement n'a pas tenu compte de la situation réelle des jeunes adultes lorsqu'il a élaboré son texte de loi. À l'appui de cette prétention, elle invoque l'estimation selon laquelle, dans les faits, seulement 11,2 p. 100 des jeunes adultes ont été en mesure de recevoir le plein montant de l'aide prévue.

Par contre, d'affirmer l'intimé, en l'espèce — tout comme dans *Law* — le texte de loi litigieux traitait différemment les jeunes adultes parce que leurs chances de subvenir à leurs besoins dans le futur étaient meilleures que celles de leurs aînés, mais contrairement au texte contesté dans *Law*, celui qui nous intéresse avait été expressément conçu pour venir en aide aux moins de 30 ans. Au soutien de cet argument, l'intimé a présenté une abondante preuve démontrant que ces programmes avaient été établis pour lutter contre le taux de chômage inquiétant chez les jeunes et visaient en conséquence à leur permettre d'acquérir les compétences nécessaires pour entrer sur le marché du travail et devenir ainsi plus autonomes.

Les témoins de l'intimé ont expliqué que l'élaboration du nouveau système avait pour but de venir en aide aux jeunes, eu égard à leur

situation. However, the language of much of the regulatory scheme appears, on its face, to suggest that the educational programs, and the monetary incentives that accompanied them, were blind as to the age of participants. Sections 32, 35.0.1 and 35.0.2 of the Regulation give no indication that such programs were specifically designed for young people. This is confirmed by the fact that while the programs ostensibly targeted those under 30, some people 30 and over did participate in the programs. In his judgment, Robert J.A. gave considerable weight to the fact that there were not enough places available in the programs to meet the needs of all beneficiaries under 30. When the programs were started, 30 000 places were opened, even though 85 000 single people under 30 were on social assistance. As was mentioned earlier, the programs were also open to persons 30 and over. I do not consider evidence of the number of places opened to be a significant factor in determining legislative purpose.

situation particulière. Cependant, le texte même de la majeure partie du régime établi par le Règlement semble à première vue indiquer que les programmes de formation et les incitatifs financiers dont ils étaient assortis ne tenaient pas compte de l'âge des participants. Rien dans les art. 32, 35.0.1 et 35.0.2 du Règlement n'indique que ces programmes avaient été conçus de façon particulière pour les jeunes. Cette constatation est confirmée par le fait que, bien que les programmes aient visé ostensiblement les moins de 30 ans, certaines personnes de 30 ans et plus y ont participé. Dans ses motifs, le juge Robert de la Cour d'appel accorde beaucoup d'importance au fait que les programmes ne comptaient pas suffisamment de places pour accueillir tous les bénéficiaires de moins de 30 ans. En effet, lors de leur création, ces programmes comptaient 30 000 places, alors qu'on dénombrait 85 000 personnes seules de moins de 30 ans recevant de l'aide sociale. Comme je l'ai indiqué plus tôt, un programme était aussi ouvert aux personnes de 30 ans et plus. Je ne considère pas que la preuve relative au nombre de places disponibles constitue un facteur important pour dégager l'objet du texte de loi.

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In my view, the treatment of legislative purpose at this stage of the s. 15(1) analysis must not undermine or replace that which will be undertaken when applying s. 1. Whether the distinction is made explicitly in the legislation, as compared with a facially neutral scheme, is immaterial when looking at legislative purpose. Indeed, this Court has adopted a unified approach to discrimination for claims under both the *Charter* and provincial human rights statutes, and affirmed that the method of discrimination is irrelevant. As McLachlin J. wrote for a unanimous Court in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, at paras. 47-48:

À mon avis, l'examen de l'objet du texte de loi effectué à ce stade-ci de l'analyse fondée sur le par. 15(1) ne doit pas rendre inutile ou remplacer l'analyse qui doit être faite ultérieurement en application de l'article premier. Le fait d'être en présence d'une distinction prévue explicitement par le texte de loi plutôt que d'un régime en apparence neutre n'a aucune pertinence dans l'examen de l'objet du texte de loi. D'ailleurs, notre Cour a adopté une démarche uniforme à l'égard des plaintes de discrimination présentées en vertu soit de la *Charte* soit des lois provinciales sur les droits de la personne, et elle a confirmé que la méthode par laquelle la discrimination est créée n'est pas pertinente. Comme l'a indiqué le juge McLachlin, dans les motifs unanimes de la Cour dans l'arrêt *Colombie-Britannique (Public Service Employee Relations Commission) c. BCGSEU*, [1999] 3 R.C.S. 3, par. 47-48 :

In the *Charter* context, the distinction between direct and adverse effect discrimination may have some analytical significance but, because the principal concern is the

Dans le contexte de la *Charte*, la distinction entre la discrimination directe et la discrimination par suite d'un effet préjudiciable peut avoir une certaine importance

effect of the impugned law, it has little legal importance. As Iacobucci J. noted at para. 80 of *Law*, *supra*:

While it is well established that it is open to a s. 15(1) claimant to establish discrimination by demonstrating a discriminatory legislative purpose, proof of legislative intent is not required in order to found a s. 15(1) claim: *Andrews*, *supra*, at p. 174. What is required is that the claimant establish that either the purpose or the effect of the legislation infringes s. 15(1), such that the onus may be satisfied by showing only a discriminatory effect. (Emphasis in original.)

Where s. 15(1) of the *Charter* is concerned, therefore, this Court has recognized that the negative effect on the individual complainant's dignity does not substantially vary depending on whether the discrimination is overt or covert. [Emphasis in original.]

Whether a positive legislative purpose may be relevant under the *Law* analysis at the s. 15 stage is another matter. As is clear in the passage from *Law* that I have just reproduced, a claimant may demonstrate an infringement of s. 15(1) by either the legislative purpose or the effect. In the context, it is clear that Iacobucci J. is talking only about a detrimental purpose or effect, since it is nonsensical to think that a claimant might establish that a beneficial or benign purpose or effect infringes s. 15(1). It may be argued that a positive legislative intention might make some difference in the subjective-objective assessment of a distinction's impact on a claimant's human dignity, but the "principal concern", as McLachlin J. put it, remains the effect. Furthermore, any argument based on the positive legislative intention must take into account the impugned distinction. As stated earlier, the assumption that long-term benefits of training are greater for younger persons has nothing to do with the present need of all persons for a minimum amount of support and their likely response to the availability of training programs through penalties or incentives.

sur le plan analytique, mais, puisque la principale préoccupation est l'effet de la loi contestée, cette distinction a peu d'importance sur le plan juridique. Comme le juge Iacobucci l'a fait remarquer au par. 80 de l'arrêt *Law*, précité :

Bien qu'il soit bien établi qu'il est loisible à la personne qui invoque le par. 15(1) de faire la preuve de la discrimination en démontrant que la loi a un objet discriminatoire, la preuve de l'intention législative n'est pas nécessaire pour établir le bien-fondé d'une allégation fondée sur l'art. 15 : *Andrews*, précité, à la p. 174. L'exigence faite au demandeur est d'établir que soit l'objet, soit l'effet de la disposition législative viole le par. 15(1), de sorte qu'il puisse satisfaire au fardeau qui lui incombe en faisant la preuve seulement d'un effet discriminatoire. (Souligné dans l'original.)

Lorsqu'il est question du par. 15(1) de la *Charte*, notre Cour reconnaît donc que l'effet négatif sur la dignité du demandeur ne varie pas sensiblement selon que la discrimination est flagrante ou dissimulée [Souligné dans l'original.]

Constitue une tout autre question celle de savoir si le fait qu'un texte de loi a un objet positif peut s'avérer un facteur pertinent dans l'analyse prescrite par l'arrêt *Law* à l'étape de l'art. 15. Comme l'indique clairement l'extrait de cet arrêt que je viens de citer, le demandeur peut établir l'existence d'une violation du par. 15(1) en s'attachant soit à l'objet du texte de loi soit à son effet. Vu le contexte, il est évident que le juge Iacobucci ne vise que les objets ou effets préjudiciables, puisqu'il est absurde de penser qu'un demandeur puisse prouver qu'un objet ou effet bénéfique ou bénin contrevient au par. 15(1). Il est possible de prétendre que le fait que l'intention du législateur soit positive puisse jouer dans une certaine mesure dans l'appréciation subjective-objective de l'effet de la distinction sur la dignité humaine du demandeur, mais la « principale préoccupation », pour reprendre l'expression du juge McLachlin, demeure l'effet du texte de loi. Qui plus est, tout argument invoquant l'intention positive du législateur doit tenir compte de la distinction contestée. Comme il a été indiqué plus tôt, la prémisse selon laquelle les bénéficiaires à long terme de la formation sont plus grands pour les jeunes n'a aucun rapport avec le besoin de toute personne de recevoir une aide financière minimale et avec la réponse probable des jeunes à la disponibilité de programmes de formation assortis de sanctions ou d'incitatifs.

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Indeed, giving too much weight here to what the government says was its objective in designing the scheme would amount to accepting a s. 1 justification before it is required. Commentators have already raised concerns with the blurring between s. 15 and s. 1: see e.g. C. D. Bredt and A. M. Dodek, “The Increasing Irrelevance of Section 1 of the Charter” (2001), 14 *Sup. Ct. L. Rev.* (2d) 175, at p. 182; Hogg, *supra*, at p. 52-27. In my view, it is highly significant whether certain factors are considered under s. 15 or s. 1. As the Chief Justice recently wrote for the majority of this Court in *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68, at para. 10:

The *Charter* distinguishes between two separate issues: whether a right has been infringed, and whether the limitation is justified. The complainant bears the burden of showing the infringement of a right (the first step), at which point the burden shifts to the government to justify the limit as a reasonable limit under s. 1 (the second step). These are distinct processes with different burdens.

The point is that under the *Oakes* analysis, the legislative objective is not accepted uncritically. At the s. 15 stage, it is not appropriate to accept at face value the legislature’s characterization of the purpose of the legislation and then use that to negate the otherwise discriminatory effects.

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In any case, as I have noted, the legislature’s intention is much less important at this stage of the *Law* analysis than the real effects on the claimant. The fundamental question, then, in this case, is not how the legislature viewed the scheme, nor how members of the majority would have viewed it in relation to the claimant group. The approach set out for us by *Law* is to ask how any member of the majority, reasonably informed, would feel in the shoes of the claimant, experiencing the effects of the legislation. This approach is essential: if people whom the legislature views as different are not

De fait, accorder un poids trop grand ici aux prétentions du gouvernement quant à l’objectif qu’il poursuivait lorsqu’il a conçu le régime en litige reviendrait à accepter une justification au regard de l’article premier avant même qu’elle ne soit requise. Des commentateurs ont déjà exprimé certaines inquiétudes relativement à la confusion qui existe entre l’art. 15 et l’article premier : voir, par exemple, C. D. Bredt et A. M. Dodek, « The Increasing Irrelevance of Section 1 of the Charter » (2001), 14 *Sup. Ct. L. Rev.* (2d) 175, p. 182; Hogg, *op. cit.*, p. 52-27. À mon avis, le fait que certains facteurs soient pris en compte soit dans l’analyse fondée sur l’article premier, soit dans celle fondée sur l’art. 15, est très pertinent. Comme l’a indiqué récemment le Juge en chef dans les motifs de la majorité dans l’arrêt *Sauvé c. Canada (Directeur général des élections)*, [2002] 3 R.C.S. 519, 2002 CSC 68, par. 10 :

La *Charte* établit une distinction entre deux questions distinctes : celle de savoir s’il y a eu atteinte à un droit et celle de savoir si la restriction est justifiée. Le plaignant a le fardeau de prouver qu’une atteinte a été portée à un droit (première étape), après quoi il incombe au gouvernement de prouver que la restriction constitue une limite raisonnable au sens de l’article premier (deuxième étape). Il s’agit de deux processus distincts impliquant des fardeaux de preuve différents.

Le fait est que, dans le cadre de l’analyse prescrite dans l’arrêt *Oakes*, le tribunal n’accepte pas aveuglément ce qui, avance-t-on, serait l’objectif visé par le texte de loi. À l’étape de l’examen fondé sur l’art. 15, il ne convient pas d’accepter sans réserve la description que donne le législateur de l’objet de la loi et de l’invoquer ensuite pour faire contrepoids à des effets par ailleurs discriminatoires.

Quoi qu’il en soit, comme je l’ai souligné précédemment, à cette étape-ci de l’analyse prescrite dans l’arrêt *Law*, l’intention du législateur revêt beaucoup moins d’importance que les effets concrets de la mesure sur le demandeur. Par conséquent, la question fondamentale en l’espèce ne consiste pas à se demander comment les membres de la majorité de la population auraient considéré le régime par rapport aux membres du groupe de l’appelante. La démarche énoncée dans *Law* consiste à se demander comment tout membre raisonnablement bien informé de la majorité se sentirait s’il se trouvait dans la

demonstrably different at all, the measure should not be acceptable. In other words, this Court's holding that substantive equality can mean treating different people differently applies only where there is a genuine difference.

Moreover, unlike the situation in *Law*, in which the legislation in question gradually decreased the benefits from the age of 45 to 35, the *Social Aid Act* created a bright line at 30, a line which appears to have had little, if any, relationship to the real situation of younger people. As the appellant has demonstrated, and the respondent conceded, the dietary and housing costs of people under 30 are no different from those 30 and over. The respondent argued that those under 30 were more likely to live with their parents than those 30 and over. While this appears to have been true, the government had no empirical data to support that view when it adopted the Regulation; it was also shown that those over 25 were much less likely to live with their parents than those under 25. Thus, the decision to draw a bright line at the age of 30 appears to have little to do with the actual situation of the affected group.

No attempt appears to have been made by the government to actually identify those recipients who were living with their parents, either through the Regulation or through the screening and application process. In fact, no effort was made to establish what living conditions were and a presumption was adopted that all persons under 30 received assistance from their family. This was obviously untrue, as the appellant's personal experience has shown. It is worth mentioning here that this situation is very different from that in *Law*, where there was a rational basis for presuming that younger widows had fewer

situation de l'appelante et subissait les effets du texte de loi contesté. Cette démarche est essentielle : si des personnes que le législateur considère différentes ne le sont visiblement pas de quelque façon que ce soit, la mesure litigieuse ne saurait être acceptable. En d'autres mots, la conclusion de notre Cour selon laquelle l'égalité réelle peut impliquer que des personnes différentes doivent être traitées différemment ne s'applique que lorsqu'il existe une différence réelle.

Qui plus est, contrairement à la situation qui existait dans l'arrêt *Law*, où le texte de loi contesté accordait aux bénéficiaires âgés de 35 à 45 ans des prestations n'augmentant que progressivement, en l'espèce la *Loi sur l'aide sociale* fixait une ligne de démarcation nette — 30 ans —, qui paraît n'avoir que peu de rapports, voire aucun, avec la situation véritable des adultes de moins de 30 ans. Comme l'a démontré l'appelante — point qu'a d'ailleurs concédé l'intimé —, les dépenses au titre de l'alimentation et du logement des personnes de moins de 30 ans ne diffèrent pas de celles des personnes de 30 ans et plus. De prétendre l'intimé, les personnes de moins de 30 ans étaient plus susceptibles de vivre chez leurs parents que celles de 30 ans et plus. Bien que cela semble avoir été le cas, le gouvernement ne possédait aucune donnée empirique étayant cette affirmation au moment où il a pris le Règlement. On a par ailleurs également démontré que les 25 ans et plus étaient beaucoup moins susceptibles de vivre chez leurs parents que les moins de 25 ans. Par conséquent, il semble que la décision de tracer une ligne de démarcation nette à 30 ans ait peu à voir avec la situation réelle du groupe touché.

Le gouvernement ne semble pas avoir tenté d'identifier concrètement les bénéficiaires vivant chez leurs parents, que ce soit au moyen du Règlement ou dans le cadre du processus de tamisage et d'examen des demandes. De fait, aucun effort n'a été déployé pour déterminer les conditions de vie des personnes de moins de 30 ans et l'on a présumé que ces dernières recevaient toutes de l'aide de leur famille, ce qui n'était évidemment pas le cas, comme en témoigne l'expérience personnelle de l'appelante. Il importe de rappeler que, en l'espèce, la situation est fort différente de celle qui

needs and superior means of meeting those needs than older widows. In contrast, the young in the present case have similar needs to their elders and their relative youth provides no advantage in meeting those needs.

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While the government offered evidence to show that the programs it established targeted what it saw as the needs of those under 30, there does seem to have been a certain degree of reliance on the fact that, by happenstance, the distinction between those under 30 years of age and those 30 and over had traditionally existed in Quebec's social assistance laws. As the government economist Pierre Fortin noted in his report, speaking about the need to do something about the difficult situation facing young welfare recipients:

[TRANSLATION] An opportunity was provided by the existence of the reduced scale for those capable of working who were under 30 years of age, which could be brought back up to the regular scale provided the recipient participated in one or other of the employability development measures.

(P. Fortin, "Les mesures d'employabilité à l'aide sociale: origine, signification et portée" (February 1990), at p. 3)

The prior existence of the distinction between beneficiaries under 30 and those 30 and over was based upon older schemes which had sought to emphasize the "principle of parental responsibility" and which had been created within the context of much lower levels of youth unemployment. Thus, the relationship between the actual needs of welfare recipients under 30 and the provisions of the *Social Aid Act* and Regulation was not particularly strong. By relying on a distinction that had existed decades earlier and that did not take into account the actual circumstances faced by those under 30 in the 1980s, the legislation appears to have shown little respect for the value of those recipients as individual human beings. It created for them what it defined as substandard living conditions on the

existait dans l'affaire *Law*, où il existait des raisons logiques de présumer que les jeunes veuves avaient des besoins moins nombreux que ceux des veuves plus âgées et qu'elles disposaient de ressources supérieures pour y subvenir. À l'opposé, les jeunes adultes visés en l'espèce ont des besoins semblables à ceux de leurs aînés et leur relative jeunesse n'offre aucun avantage lorsqu'il s'agit de satisfaire ces besoins.

Bien que le gouvernement ait présenté des éléments de preuve pour démontrer que ses programmes visaient à répondre à ce qu'il considérait comme les besoins des personnes de moins de 30 ans, il semble fortuitement s'être servi jusqu'à un certain point de la distinction entre les moins de 30 ans et les 30 ans et plus qu'on a traditionnellement faite au Québec dans les lois en matière d'aide sociale. Comme l'a souligné dans son rapport l'économiste du gouvernement, Pierre Fortin, relativement au besoin d'agir à l'égard de la situation difficile dans laquelle se trouvaient les jeunes bénéficiaires d'aide sociale :

L'occasion en fut fournie par l'existence du barème réduit pour les aptes de moins de 30 ans, qu'on pouvait ramener au barème régulier sous condition de participation à l'une ou l'autre des mesures de développement de l'employabilité.

(P. Fortin, « Les mesures d'employabilité à l'aide sociale : origine, signification et portée » (février 1990), p. 3)

La préexistence de la distinction entre les bénéficiaires de moins de 30 ans et ceux de 30 ans et plus était fondée sur d'anciens régimes dans lesquels on avait voulu mettre l'accent sur le « principe de la responsabilité parentale » et qui avaient été créés durant des périodes où le taux de chômage chez les jeunes était beaucoup plus bas. Par conséquent, le lien entre les besoins réels des bénéficiaires d'aide sociale de moins de 30 ans et les dispositions de la *Loi sur l'aide sociale* et de son règlement d'application n'était pas particulièrement solide. En se fondant sur une distinction qu'on avait faite plusieurs décennies auparavant et qui ne tenait même pas compte de la situation véritable des moins de 30 ans dans les années 80, on semble avoir fait preuve de peu de respect dans le texte de loi pour la valeur de ces

basis of their age. Where, as here, persons experience serious detriment and evidence shows that the presumptions guiding the legislature were factually unsupported, it is not necessary to demonstrate actual stereotyping, prejudice, or other discriminatory intention. Nor does a positive intention save the regulation. That is the lesson to be drawn from this Court's cases on indirect or effects discrimination: *BCGSEU, supra*; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114. I would therefore disagree with the Chief Justice's views as expressed at para. 38 of her reasons. She writes there that far from being stereotypical or arbitrary, the program was calibrated to address the particular needs and circumstances of young adults requiring social assistance. In my view it is more appropriate to characterize the government's action in this way: Based on the unverifiable presumption that people under 30 had better chances of employment and lower needs, the program delivered to those people two thirds less of what the government viewed as the basic survival amount, drawing its distinction on a characteristic over which those people had no control, their age.

Before turning to the next contextual factor, I wish to address the issue of evidence and the burden of proof necessary to demonstrate a *Canadian Charter* infringement. The Chief Justice is clearly influenced by what she perceives as the lack of evidence from other individuals besides Ms. Gosselin in support of the contentions of adverse effect. It appears to me that the Chief Justice is also influenced by the procedural fact that Ms. Gosselin's claim was authorized as a class action. It is clear that, in Quebec, to obtain authorization for a class action, the applicant must

personnes en tant qu'êtres humains. Sur le fondement de l'âge, le texte de loi créait pour ces personnes des conditions de vie inférieures à celles qu'il définissait comme étant des conditions minimales. Dans les cas où, comme en l'espèce, des personnes subissent un grave désavantage et où la preuve démontre que les hypothèses ayant guidé le législateur n'étaient pas étayées par les faits, il n'est pas nécessaire de prouver l'existence concrète de stéréotype, préjugé ou autre intention discriminatoire. L'existence d'une intention positive ne préserve pas davantage la validité de la mesure réglementaire litigieuse. Voilà l'enseignement qu'il faut tirer de la jurisprudence de notre Cour sur la discrimination indirecte ou les effets de la discrimination : *BCGSEU*, précité; *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624; *Compagnie des chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne)*, [1987] 1 R.C.S. 1114. Je ne saurais donc souscrire aux vues exprimées par le Juge en chef au par. 38, où elle écrit que, loin d'être stéréotypé ou arbitraire, le programme était conçu pour répondre à la situation et aux besoins particuliers des jeunes adultes nécessitant de l'aide sociale. Voici, à mon avis, une description plus fidèle de la mesure établie par le gouvernement : basé sur l'hypothèse invérifiable selon laquelle les personnes de moins de 30 ans ont des besoins moins grands que leurs aînés et de meilleures chances que ceux-ci de se trouver un emploi, le programme accordait aux premières une somme inférieure des deux tiers à celle que le gouvernement considérait comme le strict nécessaire, et il fondait cette distinction de traitement sur une caractéristique indépendante de la volonté de ces personnes, à savoir leur âge.

Avant d'amorcer l'analyse du prochain facteur contextuel, je tiens à examiner la question du fardeau de la preuve et de la preuve requise pour établir l'existence d'une violation de la *Charte canadienne*. Madame le Juge en chef est manifestement influencée par ce qu'elle considère être l'absence de preuve, émanant d'autres personnes que M<sup>me</sup> Gosselin, au soutien des prétentions reprochant l'existence d'effets préjudiciables. Il me semble qu'elle est également influencée par le fait d'ordre procédural que la demande de M<sup>me</sup> Gosselin est un recours collectif.

prove the existence of a group of persons harmed by facts deriving from a common origin: P.-C. Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), at p. 400. Ms. Gosselin obtained authorization, and that authorization is not a live issue in this appeal, so it is established that she has proved the existence of such a group before the court. While even respecting the common law mechanism it is not necessary that common issues predominate or that the class members be identically situated *vis-à-vis* the opposing party (*Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 39, *per* McLachlin C.J.), the legislature in Quebec deliberately departed from the conception of common interest by which all points at issue must be identical, questions of law as well as questions of fact. The legislative intention was for the class action to apply where the problem raised by a member of the group resembles without being identical to those raised by other members. See Lafond, *supra*, at pp. 405-6; *Code of Civil Procedure*, R.S.Q., c. C-25, art. 1003(a). The question of the extent of individual disadvantage suffered would become relevant much later, when calculating damages. At this stage, however, it would be a departure from past jurisprudence for this Court to refuse to find a *Canadian Charter* breach on the basis that the claimant had not proven disadvantage to enough others. As the Chief Justice wrote in *Sauvé*, *supra*, at para. 55: “Even one person whose *Charter* rights are unjustifiably limited is entitled to seek redress under the *Charter*.”

### (iii) Ameliorative Purpose

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The respondent argues that the purpose of this legislation was ameliorative in that it was meant to improve the situation of unemployed youths through academic and experiential benefits, as opposed to

Au Québec, il est clair que la personne qui demande l'autorisation d'intenter un recours collectif doit prouver l'existence d'un groupe de personnes lésées par des faits ayant une origine commune : P.-C. Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), p. 400. Madame Gosselin a obtenu l'autorisation requise et il ne s'agit pas d'une question en litige dans le présent pourvoi. En conséquence, elle a prouvé l'existence d'un tel groupe devant les tribunaux. Bien qu'il ne soit pas nécessaire (et ce même suivant les règles de la common law applicables en la matière) que les questions communes prédominent, ni que les membres du groupe soient dans une situation identique vis-à-vis de la partie adverse (*Western Canadian Shopping Centres Inc. c. Dutton*, [2001] 2 R.C.S. 534, 2001 CSC 46, par. 39, le juge en chef McLachlin), le législateur québécois a délibérément dérogé à la notion d'intérêt commun, notion requérant que toutes les questions — juridiques et factuelles — soient identiques. L'intention du législateur était d'autoriser les recours collectifs lorsque le problème soulevé par un membre du groupe ressemble à ceux soulevés par les autres membres, sans pour autant être identique. Voir Lafond, *op. cit.*, p. 405-406; al. 1003a) du *Code de procédure civile*, L.R.Q., ch. C-25. La question de l'étendue du désavantage subi par chacun devient pertinente beaucoup plus tard, au moment de la détermination des dommages-intérêts. À cette étape-ci, toutefois, constituerait une dérogation à la jurisprudence antérieure de notre Cour le fait de refuser de conclure à l'existence d'une violation de la *Charte canadienne* au motif que l'appelante n'aurait pas établi qu'un nombre suffisamment grand d'autres personnes ont elles aussi subi un désavantage. Comme l'a souligné le Juge en chef dans l'arrêt *Sauvé*, précité, par. 55 : « L'atteinte portée sans justification aux droits garantis ne fût-ce que d'une seule personne fonde celle-ci à demander réparation en vertu de la *Charte*. »

### (iii) L'objet améliorateur

L'intimé affirme que le texte de loi avait un objet améliorateur en ce qu'il visait à améliorer la situation des jeunes chômeurs au moyen de mesures de formation et d'expérience de travail, plutôt

exclusively pecuniary assistance. Quite simply, this is not a useful factor in determining whether this legislation's differential treatment was discriminatory. In *Law, supra*, Iacobucci J. held that a piece of legislation might be less harmful to a group's dignity if its purpose or effect is to help a more disadvantaged person or group in society. In that case, the fact that the purpose of the legislation was to aid elderly widows meant that the impact on the dignity of those under the age of 35 was lessened. Such is not the case here. In this case, the legislature has differentiated between the appellant's group and other welfare recipients based on what it claims is an effort to ameliorate the situation of the very group in question. Groups that are the subject of an inferior differential treatment based on an enumerated or analogous ground are not treated with dignity just because the government claims that the detrimental provisions are "for their own good". If the purpose and effect of the distinction really are to help the group in question, the government should be able to show a tight correspondence between the grounds upon which the distinction is being made and the actual needs of the group. Here, no correspondence has been shown between the lower benefit and the actual needs of the group, even though it may have been established that the programs were themselves beneficial. The only logical inference for the differential treatment is that younger welfare recipients will not respond as positively to training opportunities and must be coerced by punitive measures while older welfare recipients are expected to respond positively to incentives.

(iv) Nature of the Interest Affected

The more important the interest that is affected by differential treatment, the greater the chance that such differential treatment will threaten a group's self-worth and dignity. This determination will

que par une assistance exclusivement financière. Il ne s'agit vraiment pas d'un facteur utile pour décider si le traitement différent prévu par le texte de loi était discriminatoire. Dans l'arrêt *Law*, précité, le juge Iacobucci a conclu qu'un texte de loi pourrait avoir un effet préjudiciable moins grand sur la dignité d'un groupe si ce texte a pour objet ou effet d'aider des personnes ou groupes plus défavorisés dans notre société. Dans cette affaire, le fait que l'objet de la loi en litige était de venir en aide aux veuves âgées avait pour effet d'atténuer l'incidence de cette loi sur la dignité des personnes de moins de 35 ans. Ce n'est pas le cas en l'espèce. Dans la présente affaire, la législature a établi une distinction entre le groupe dont fait partie l'appelante et les autres bénéficiaires d'aide sociale en se fondant sur ce qu'elle affirme être un effort d'amélioration de la situation du groupe en question. Un groupe qui fait l'objet d'un traitement différent et moins favorable, fondé sur un motif énuméré ou un motif analogue, n'est pas traité avec dignité du seul fait que le gouvernement prétend avoir pris ses dispositions préjudiciables « pour le bien du groupe ». Si la distinction a réellement pour objet et pour effet de venir en aide au groupe en question, le gouvernement devrait être en mesure d'établir une correspondance étroite entre les motifs sur lesquels la distinction est fondée et les besoins véritables du groupe. En l'espèce, on n'a pu démontrer aucune correspondance entre les prestations inférieures et les besoins réels du groupe, même si on a peut-être été en mesure d'établir que les programmes étaient en soi utiles. La seule inférence logique qu'il est possible de tirer de la différence de traitement est que les jeunes bénéficiaires d'aide sociale ne répondent pas aussi favorablement aux occasions de formation que leurs aînés et qu'ils doivent être contraints à y participer au moyen de mesures pénalisantes, alors qu'on peut escompter que les bénéficiaires plus âgés répondront positivement aux incitatifs.

(iv) La nature du droit touché

Plus le droit touché par le traitement différent est important, plus il y a de risques que ce traitement menace l'estime de soi et la dignité du groupe visé. Pour décider si c'est le cas, il faut

generally require both a qualitative assessment of the interest affected and a quantitative inquiry as to the extent to which it is denied to the claimant. This case deals with a social assistance program which, despite the admitted existence of a secondary objective of helping people integrate into the workforce, has as its stated purpose the provision of the basic necessities for those in need. Thus, when the government creates a distinction that in some cases will result in people receiving only one third of what it has deemed to be the bare minimum for the sustenance of life, the effect on the members of the group is severe. As Iacobucci J. held in *Law, supra*, citing L'Heureux-Dubé J. in *Egan, supra*: “the discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question” (para. 74). Here, there is an obvious and important interest in having enough money to assure one’s own survival.

généralement procéder à la fois à une appréciation qualitative du droit touché et à une analyse quantitative visant à déterminer dans quelle mesure ce droit a été refusé au demandeur. Le présent pourvoi porte sur un programme d’aide sociale qui, bien qu’on lui ait reconnu un objectif secondaire — savoir celui d’aider les gens à s’intégrer dans la population active —, avait comme objectif explicite de pourvoir aux besoins fondamentaux des personnes nécessiteuses. Par conséquent, lorsque le gouvernement crée une distinction qui, dans certains cas, a pour effet que des personnes reçoivent seulement le tiers de la somme que le gouvernement lui-même a jugée constituer le strict minimum dont a besoin une personne pour subvenir à ses besoins, l’effet de cette distinction sur les membres du groupe concerné est sérieux. Comme a conclu le juge Iacobucci dans l’arrêt *Law*, précité, par. 74, citant les propos suivants du juge L’Heureux-Dubé dans *Egan*, précité : « on ne pouvait évaluer pleinement le caractère discriminatoire d’une différence de traitement sans mesurer non seulement l’importance économique, mais aussi l’importance sur le plan de la société et de la constitution, du droit ou des droits auxquels les dispositions en question ont porté atteinte ». En l’espèce, un droit évident et important est en jeu, soit celui des individus de disposer de suffisamment d’argent pour assurer leur subsistance.

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In *Law*, the Court noted that the purpose and function of the impugned CPP provisions were not to remedy the immediate financial need experienced by widows and widowers, but rather to enable older widows and widowers to meet their basic needs in the long term. In this case, while it is admitted that dealing with long-term dependency is one of the legislation’s objectives, the short-term remedying of immediate financial needs continues to play a dominant role in the objectives of the legislation. The difference in the nature and importance of the interest affected — provision for basic needs immediately as opposed to over the long term — is one of the crucial distinctions between the present case and *Law*. The effect of the distinction in the present case is that the claimant and others like her would have had their income far below not just the government’s poverty line, but its basic survival amount. A

Dans l’arrêt *Law*, la Cour a précisé que l’objet et la fonction des dispositions contestées du RPC n’étaient pas de pourvoir aux besoins financiers immédiats des veuves et des veufs, mais plutôt de permettre aux veuves et aux veufs plus âgés de subvenir à long terme à leurs besoins essentiels. Dans le présent pourvoi, quoique l’on reconnaisse que l’un des objectifs du texte de loi soit de lutter contre la dépendance chronique à l’aide sociale, répondre à court terme aux besoins financiers immédiats continue d’être un aspect primordial des objectifs de ce texte de loi. La différence en ce qui concerne la nature et l’importance du droit touché — à savoir la satisfaction immédiate, plutôt qu’à long terme, des besoins essentiels — est l’une des distinctions cruciales entre la présente affaire et l’arrêt *Law*. L’effet de la distinction en l’espèce est que l’appelante et les personnes dans sa situation

genuine contextual approach will appreciate this distinction and will not find the result determined by the apparent similarities in that both cases address an age distinction for a government benefit.

In her submissions, the respondent argues that it was not the creation of a lower base level of support for young people that was responsible for the deplorable situation in which many of them found themselves during the early 1980s. Instead, she argues, what was being offered were skills to allow young persons to enter the workforce, thereby reinforcing their dignity and self-worth:

[TRANSLATION] . . . work is universally recognized as an essential component of human dignity. . . .

This statement says nothing about the differential treatment of those offered opportunities to obtain training or work experience. Furthermore, what much of the government's reasoning neglects is that the global economic situation that created the need for a program to help young people was characterized by the fact that there were no jobs available. The reason that these young people were not in the labour force was not exclusively that their skills were too low, or that they were undereducated, but that there were no jobs to be had. This is not to question the wisdom of the government's programs, but to emphasize that the effect that the maintenance of this distinction had on the members of the group in question was real and severe given the economic context of the time. Even if one were to accept, as I do not, that the government's positive intention was a significant factor in diminishing the impact of the impugned law on human dignity, or that there was no implicit stereotype that young persons would not have participated in training programs absent severe deprivation, any reading of the evidence indicates that it was highly improbable that a person under 30,

étaient susceptibles d'avoir un revenu bien inférieur non seulement au seuil de pauvreté établi par le gouvernement, mais également à la somme considérée par celui-ci comme le minimum essentiel pour survivre. Une véritable démarche contextuelle tient compte de cette distinction et ne laissera pas le résultat être dicté par les apparentes similitudes entre les deux affaires, à savoir le fait qu'il s'agit dans les deux cas d'une distinction fondée sur l'âge, qui détermine le droit à une prestation gouvernementale.

Dans ses observations, l'intimé fait valoir que la situation déplorable dans laquelle se trouvaient de nombreux jeunes au début des années 80 ne résultait pas de l'établissement de niveaux d'assistance moins élevés. À son avis, on donnait plutôt aux jeunes la chance d'acquérir des compétences visant à leur permettre de s'intégrer dans la population active et ainsi de renforcer leur dignité et leur estime de soi :

. . . le travail est universellement reconnu comme une composante essentielle de la dignité humaine . . .

Cette affirmation ne renseigne en rien sur le traitement différent réservé à ceux à qui on offrait la possibilité d'obtenir de la formation et de l'expérience. En outre, un point à propos duquel le raisonnement du gouvernement est pour l'essentiel muet est le fait que la conjoncture générale, qui avait donné naissance au besoin d'établir un programme d'aide pour les jeunes, se caractérisait par l'absence d'emplois. La raison pour laquelle ces jeunes ne faisaient pas partie de la population active n'était pas exclusivement le fait qu'ils possédaient des compétences ou des études insuffisantes, mais aussi le fait qu'il n'y avait pas d'emplois disponibles. L'idée n'est pas de mettre en doute la sagesse des programmes du gouvernement, mais de bien faire ressortir que le maintien de la distinction a eu une incidence réelle et sérieuse sur les membres du groupe en question, vu le contexte économique de l'époque. Même si on accepte — ce que je ne fais pas — que l'intention positive du gouvernement a contribué de façon importante à réduire l'incidence de la mesure législative contestée sur la dignité humaine, ou encore qu'il n'existait aucun stéréotype implicite fondé sur l'idée que les

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with the best intentions, could at all times until he or she was 30 years old be registered in a program and therefore receive the full subsistence amount. Not all programs were open to each welfare recipient, and there would inevitably be waiting periods between the completion of one program and the start of another. During such periods, persons under 30 would clearly be exposed to deep poverty unlike persons 30 and over, in a way going directly to their human dignity and full participation as equally valued members of society.

jeunes adultes ne participeraient pas aux programmes de formation à moins de risquer de graves privations, il ressort de la preuve, peu importe l'angle sous lequel on l'examine, qu'il était hautement improbable qu'une personne de moins de 30 ans, aussi déterminée fut-elle, aurait pu à tout moment jusqu'à son trentième anniversaire être inscrite à un programme et recevoir le plein montant des prestations. Les divers programmes n'étaient pas ouverts à tous les bénéficiaires d'aide sociale et il y avait inévitablement des périodes d'attente entre la fin d'un programme et le début d'un autre. Durant ces intervalles, les moins de 30 ans, contrairement à leurs aînés, étaient clairement exposés à souffrir d'extrême pauvreté, et ce d'une manière affectant directement leur dignité humaine et les empêchant d'être considérés comme des membres à part entière de la société.

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The situation of Ms. Gosselin herself is illustrative of the manner in which s. 29(a) operated and affected her basic human dignity. There is no necessity for her to bring evidence of actual deprivation of other named welfare recipients under the age of 30. From the inception of the legislative scheme in question, Ms. Gosselin spent some months participating in the programs, receiving full benefits, and some months between programs, receiving a reduced amount in benefits. During the times that she was participating in the programs, she benefited from the experience that the programs offered, as well as the increase in benefits that such participation provided her. But, being a person under 30 years of age, much of the time she was living in fear of being returned to the reduced level of support. At certain times, she was not immediately capable of entering into a program; then, as well as when a program ended, she was left to fall back on the lower benefit. When she was given the opportunity of participating in a program, she took advantage of it. But if her participation in a particular program did not work out, as when she discovered that she had an allergy to animals and could no longer work at the pet store, she was left to survive on the reduced amount until another placement was made available to her. The presumption that she could rely on her mother was not based on true fact. She was in reality forced

La situation de M<sup>me</sup> Gosselin permet d'illustrer l'application de l'al. 29a) et la façon dont il portait atteinte à sa dignité fondamentale. Elle n'est pas tenue de prouver que d'autres bénéficiaires d'aide sociale nommément désignés et âgés de moins de 30 ans ont subi des privations concrètes. Dès l'entrée en vigueur du régime légal en question, M<sup>me</sup> Gosselin a participé aux programmes pendant un certain nombre de mois au cours desquels elle recevait le plein montant des prestations, alors que durant les mois où les programmes n'étaient pas offerts elle touchait des prestations réduites. Pendant les périodes où elle a pris part aux programmes, elle a profité de l'expérience que ces programmes lui permettaient d'acquérir ainsi que d'une majoration de ses prestations. Cependant, comme elle avait moins de 30 ans, elle vivait la plupart du temps dans la crainte de voir ses prestations réduites. Parfois, il lui était impossible de s'inscrire immédiatement à un programme. À ces moments, ainsi que dans les cas où un programme prenait fin, elle recommençait à toucher les prestations réduites. Lorsqu'elle a eu l'occasion de participer à un programme, elle en a profité. Cependant, si sa participation à un programme donné ne fonctionnait pas, mentionnons par exemple la fois où elle a découvert qu'elle était allergique aux animaux et a dû cesser de travailler à l'animalerie, elle devait subvenir à ses besoins à l'aide des prestations réduites jusqu'au prochain placement

to survive on less than the recognized minimum received by those 30 and over.

This threat to her living income, described by a government witness as “the stick” to accompany “the carrot”, caused a great deal of stress to the appellant. This additional stress, which was not experienced by those recipients 30 and over, dominated the appellant’s life. Even when she was able to live with her mother, the arrangement was not ideal. It was in fact a situation she expended a great deal of energy in avoiding. At certain times, living with her mother was not even an option, as when the rules in her mother’s housing changed, preventing the appellant from sharing her mother’s one-bedroom apartment. Undoubtedly, this is a situation that would be stressful for any person, but for the purposes of s. 15 what made the appellant’s experience demeaning was the fact that she was placed in a position that the government itself admits is a precarious and unliveable one, while it provided that older recipients of social assistance would be permitted to participate in at least one of the same programs and to receive an equivalent increase in benefits. Older recipients did not suffer a massive decrease in their benefits for failure to participate in a self-improvement program. This distinction was made simply on the basis of age, not need, opportunity or personal circumstances.

I wish to reiterate that, as this Court’s jurisprudence makes clear, the fourth contextual inquiry focuses on the particular interest denied or limited in respect of the claimant, not the societal interests engaged by the legislature’s broader program or another particular benefit purportedly being provided to the claimant. In my view, the interests that the Chief Justice discusses under the fourth inquiry of the *Law* test at para. 65 belong properly under the s. 1 justification. The interest denied to the

professionnel. La présomption selon laquelle elle pouvait compter sur l’aide de sa mère ne reposait sur aucun fait concret. En réalité, elle était contrainte de subvenir à ses besoins au moyen de ressources inférieures au minimum reconnu, que recevaient par ailleurs les 30 ans et plus.

Cette menace à son revenu, qu’un témoin du gouvernement a décrit comme « le bâton » accompagnant « la carotte », a beaucoup stressé l’appelante. Ce stress additionnel, que ne vivaient pas les bénéficiaires de 30 ans et plus, a dominé la vie de l’appelante. Même lorsqu’elle a pu vivre chez sa mère, ce n’était pas l’arrangement idéal. C’était en fait une situation qu’elle cherchait énergiquement à éviter. À certains moments, vivre chez sa mère n’était même pas une possibilité, notamment lorsque des modifications apportées aux règlements de l’immeuble où celle-ci habitait l’ont empêchée de partager l’appartement de sa mère, qui ne comptait qu’une chambre à coucher. Il ne fait pas de doute qu’une telle situation serait stressante pour n’importe qui, mais, pour l’application de l’art. 15, ce qui a rendu humiliante l’expérience vécue par l’appelante est le fait qu’elle a été placée dans une situation que le gouvernement reconnaît lui-même comme précaire et invivable, alors qu’il permettait aux bénéficiaires d’aide sociale plus âgés de participer à au moins un de ces mêmes programmes et de profiter de la même majoration de leurs prestations. Ces bénéficiaires ne subissaient pas de réduction massive de leurs prestations s’ils ne participaient pas à un programme d’amélioration de leur situation personnelle. On a établi cette distinction sur le seul fondement de l’âge des personnes visées et non en fonction de leurs besoins, de leurs possibilités ou de leur situation personnelle.

Je tiens à rappeler que, comme l’indique clairement la jurisprudence de notre Cour, la quatrième analyse contextuelle porte sur le droit particulier dont le demandeur se voit privé entièrement ou partiellement, et non sur les intérêts sociétaux que sert l’ensemble du programme du législateur ou sur un autre avantage particulier censément fourni au demandeur. À mon avis, les droits et intérêts examinés par le Juge en chef, au par. 65, en application du quatrième volet du critère établi dans *Law*, relèvent

appellant in this case was not “faith in the usefulness of education”, but rather welfare payments at the government’s own recognized subsistence level. Consideration of any “positive impact of the legislation” belongs in the proportionality analysis at s. 1.

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In conclusion, the appellant has shown that in certain circumstances, and in her circumstances in particular, there were occasions when the effect of the Regulation differentiation between those under 30 years of age and those 30 and over was such that beneficiaries under 30 could objectively be said to have experienced governmental treatment that failed to respect them as full persons. Given that this differential treatment was based on the enumerated ground of age, it was already suspect for the purposes of s. 15. The fact, among others, that no matter what she did, a beneficiary under 30 would never receive the same benefit as a beneficiary 30 or over participating in a similar program confirms, from the standpoint of the reasonable person, that such treatment would affect one’s own feeling of self-worth. I would therefore find that the distinction made by s. 29(a) of the Regulation is discriminatory.

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It can be argued that the government could not design a perfect program, and that in a program such as this, some people are bound to fall through the cracks. Indeed, the Chief Justice accepts this argument, noting that a government need not achieve a perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group. But in light of the importance of the interest affected, this should not provide a bar to a finding that Ms. Gosselin’s dignity was adversely affected. The severe harm suffered by the appellant as a result of the age-based distinction far exceeds the margin of imperfection *Iacobucci J.* contemplated in *Law, supra*, at para. 105. The respondent’s claim that such treatment was in the best interest of the appellant is better left to the s. 1 analysis where the government

plutôt de l’étape de la justification au regard de l’article premier. Le droit nié à l’appellant en l’espèce n’était pas la « foi en l’utilité de l’instruction », mais plutôt des prestations d’aide sociale correspondant au niveau de subsistance reconnu par le gouvernement lui-même. La prise en considération de « l’effet positif de la mesure législative » doit se faire à l’étape de l’analyse de la proportionnalité dans le cadre de l’examen fondé sur l’article premier.

En conclusion, l’appelante a démontré que, dans certaines circonstances et particulièrement dans sa situation personnelle, il y a eu des occasions où l’effet de la différence établie par le Règlement entre les moins de 30 ans et les 30 ans et plus était tel qu’on pourrait objectivement affirmer que les premiers ont été traités par le gouvernement d’une manière qui ne les respectait pas en tant que citoyens à part entière. Comme ce traitement différent était fondé sur un motif énuméré, à savoir l’âge, il était déjà suspect pour l’application de l’art. 15. Le fait, notamment, qu’une bénéficiaire de moins de 30 ans ne pourrait jamais, quoi qu’elle fasse, recevoir des prestations égales à celles reçues par les bénéficiaires de 30 ans et plus participant à un programme similaire vient confirmer que, considéré du point de vue d’une personne raisonnable, ce traitement avait pour effet de miner l’estime de soi de l’intéressée. En conséquence, j’estime que la distinction établie par l’al. 29a) du Règlement est discriminatoire.

Il est possible de prétendre que le gouvernement n’était pas en mesure d’élaborer un programme parfait et que, dans l’application d’un programme comme celui qui nous intéresse, certaines personnes vont inmanquablement être laissées de côté. D’ailleurs, le Juge en chef accepte cet argument, soulignant qu’il n’est pas nécessaire que les programmes gouvernementaux de prestations correspondent parfaitement aux besoins et à la situation véritables du groupe demandeur. Toutefois, vu l’importance du droit touché, cet argument ne saurait empêcher de conclure qu’il y a eu atteinte à la dignité de M<sup>me</sup> Gosselin. Le grave préjudice subi par l’appelante en raison de la distinction fondée sur l’âge excède considérablement le degré d’inadéquation envisagé par le juge *Iacobucci* dans l’arrêt *Law*,

can argue that the adverse effects that the legislation had on the appellant's dignity were justifiable given the practical, economic and social reality of designing a complex social assistance program. Indeed, this sort of reasoning is typical of reasoning under the *Oakes* test, at minimal impairment or proportionality, to determine whether a breach, once found, is justifiable: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. It is not what we associate with s. 15 reasoning, and in this case serves to make sustaining a breach much more onerous. As I noted earlier, the burden of proof is significant, too. The Chief Justice appears to believe that the appellant has the onus, under s. 15(1), to demonstrate not only that she is harmed, but also that the government program allows more than an acceptable number of other individuals to fall through the cracks. Given the government's resources, it is much more appropriate to require it to adduce proof of the importance and purpose of the program and its minimal impairment of equality rights in discharging its burden under s. 1.

### (3) Section 1

Since it is found that the appellant's equality rights were infringed by the legislation, the burden falls on the government to prove that such a limit on her rights was a reasonable one that is demonstrably justifiable in a free and democratic society; see *Oakes*, *supra*, at pp. 136-37. In order to demonstrably justify such a limit, the government must show that the provision pursues an objective that is sufficiently important to justify limiting a *Charter* right, and that it does so in a manner that is (1) rationally connected to that objective, (2) impairs the right no more than is reasonably

par. 105. Il est préférable d'examiner dans le cadre de l'analyse fondée sur l'article premier l'argument de l'intimé selon lequel ce traitement était dans l'intérêt de l'appelante, le gouvernement pouvant alors plaider que les effets préjudiciables du texte de loi sur la dignité de l'appelante étaient justifiables compte tenu des réalités pratiques, sociales et économiques qui entrent en jeu dans l'établissement d'un complexe programme d'aide sociale. De fait, cet argument est typique du genre de raisonnement qui est fait dans l'application du critère établi dans *Oakes*, à l'étape de l'atteinte minimale ou de la proportionnalité, pour décider si la violation dont l'existence a été établie est justifiable ou non : *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713. Il ne s'agit pas d'un raisonnement qu'on associe à l'analyse fondée sur l'art. 15 et, en l'espèce, il alourdit considérablement la tâche d'établir l'existence d'une violation. Comme je l'ai souligné plus tôt, la question de la charge de la preuve est un facteur important. Le Juge en chef semble croire que l'appelante est tenue, pour l'application du par. 15(1), non seulement de prouver qu'elle a subi un préjudice, mais aussi que le programme gouvernemental laisse sans protection un nombre inacceptable d'autres personnes. Compte tenu des ressources dont dispose le gouvernement, il convient davantage d'obliger celui-ci, lorsqu'il est appelé à s'acquitter du fardeau qui lui incombe dans le cadre de l'article premier, à faire la preuve de l'objet et de l'importance de son programme et à établir que celui-ci ne porte qu'une atteinte minimale aux droits à l'égalité.

### (3) L'article premier

Vu la conclusion que le texte de loi a porté atteinte aux droits à l'égalité de l'appelante, il incombe en conséquence au gouvernement d'établir qu'il s'agit d'une limite raisonnable et justifiée dans le cadre d'une société libre et démocratique : voir *Oakes*, précité, p. 136-137. Pour justifier une telle limite, le gouvernement doit démontrer que la disposition vise un objectif suffisamment important pour justifier la restriction d'un droit garanti par la *Charte* d'une manière (1) qui a un lien rationnel avec cet objectif, (2) qui ne porte pas atteinte à ce droit plus qu'il est raisonnablement nécessaire de le faire pour

necessary to accomplish the objective, and (3) does not have a disproportionately severe effect on the persons to whom it applies; see *Oakes*, at pp. 138-39.

261 These criteria will be applied with varying levels of rigour depending on the context of the appeal; see *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. In this case, we are presented with a law that attempts to remedy the financial situation of the chronically unemployed by providing them with cash benefits and training in order to ensure their subsistence and help them integrate into the workforce. The development of the training programs was obviously a complex process that involved the balancing of various interests, the expenditure of large sums of public money, and a consideration of many variables. Social policy is by no means an exact science; a certain degree of deference should be accorded in reviewing this type of legislation. That being said, the government does not have *carte blanche* to limit rights in the area of social policy.

262 In *Thomson Newspapers*, I held that part of what may lead to deference under a contextual approach to s. 1 is the fact that the legislation is meant to protect a vulnerable group. In such a case, the importance of deferring to the government's decision in balancing competing interests is highlighted. However, in this case, the government claims that the group that it is in fact trying to protect is the very same group whose rights have been infringed. This should militate against an overly deferential approach. If the government wishes to help people by infringing their constitutional rights, the courts should not, given the peculiarities of such an approach, be overly deferential in assessing the objective of the impugned provision or whether the means used were minimally impairing to the right in question.

réaliser l'objectif et (3) qui n'a pas d'effets préjudiciables disproportionnés sur les personnes visées : voir *Oakes*, précité, p. 138-139.

Ces critères sont appliqués de façon plus ou moins stricte, selon le contexte de l'appel : voir *Thomson Newspapers Co. c. Canada (Procureur général)*, [1998] 1 R.C.S. 877. Dans le présent pourvoi, le texte de loi contesté tente de remédier à la situation financière des chômeurs chroniques en leur offrant des prestations et des programmes de formation visant à les aider à subvenir à leurs besoins et à s'intégrer dans la population active. L'élaboration des programmes de formation fut de toute évidence une tâche complexe, qui a nécessité la conciliation des divers intérêts en jeu, des dépenses considérables sur les fonds publics ainsi que la prise en considération de nombreuses variables. La politique sociale est loin d'être une science exacte; il faut faire montre d'une certaine déférence dans le contrôle de mesures législatives de ce type. Cela ne veut toutefois pas dire que le gouvernement a carte blanche pour restreindre les droits dans le domaine des politiques sociales.

Dans l'arrêt *Thomson Newspapers*, précité, j'ai jugé qu'une des raisons susceptibles de justifier de faire montre de déférence dans l'application d'une approche contextuelle à l'égard de l'article premier serait le fait que le texte de loi contesté est censé protéger un groupe vulnérable. Dans un tel cas, l'importance de faire preuve de déférence à l'égard de la décision prise par le gouvernement pour concilier les divers intérêts en jeu ressort avec acuité. Cependant, en l'espèce, le groupe que le gouvernement prétend en fait protéger est précisément le groupe dont les droits ont été lésés. Cette constatation devrait militer contre la manifestation d'une trop grande déférence. Si le gouvernement désire aider des gens en portant atteinte à leurs droits constitutionnels, les tribunaux ne devraient pas, compte tenu de la singularité d'une telle démarche, faire montre d'une trop grande déférence lorsqu'ils apprécient l'objectif de la disposition contestée ou se demandent si les moyens utilisés portent le moins possible atteinte au droit en question.

(i) Objective — Pressing and Substantial

In his reasons, Robert J.A. held that for the purposes of the *Oakes* test, it is the objective of the distinction that should be analysed. In doing so, he determined that the distinction served two purposes: (1) to avoid attracting young adults to social assistance, and (2) to facilitate integration into the workforce by encouraging participation in the employment programs. The appellant argues that the objective of the distinction should be analysed in light of the legislation as a whole, in particular, the explicit objective of the legislation under s. 6 to provide supplemental aid to those who fall below a subsistence level. Furthermore, she argues that the objective of the legislation cannot, pursuant to this Court's decision in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, be found to have "evolved". The respondent agrees with the double objective analysis of Robert J.A.

In my view, the double objective analysis of Robert J.A. is correct. While the s. 1 analysis must not take place in a contextual vacuum, when a specific legislative provision has been found to infringe a *Charter* right, the s. 1 analysis must focus on the objective of that particular provision. In cases such as *Vriend, supra*, in which this Court focussed on the legislation as a whole, it did so because the legislation was being challenged for underinclusion; thus, there was no specific provision to be considered. Here, s. 29(a) is clearly the impugned provision. The s. 1 analysis must therefore focus on the distinction it creates. If too much weight is given to the objective of the legislation as a whole, this will lead the court into an inquiry of what would be the best way to formulate an entire piece of legislation. That is the province of the legislature.

While the "shifting emphasis" argument accepted by Robert J.A. seems to suggest a novel approach to the s. 1 analysis, I believe it was appropriate to accept it in this case. This Court has normally held that the objectives of legislation cannot be found to have

(i) Un objectif urgent et réel

Dans ses motifs, le juge Robert de la Cour d'appel a estimé que, aux fins d'application du critère formulé dans *Oakes*, c'est l'objectif de la distinction qui doit être analysé. Dans son analyse, il a constaté que la distinction visait deux objectifs : (1) éviter l'effet d'attraction du régime d'aide sociale sur les jeunes adultes; (2) favoriser l'intégration de ceux-ci dans la population active en encourageant leur participation aux programmes d'emploi. L'appelante plaide que l'objectif de la distinction devrait être analysé au regard de l'ensemble des mesures législatives pertinentes, plus particulièrement l'objectif explicite prévu à l'art. 6 de la Loi, à savoir fournir une aide complémentaire aux personnes dont les moyens de subsistance sont inférieurs à un niveau donné. De plus, elle affirme que, conformément à l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295 de notre Cour, on ne saurait conclure que l'objectif de la loi a « changé ». L'intimé souscrit à l'analyse du juge Robert basée sur l'existence de deux objectifs.

À mon avis, l'analyse préconisée par le juge Robert est bien fondée. Bien que l'analyse relative à l'article premier ne doive pas être effectuée sans contexte, une fois qu'il a été jugé qu'une disposition législative particulière viole un droit garanti par la *Charte*, cette analyse doit s'attacher à l'objectif de la disposition en question. Dans des arrêts comme *Vriend*, précité, où notre Cour a centré son analyse sur l'ensemble du texte de loi, étant donné qu'on reprochait à celui-ci d'avoir une portée trop limitée, il n'y avait en conséquence aucune disposition particulière devant être examinée. En l'espèce, l'al. 29a) est clairement la disposition contestée. L'analyse relative à l'article premier doit donc porter sur la distinction créée par cette disposition. Si le tribunal accorde une importance trop grande à l'objectif visé par l'ensemble du texte de loi, il se demandera quelle est la meilleure façon de formuler la loi au complet, tâche qui relève du législateur.

Bien que l'argument de « l'objet changeant » retenu par le juge Robert semble suggérer l'application d'une nouvelle approche à l'égard de l'analyse relative à l'article premier, j'estime qu'il convenait d'accueillir cet argument en l'espèce. Notre

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evolved over time. But in this case, it was a legislative act that signalled the change in emphasis: *Big M Drug Mart, supra*. In my view, the 1984 changes to the Act, which established the educational programs and provided for an increase in assistance for those who participated in them, constituted a legislative signal that the objective of the distinction in s. 29(a) had, to a certain degree, shifted.

266 Having found that the objective of the distinction had shifted towards encouraging the integration of young people into the workforce, and given the dire situation of that segment of the population during those years, I would find the objectives of s. 29(a) to be pressing and substantial.

(ii) Rational Connection

267 The appellant attacks the rational connection between the means used by the government and its dual objective on two fronts. First, she argues that the choice of age 30 as the point of distinction was made arbitrarily and that it had no bearing on the means by which the government would achieve its objective. She argues that the government distinguished beneficiaries on the basis of age 30 simply because that distinction already existed, and therefore, in the words of a government witness, because [TRANSLATION] “an opportunity was provided”. She also argues that the level of assistance accorded to those under 30 who did not participate in the programs was arbitrary. In her view, if the purpose of selecting a low level of assistance was to encourage participation in the programs, then there should have been enough places available in the programs to accommodate everyone under the age of 30, which there was not.

268 The respondent agrees with Robert J.A.’s conclusion that while the connection between the means and the objective might not have been shown to be particularly strong, there was a logical link between the different treatment of those under 30 and the objective of encouraging the integration of these people into the workforce. She disagrees, however,

Cour a généralement jugé qu’on ne saurait conclure que les objectifs d’un texte de loi ont changé au fil du temps. En l’espèce, toutefois, c’est une mesure législative qui a signalé le changement d’orientation : *Big M Drug Mart*, précité. À mon avis, les modifications qui ont été apportées à la Loi en 1984 pour établir les programmes de formation et majorer l’aide accordée aux personnes y participant ont constitué un signal du législateur indiquant que l’objectif de la distinction établie à l’al. 29a) avait changé jusqu’à un certain point.

Vu ma conclusion que l’objectif de la distinction avait changé et consistait à encourager l’intégration des jeunes dans la population active, et vu la situation grave dans laquelle se trouvait cette tranche de la population à l’époque en question, j’estime que les objectifs de l’al. 29a) étaient urgents et réels.

(ii) Le lien rationnel

L’appelante attaque sur deux plans le lien rationnel entre le double objectif du gouvernement et le moyen utilisé pour les réaliser. Premièrement, elle soutient que la décision de choisir l’âge de 30 ans comme critère de distinction a été prise arbitrairement et que ce choix n’avait aucun rapport avec les moyens par lesquels le gouvernement concrétiserait son objectif. À son avis, le gouvernement avait retenu ce critère de distinction parce qu’il existait déjà et parce que, pour reprendre les termes mêmes utilisés par le témoin du gouvernement, « l’occasion en fut fournie ». Elle plaide également que le niveau d’assistance accordé aux personnes de moins de 30 ans ne participant pas aux programmes avait un caractère arbitraire. Selon elle, si le versement de prestations réduites visait à inciter la participation aux programmes, ceux-ci auraient dû compter suffisamment de places pour accueillir toutes les personnes de moins de 30 ans, mais ce n’était pas le cas.

L’intimé souscrit à la conclusion du juge Robert de la Cour d’appel selon laquelle, bien qu’on n’ait peut-être pas démontré l’existence d’un lien particulièrement solide entre le moyen et l’objectif, il existait un lien logique entre le traitement différent réservé aux moins de 30 ans et l’objectif qui consistait à favoriser leur intégration dans la population

with some of his analysis, emphasizing again that the distinction made in s. 29(a) has to be analysed in the context of the rest of the legislation and the economic situation of the time.

On this issue I am again in agreement with the findings of Robert J.A. There is a logical link between the provisions of the Regulation and the objective of integrating people under 30 into the workforce. It is logical and reasonable to suppose that young people are at a different stage in their lives than those 30 and over, that it is more important, and perhaps more fruitful, to encourage them to integrate into the workforce, and that in order to encourage such behaviour, a reduction in basic benefits could be expected to achieve that objective.

(iii) Minimal Impairment

It is on the issue of minimal impairment that Robert J.A. found that the legislation could not be upheld under s. 1. Again, I find myself in substantial agreement.

First, I would agree with Robert J.A.'s comments regarding the onus that the government must meet at this stage of the analysis. When analysing social legislation, it is true that the Court should avoid second-guessing government policy. The government need not have chosen the least drastic means at its disposal. Nonetheless, it must have chosen to infringe the right as little as was reasonably possible. The respondent argues that given the government's objectives and the evidence it put forth, the methods employed were reasonable and should therefore pass the minimal impairment test. I do not believe that this is the case.

The respondent argues that by allowing people under 30 to participate in programs in order to increase their benefits to the level of those 30 and over, the government demonstrated that the needs and concerns of young social assistance recipients were given careful consideration and were respected. She rejects the alternatives proposed

active. L'intimé a cependant exprimé son désaccord avec une partie de l'analyse du juge Robert, réitérant que la distinction établie à l'al. 29a) devait être analysée au regard du reste du texte de loi et de la conjoncture de l'époque.

Sur ce point, je suis également d'accord avec les conclusions du juge Robert. Il existe un lien logique entre les dispositions du texte de loi et l'objectif d'intégration des personnes de moins de 30 ans dans la population active. Il est logique et raisonnable de supposer que ces personnes ne sont pas rendues au même stade de la vie que les 30 ans et plus, qu'il est plus important, voire plus utile, de les inciter à s'intégrer dans la population active et, enfin, qu'une réduction des prestations de base pourrait permettre de réaliser cet objectif.

(iii) L'atteinte minimale

C'est à l'étape de l'atteinte minimale que le juge Robert a conclu que le texte de loi ne pouvait être justifié au regard de l'article premier. Ici encore, je souscris pour l'essentiel à sa conclusion.

Premièrement, je fais miens les commentaires formulés par le juge Robert relativement à la preuve qui incombe au gouvernement à cette étape de l'analyse. Il est exact que, dans l'analyse d'un texte législatif à caractère social, notre Cour doit éviter de mettre en doute, à posteriori, la politique gouvernementale. Le gouvernement n'était pas obligé de choisir le moyen le moins radical dont il disposait. Néanmoins, il lui faut avoir choisi celui qui portait aussi peu atteinte au droit concerné qu'il était raisonnablement possible de le faire. Compte tenu des objectifs du gouvernement et de la preuve qu'il a présentée, l'intimé prétend que les méthodes employées étaient raisonnables et satisfont en conséquence au critère de l'atteinte minimale. Je ne crois pas que ce soit le cas.

Selon l'intimé, en permettant aux moins de 30 ans de participer à certains programmes afin qu'ils puissent hausser le montant de leurs prestations au niveau de celles des 30 ans et plus, le gouvernement a démontré qu'il avait soigneusement examiné et respecté les besoins et les préoccupations des jeunes bénéficiaires d'aide sociale. L'intimé

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by the appellant — such as the elimination of s. 29(a) or the creation of a universally conditional program — as either eliminating the objective completely or as being impossible to implement. An examination of the evidence, however, fails to demonstrate that such approaches would not have been appropriate. With regard to increasing the level of support provided to those under 30, the government insists that such an approach would have prevented it from achieving its objective of integrating young people into the workforce. This is presumably based on the assumption that there would be less incentive to enter the workforce or to participate in the programs if the full benefit was provided unconditionally. However, this remains unproven in the record. There is nothing to show why the response of beneficiaries under 30 would have been different from that of older beneficiaries, and nothing to show why integration in the workforce would have been superior for participants under 30 as compared to older participants. Witnesses for the respondent repeatedly referred to the [TRANSLATION] “attraction effect” that would result from increasing the benefits of people under 30, but they failed to adduce any evidence of studies or previous experience to justify the hypothesis. Aside from supporting the contention that the provisions reflect a discriminatory and stereotypical view of irresponsible youth, such participation by some persons among those 30 and over demonstrates that tying the programs to reduced benefits was not the only option that was available to the government.

rejette les solutions de rechange proposées par l'appelante — par exemple l'élimination de l'al. 29a) ou la création d'un programme conditionnel pour tous — soit parce qu'elles vont tout à fait à l'encontre de l'objectif visé soit parce qu'elles sont impossibles à mettre en œuvre. Cependant, l'examen de la preuve ne démontre pas que de telles mesures n'auraient pas été appropriées. Pour ce qui est de la majoration des prestations accordées aux moins de 30 ans, le gouvernement insiste sur le fait qu'une telle mesure l'aurait empêché d'atteindre son objectif d'intégration des jeunes dans la population active. Cet argument repose vraisemblablement sur l'hypothèse que l'incitation à joindre les rangs de la population active ou à participer à des programmes n'est pas aussi grande si le plein montant des prestations est versé sans condition. Toutefois, le dossier n'établit pas le bien-fondé de cet argument. Rien n'indique en quoi le comportement des bénéficiaires de moins de 30 ans aurait été différent de celui des bénéficiaires plus âgés, ni en quoi les premiers auraient joint la population active en plus grand nombre que leurs aînés. Les témoins de l'intimé ont à maintes reprises invoqué « l'effet d'attraction » qui résulterait de l'accroissement des prestations versées aux moins de 30 ans, mais ils n'ont présenté en preuve aucune étude ou expérience antérieure pour étayer cette hypothèse. En plus d'appuyer l'argument que les dispositions contestées reflètent une perception discriminatoire et stéréotypée des jeunes — qui sont considérés irresponsables —, le taux de participation parmi les 30 ans et plus démontre que le fait d'assortir la non-participation aux programmes d'une réduction de prestations n'était pas la seule solution à la disposition du gouvernement.

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I also find the argument that the reforms of 1989 which made the programs universally conditional could not have been implemented earlier to be somewhat unconvincing. When the *Charter* was passed in 1982, a three-year delay was placed on the implementation of s. 15 in recognition of the effect it could have had on government legislation and the complexity of making appropriate changes. With the passage of the omnibus *Act respecting the Constitution Act, 1982*, the government of Quebec

Je considère également assez peu convaincant l'argument selon lequel il n'aurait pas été possible d'instaurer plus tôt les réformes qui, en 1989, ont rendu les programmes conditionnels pour tous. Lors de l'édiction de la *Charte* en 1982, on avait fixé un délai de trois ans pour l'entrée en vigueur de l'art. 15, en raison de l'effet considérable qu'il était susceptible d'avoir sur les mesures législatives des gouvernements et de la difficulté d'apporter à celles-ci les modifications appropriées. Par

provided itself with two extra years to deal with the requirements of the equality provision. Therefore, as of 1982, the Quebec government had five years to consider the implications that the *Charter's* equality provision would have for its *Social Aid Act*. Although the government demonstrated that such changes took 18 to 24 months to implement, it did not demonstrate why that process could not have begun at an earlier date.

Thus, it seems to me that the above alternatives cannot be characterized as unreasonable; certainly they would also have been less impairing. However, given the complexity of designing social assistance programs, I accept that the Court should not be in the business of advocating completely new policy directions for the legislature. At the time the legislation was passed, in 1984, it seems clear that the government believed that the continued distinction between those under 30 and those 30 and over was necessary in order to achieve its objective of facilitating the integration of young people into the workforce. Nevertheless, given the availability of the alternative approaches that would have been less impairing to the right, the onus is on the government to demonstrate that the approach it took was itself minimally impairing.

Like Robert J.A., upon examination of the manner in which the legislation in question was implemented, I have come to the conclusion that the government's initiative was not designed in a sufficiently careful manner to pass the minimally impairing test. As Robert J.A. held at p. 1084, the government has failed to show:

[TRANSLATION]

(1) that it set sufficiently flexible eligibility requirements for access to the programs; [and] (2) that it acted reasonably in determining the requirements for an increase in assistance, which was only possible through participation in the measures.

l'adoption de la *Loi concernant la Loi constitutionnelle de 1982*, le gouvernement du Québec s'est donné deux années additionnelles pour respecter les exigences de la disposition relative à l'égalité. Par conséquent, à partir de 1982, le gouvernement du Québec a disposé d'une période de cinq ans pour examiner les répercussions que cette disposition aurait sur sa *Loi sur l'aide sociale*. Bien que le gouvernement ait démontré qu'il a fallu de 18 à 24 mois pour mettre en place les modifications requises, il n'a pas établi pourquoi le processus n'avait pu être amorcé plus tôt.

Par conséquent, il me semble que les solutions de rechange susmentionnées ne peuvent être qualifiées de déraisonnables; elles auraient certes été également moins attentatoires. Cependant, compte tenu de la difficulté que pose l'élaboration de programmes d'aide sociale, je reconnais qu'il n'appartient pas à la Cour de préconiser l'adoption par le législateur d'orientations politiques entièrement nouvelles. Au moment de l'adoption des mesures législatives contestées, en 1984, il semble clair que le gouvernement croyait que le maintien de cette distinction entre les 30 ans et plus et les moins de 30 ans était nécessaire pour réaliser son objectif qui était de faciliter l'intégration des jeunes dans la population active. Néanmoins, vu l'existence de solutions de rechange qui auraient été moins attentatoires au droit concerné, il incombe au gouvernement de démontrer que l'approche qu'il a retenue ne créait qu'une atteinte minimale.

Après examen de la mise en œuvre du texte de loi en question, je conclus, à l'instar du juge Robert de la Cour d'appel, que la mesure prise par le gouvernement n'avait pas été conçue avec assez de soin pour respecter le critère de l'atteinte minimale. Comme l'a affirmé le juge Robert, à la p. 1084, le gouvernement n'a pas démontré :

1) qu'on a[vait] fixé des conditions d'admissibilité suffisamment souples pour avoir accès aux programmes, [et] 2) qu'on a[vait] agi de façon raisonnable dans la détermination des conditions permettant une augmentation de l'aide, ce qui n'était possible qu'en participant aux mesures.

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In assessing whether the legislation in place was minimally impairing to the right, the first fact that comes to light is that only 11 percent of social assistance recipients under the age of 30 were in fact enrolled in the employment programs that allowed them to receive the base amount allocated to beneficiaries 30 years of age and over. This in and of itself is not determinative of the fact that the legislation was not minimally impairing, but it does bring to our attention the real possibility that the programs were not designed in a manner that would infringe upon the appellant's rights as little as is reasonably possible. In examining the record, I have found four areas in which the structure of the legislation and the programs can be shown to have been designed in a manner that was not minimally impairing of the appellant's rights.

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First, one major branch of the scheme, the Remedial Education Program, did not provide for full benefits for those who participated, leaving them \$100 short of the base benefit. Thus, the government foresaw, in the creation of its programs, that a large number of even those who participated in the programs would, in return for their efforts, continue to receive less than the amount received by those 30 and over who were not participating in the programs. As mentioned earlier, the most uneducated, the illiterate, were originally left out of this program entirely. The government argues that the amount of assistance must be examined in tandem with the government student loan and bursary program. However, because the Remedial Education students were in high school, the government witness admitted that the only money that they would receive through student loans would be to pay for specific school-related expenses such as books and school supplies. As such, the student loan program did not raise the Remedial Education participant's benefits to the same level as those 30 and over. In reality, given that almost 50 percent of participants under 30 were involved with the Remedial Education Program, this meant that a very large portion of the participants would

Lorsqu'on se demande si le texte de loi portait le moins possible atteinte au droit concerné, le premier fait qui se dégage est que seulement 11 p. 100 des bénéficiaires d'aide sociale de moins de 30 ans étaient dans les faits inscrits aux programmes qui leur permettaient de recevoir le montant de base accordé aux bénéficiaires de 30 ans et plus. En soi, ce fait ne permet pas de conclure que le texte de loi ne créait pas une atteinte minimale, mais il nous indique cependant qu'il est tout à fait possible que les programmes n'aient pas été conçus d'une façon qui permettait de porter aussi peu atteinte aux droits de l'appelante qu'il était raisonnablement possible de le faire. Dans le cours de l'examen du dossier, j'ai relevé quatre aspects des programmes et de la structure du texte de loi qui indiquent que ce texte ainsi que les programmes ont été conçus d'une façon qui ne portait pas le moins possible atteinte aux droits de l'appelante.

Premièrement, ceux qui participaient au programme Rattrapage scolaire, un important volet du régime, ne touchaient pas le plein montant des prestations, mais recevaient 100 \$ de moins que la prestation de base. Par conséquent, lors de la création des programmes, le gouvernement avait prévu qu'un grand nombre de personnes — même parmi celles participant aux programmes — continueraient de recevoir, en contrepartie de leurs efforts, une somme moindre que celle versée aux personnes de 30 ans et plus ne participant pas aux programmes. Comme je l'ai mentionné plus tôt, les personnes les moins instruites, les analphabètes, avaient au départ été complètement exclues du programme susmentionné. Le gouvernement plaide que la question du montant d'aide accordé doit être examinée en corrélation avec celle de son programme de prêts et bourses aux étudiants. Toutefois, comme les participants au programme Rattrapage scolaire étudiaient au niveau secondaire, le témoin du gouvernement a admis que les seules sommes accordées à ces personnes sous forme de prêts étudiants visaient à payer le coût de frais scolaires précis, tel l'achat de livres et de fournitures scolaires. En conséquence, le programme de prêts étudiants ne permettait pas de hausser les prestations des participants au programme Rattrapage scolaire au niveau de celles reçues par les 30 ans et

not be receiving the full amount of benefits that those 30 and over were receiving.

It might be argued that the value of the education and experience being derived from such programs cannot be calculated on a purely pecuniary basis. I would agree that the power of education can be invaluable to its recipient. However, the strength of this argument is diminished by the fact that the cost of this education is, in this case, the reduction of benefits that are supposed to guarantee certain standards of minimal subsistence. While the long-term value of the education and experience is certainly important, this must be balanced against the short-term need for survival that social assistance is intended to placate. Moreover, those people who participated in the programs who were not under 30 were not required to make a similar sacrifice.

Second, the design of the programs was not tailored in such a way as to ensure that there would always be programs available to those who wanted to participate. For instance, for a student who could not find a job after finishing school, the Remedial Education Program was only available after nine months. The On-the-job Training Program was only available after 12 months. This left the Community Work Program, which, given its very remedial nature, may not have been useful to everyone, and was prioritized for those who had been on social assistance for more than 12 months. The existence of this priority is itself evidence that the programs were not available to all applicants at all times. For someone who had completed CEGEP, the Remedial Education and On-the-job Training Programs would simply be unavailable. Even if he or she were then able to participate in the Community Work Program, this would only last for one year, after which the young social assistance recipient would, because of the 12-month limit on the program, be left with no program in which to participate. Take someone like Ms. Gosselin, whose prospects for moving into the private workforce, like many in her situation, do

plus. En réalité, étant donné que presque 50 p. 100 des participants de moins de 30 ans étaient inscrits à ce programme, ceci signifie qu'un pourcentage très élevé des participants ne recevaient pas le plein montant des prestations versées aux personnes de 30 ans et plus.

Il est possible d'affirmer qu'on ne saurait calculer sur une base purement pécuniaire la valeur de l'instruction et de l'expérience découlant de la participation à de tels programmes. Je reconnais que le pouvoir de l'instruction peut se révéler un acquis très précieux pour qui le possède. Cependant, le poids de cet argument est diminué par le fait que, en l'espèce, le prix à payer pour cette instruction est la réduction de prestations censées garantir un certain niveau de subsistance minimal. Bien que la valeur à long terme de l'instruction et de l'expérience soit certes importante, elle doit être mise en balance avec le besoin de subsistance à court terme auquel l'aide sociale est censée répondre. Qui plus est, on ne demandait pas pareil sacrifice aux personnes de 30 ans et plus qui participaient aux programmes.

Deuxièmement, les programmes n'étaient pas conçus d'une manière propre à garantir une place à toute personne désireuse d'y participer. Par exemple, les étudiants incapables de trouver un emploi après leurs études devaient attendre neuf mois avant de pouvoir participer au programme Rattrapage scolaire et 12 mois dans le cas du programme Stages en milieu de travail. Restait le programme Travaux communautaires qui, vu son caractère très ponctuel, n'était peut-être pas utile à tous et accordait la priorité aux personnes recevant de l'aide sociale depuis plus de 12 mois. L'existence même de cette priorité indique que les programmes n'étaient pas accessibles à tous les candidats en tout temps. De plus, les personnes ayant terminé leurs études collégiales (CÉGEP) n'avaient tout bonnement pas accès aux programmes Rattrapage scolaire et Stages en milieu de travail. Par ailleurs, même si ces personnes avaient eu accès au programme Travaux communautaires, la durée de la participation n'était que d'une année, au terme de laquelle le jeune bénéficiaire d'aide sociale n'avait plus, en raison de l'existence de cette limite, aucun programme auquel il pouvait participer. Si l'on prend l'exemple de M<sup>me</sup> Gosselin,

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not, unfortunately, appear to have been very promising. After one year in a Community Work Program (and, if they could find one, a year in an On-the-job Training placement), she would be unable to receive the same benefit as someone 30 or over. Thus, in reality, the system of training and education gave social assistance recipients under 30 who were able to access programs two years to get a job before they had their benefit reduced to \$170 per month — with some extra time available at a moderately reduced rate for those who had not yet received their high school diploma.

les perspectives d'emploi de cette dernière dans le secteur privé, tout comme celles de bien d'autres personnes dans sa situation, ne paraissent malheureusement pas avoir été très prometteuses. Une personne dans la situation de M<sup>me</sup> Gosselin qui aurait participé pendant un an à un programme de Travaux communautaires (et, pendant une autre année, à un stage en milieu de travail si un tel stage avait été disponible) n'aurait pas été en mesure de recevoir les mêmes prestations qu'une personne de 30 ans et plus. Par conséquent, dans les faits, les programmes de stages et de rattrapage scolaire accordaient aux bénéficiaires d'aide sociale de moins de 30 ans qui pouvaient y avoir accès une période de deux ans pour se trouver un emploi avant que leurs prestations ne soient de nouveau ramenées à 170 \$ par mois — avec possibilité d'une prorogation assortie d'un taux de prestation modérément réduit pour les personnes n'ayant pas encore reçu leur diplôme d'études secondaires.

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Another substantive flaw in the design of the programs was that faced by illiterate or severely undereducated persons, who were unable to participate in the Remedial Education Program. While ineligible for the Remedial Education Program, such persons would also face difficulty entering On-the-job Training, and would thus be left with the Community Work Program, which, as has been noted, was limited to one year. This flaw was apparently addressed in 1989 with the creation of a special literacy program, but it nonetheless serves as an example of another situation where even those participants who were willing to participate were at times unable to do so.

Un autre vice de fond de ces programmes découlait du fait que les personnes analphabètes ou possédant très peu d'instruction ne pouvaient participer au programme Rattrapage scolaire. En plus d'être inadmissibles à ce programme, ces personnes éprouvaient également de la difficulté à accéder au programme Stages en milieu de travail, ce qui ne leur laissait donc que le programme Travaux communautaires qui, comme je l'ai mentionné plus tôt, ne durait qu'une année. Bien qu'on ait apparemment remédié à ce vice en 1989 en créant un programme spécial d'alphabétisation, il s'agit néanmoins d'un autre exemple de situation où même des personnes souhaitant participer à un programme étaient parfois dans l'impossibilité de le faire.

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Third, in addition to the problems with the design of the programs, their implementation presented still more hurdles which young recipients were forced to overcome. For instance, when a person under 30 years of age found himself or herself on social assistance, he or she would have to organize a meeting with a social aid worker. An "evaluation interview" would follow, sometimes several, in order to determine what type of program would be best suited to the recipient. This process would sometimes take several weeks. Then, once it was determined which

Troisièmement, outre les problèmes qui affectaient la conception des programmes, la mise en œuvre de ceux-ci créait des obstacles supplémentaires que les jeunes bénéficiaires devaient également surmonter. Par exemple, lorsqu'une personne de moins de 30 ans devenait bénéficiaire d'aide sociale, elle devait prendre rendez-vous avec un travailleur social. Il y avait alors une « entrevue d'évaluation », parfois plusieurs, en vue de déterminer quel genre de programme conviendrait le mieux au bénéficiaire. Ce processus durait parfois plusieurs

program would be best, there was often another delay, as space in the program in which the recipient could participate had to be found. If, for instance, someone wanted to participate in the Remedial Education Program in June, he or she would have to wait until September, for school to start. In the case of the On-the-job Training Program, the process provided that one would have to wait until a suitable employer was found. Also, the employer had the final say as to whether he or she wished to hire a particular individual. This caused more delay. Once a placement was completed, this process was started all over again. Thus, in the course of his or her time on social assistance, a young person desiring to receive the full benefit of the programs would most likely spend at least a month or two on the reduced benefit.

Given the precarious situation of those on social assistance, even a short lapse in additional benefits was certainly enough to cause major difficulties in the recipients' lives, difficulties that someone 30 and over would not have to face. Ms. Gosselin herself spent a considerable amount of time between programs, this sometimes leading to periods of mental breakdown. One government witness described the situation of many of those young people on social assistance as being an existence "on the edge of capacity" — walking a tightrope along the border of aptness and inaptitude for work. Falling back onto the reduced amount was therefore a very real possibility that could have exaggerated effects on the capacity of young recipients to cope with life.

A fourth and final reason why the approach taken by the government was not reasonably minimally impairing was the fact that even though 85 000 single people under 30 years of age were on social assistance, the government at first only made 30 000 program places available. The respondent argues, and Baudouin J.A. agreed, that the government should not have been forced to open up places for everyone when it knew that not everyone would participate. I think this is right. The government did not have to prove that it had 85 000 empty chairs waiting in classrooms and elsewhere. However, the very

semaines. Ensuite, une fois déterminé le programme approprié, il y avait souvent une autre période d'attente, puisqu'il fallait trouver une place libre dans le programme en question. Les personnes qui, en juin, manifestaient le désir de participer au programme Rattrapage scolaire devaient attendre à la rentrée scolaire, en septembre, pour être en mesure de le faire. Dans le cas du programme Stages en milieu de travail, il fallait attendre de trouver un employeur approprié. De plus, c'est ce dernier qui décidait, en dernière analyse, d'engager ou non l'intéressé. Cette situation causait des délais additionnels. Une fois le stage terminé, tout ce processus recommençait. Par conséquent, les jeunes bénéficiaires d'aide sociale désireux de tirer parti pleinement des programmes devaient vraisemblablement toucher les prestations réduites pendant un mois ou deux.

Compte tenu de la situation précaire dans laquelle se trouvent les bénéficiaires d'aide sociale, même une courte interruption des prestations additionnelles était certainement suffisante pour causer d'importantes difficultés aux jeunes bénéficiaires, difficultés que n'avaient pas à subir les 30 ans et plus. Madame Gosselin a elle-même connu d'importants intervalles entre les programmes, situation qui a parfois entraîné des périodes de dépression. Un témoin du gouvernement a décrit la situation de nombreux jeunes bénéficiaires d'aide sociale en ces termes : « ils sont à la limite de la capacité » — marchant sur la corde raide entre l'aptitude et l'inaptitude au travail. Le risque de retourner aux prestations réduites était donc une possibilité très réelle et susceptible d'avoir des effets démesurés sur la capacité d'une jeune personne à affronter la vie.

Un quatrième et dernier motif pour lequel l'approche adoptée par le gouvernement ne portait pas atteinte aussi peu qu'il était raisonnablement possible de le faire aux droits de l'appelante est le fait suivant : même s'il y avait 85 000 personnes seules de moins de 30 ans recevant de l'aide sociale, le gouvernement n'avait créé initialement que 30 000 places dans ses programmes. De l'avis de l'intimé, auquel a souscrit le juge Baudouin de la Cour d'appel, le gouvernement n'était pas obligé d'ouvrir des places pour l'ensemble des bénéficiaires, sachant que tous ne participeraient pas à ces programmes. À mon

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fact that it was expecting such low levels of participation brings into question the degree to which the distinction in s. 29(a) was geared towards improving the situation of those under 30, as opposed to simply saving money. The government noted that many places did not have to be made available because 50 percent of young people were thought to be living with their parents. As noted earlier, this was not proven and if true would have left 50 percent of recipients in an unjustified state of deprivation. Also, it is by no means clear why young persons living at home would not want to take advantage of such programs if they provided them with an extra \$296 per month. Moreover, it is not clear why, if the object of s. 29(a) was to encourage the integration of young people into the workforce, the government would not expect or want those on social assistance who were living at home to participate in the programs.

avis, cette affirmation est exacte. Le gouvernement n'avait pas à établir qu'il disposait de 85 000 places disponibles en salle de classe et ailleurs. Cependant, le fait même que le gouvernement s'attendait à un taux de participation aussi faible incite à se demander dans quelle mesure la distinction prévue à l'al. 29a) visait vraiment à améliorer la situation des personnes de moins de 30 ans, et non pas simplement à réaliser des économies. Le gouvernement a souligné qu'il n'était pas nécessaire d'ouvrir un nombre considérable de places, puisqu'on estimait que 50 p. 100 des jeunes vivaient chez leurs parents. Comme je l'ai indiqué plus tôt, ce fait n'a pas été établi et, s'il était exact, on aurait laissé 50 p. 100 des bénéficiaires dans un état de privation injustifié. En outre, il n'est pas du tout évident que des jeunes vivant au foyer ne voudraient pas participer à ces programmes si ceux-ci leur rapportaient une somme additionnelle de 296 \$ par mois. De plus, si l'al. 29a) visait à encourager l'intégration des jeunes dans la population active, on comprend difficilement pourquoi le gouvernement n'aurait pas voulu que les bénéficiaires d'aide sociale vivant chez leurs parents participent aux programmes, ou encore pourquoi il ne s'attendait pas à ce qu'ils le fassent.

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The government maintains that it always had more places available if the need arose, but the evidence has left me questioning how a program such as On-the-job Training which relied on private enterprises to provide jobs could provide an endless stream of positions for any young person on social assistance who wanted one. It also seems somewhat disingenuous to suggest that there were unlimited spaces in the program when the program profiles clearly outline that some groups were to be specifically targeted, others given preference. How can there be preferences when access to the programs is unlimited? It also seems odd that a government that claims it would not have been able to eliminate the reduced benefit level for people under 30 for economic reasons would have been able to support a program in which a significant portion of those persons participated in the programs and, therefore, had their benefits increased to the normal level. If legislation is found to infringe upon a group's right and the government claims that the right is minimally impaired due to the operation of another program,

Le gouvernement soutient qu'il disposait à tout moment de places supplémentaires si on en avait besoin. Cependant, la preuve m'amène à me demander comment un programme comme celui des Stages en milieu de travail, qui était tributaire des entreprises privées pour les emplois, aurait pu fournir un poste à tout jeune bénéficiaire d'aide sociale qui en aurait voulu un. Il me semble quelque peu fallacieux de laisser entendre qu'il existait un nombre illimité de places dans le programme, alors que la description de celui-ci précise clairement que certains groupes étaient expressément ciblés et que d'autres devaient avoir la préférence. Comment peut-on accorder des préférences si l'accès au programme est illimité? Il semble également paradoxal qu'un gouvernement qui avance que, pour des raisons budgétaires, il n'aurait pas été en mesure d'éliminer le régime des prestations réduites applicable aux personnes de moins de 30 ans, aurait par ailleurs été en mesure de financer un programme auquel participait un pourcentage élevé de ces personnes, dont les prestations auraient en conséquence été haussées

the fact that only 20 percent of the affected group participates would seem to suggest that the right was not being reasonably infringed.

Accordingly, I would hold that, even according to a high degree of deference, the respondent has failed to demonstrate that the provision in question constituted a means of achieving the legislative objective that was reasonably minimally impairing in respect of the appellant's equality rights. Other reasonable alternatives to achieve the objective were available. The approach taken by the government involved providing a vulnerable group with a base amount of money that was one third of the level the government itself had deemed to be a subsistence level for others and, moreover, the programs themselves were additionally found to have several important shortcomings. This was not minimally impairing of the right. The respondent has therefore failed to meet its burden of demonstrably justifying the limitation on the appellant's rights.

Even accepting the general approach of differentiating between those under 30 and those 30 and over that the legislature adopted to achieve its objectives, there are several other means by which the substantive equality of young people would have been considerably more respected and less impaired. First, as Robert J.A. suggested, the full benefit could have been extended to those individuals who had expressed their willingness to participate in a program, as opposed to requiring them to be at all times participating in programs that, by their design and implementation, did not allow for constant participation. Another approach, given the government's opinion that the majority of young people on welfare were living at home and therefore did not require the full benefit, would have been to tie the benefits to whether the recipient — whatever his or her age — was actually living at home. This was already being done for other recipients since anyone

au niveau normal. S'il est jugé qu'un texte de loi porte atteinte au droit d'un groupe et que le gouvernement prétend que cette atteinte est minimale en raison de l'application d'un autre programme, le fait que le taux de participation du groupe touché se chiffrait à seulement 20 p. 100 tend à indiquer que l'atteinte au droit concerné n'était pas raisonnable.

En conséquence, même en manifestant beaucoup de déférence envers la décision du législateur, j'estime que l'intimé n'a pas su démontrer que la disposition litigieuse constituait un moyen de réaliser l'objectif législatif d'une manière qui portait aussi peu atteinte au droit à l'égalité de l'appelante qu'il était raisonnablement possible de le faire. Il existait des solutions de rechange raisonnables à celle choisie par la législature en vue de réaliser son objectif. L'approche retenue par le gouvernement consistait à fournir à un groupe vulnérable une prestation de base égale au tiers de celle qu'il considérait lui-même être le niveau de subsistance requis par d'autres personnes. De plus, il a été jugé que les programmes eux-mêmes comportaient plusieurs lacunes importantes. Il ne s'agissait pas d'une atteinte minimale au droit concerné. L'intimé ne s'est pas acquitté du fardeau qui lui incombait, à savoir justifier la limite imposée aux droits de l'appelante.

Même si l'on accepte l'approche générale retenue par la législature en vue de réaliser ses objectifs — c'est-à-dire la distinction établie entre les personnes de moins de 30 ans et celles de 30 ans et plus —, il y a plusieurs moyens qui auraient permis de respecter bien davantage l'égalité réelle des jeunes et d'y porter une atteinte moins grande. Premièrement, comme l'a proposé le juge Robert de la Cour d'appel, on aurait pu accorder le plein montant des prestations à toutes les personnes ayant exprimé le désir de participer à un programme, plutôt que d'exiger d'elles qu'elles participent en tout temps à des programmes auxquels il était impossible de participer de façon constante en raison de leur conception et leur mise en œuvre. Par ailleurs, comme le gouvernement croyait que la majorité des jeunes bénéficiaires d'aide sociale vivaient chez leurs parents et n'avaient en conséquence pas besoin du plein montant des prestations, une autre solution aurait

30 or over living with family had his or her benefits reduced by \$85. This would have had the effect of recognizing that many young people did not require the full amount of social assistance, while basing the amount awarded on their actual situation as opposed to the proxy of age.

été de lier les prestations au fait que le bénéficiaire — indépendamment de son âge — habite ou non vraiment chez ses parents. C'était d'ailleurs ce qu'on faisait déjà pour d'autres bénéficiaires, puisqu'une personne de 30 ans et plus vivant chez ses parents voyait ses prestations réduites de 85 \$. Une telle mesure aurait eu pour effet de reconnaître que bon nombre de jeunes gens n'avaient pas besoin du plein montant d'aide sociale, et permis en outre de fixer la somme accordée en fonction de la situation véritable du bénéficiaire plutôt que sur l'ersatz que constitue l'âge.

287 Having found that the legislation was not minimally impairing of the appellant's right to equality, I would hold that the legislation was not a reasonable limit on the right that was demonstrably justified. The final branch of the *Oakes* test need not therefore necessarily be addressed. However, given the deleterious effect that the legislation had on the appellant's right it would, I believe, be useful to consider that branch of the test as well.

Ayant conclu que le texte de loi ne portait pas atteinte le moins possible au droit à l'égalité de l'appelante, j'estime qu'il ne constituait pas une limite raisonnable dont la justification pouvait se démontrer. Il n'est par conséquent pas essentiel d'examiner le dernier volet du critère de l'arrêt *Oakes*. Cependant, vu l'effet préjudiciable qu'a eu le texte de loi sur le droit de l'appelante, il est, je crois, utile d'examiner également ce volet.

(iv) Proportionality

(iv) La proportionnalité

288 At this stage of the *Oakes* test, a court must determine whether the deleterious effects that a legislative provision has on a given rights holder are outweighed by the salutary effects of the same legislation in achieving the stated government objective. Here, again, I agree with Robert J.A. It is clear from the evidence that \$170 per month is not enough money for one to live on. While the government claims that those under 30 had the right to increased benefits if they participated in the programs, there were clear holes in the programs which prevented certain individuals, at certain times, from accessing the additional benefits. Moreover, Remedial Education students never achieved parity. In fact, though this is not determinative, only 11 percent of single persons under 30 years of age who were on social assistance actually received what the government had determined to be the basic amount needed to support one's self. This constitutes a severe deleterious effect on the equality and self-worth of the appellant and those in her group. With respect to the salutary effects side of the equation, the government was not required to demonstrate that the

À cette étape-ci du critère formulé dans l'arrêt *Oakes*, le tribunal doit se demander si les effets préjudiciables qu'a une disposition législative sur le titulaire des droits l'emportent sur les effets bénéfiques de cette même disposition sur la réalisation de l'objectif formulé par le gouvernement. Sur ce point, je souscris également à l'opinion du juge Robert. Il ressort clairement de la preuve que la somme mensuelle de 170 \$ n'est pas suffisante pour permettre à une personne de subvenir à ses besoins. Bien que le gouvernement affirme que les moins de 30 ans avaient droit à des prestations majorées s'ils participaient aux programmes, ceux-ci présentaient des lacunes évidentes qui empêchaient certaines personnes, à certaines périodes, de toucher les prestations additionnelles. Qui plus est, les étudiants ayant participé au programme Rattrapage scolaire n'ont jamais bénéficié de la parité. En fait, bien que cet élément ne soit pas déterminant, précisons que seulement 11 p. 100 des personnes seules de moins de 30 ans qui touchaient de l'aide sociale ont réellement reçu ce que le gouvernement avait établi comme étant la somme de base nécessaire pour permettre à une

programs had any actual significant salutary effect on the well-being of young people; it nevertheless had to demonstrate that the reduction in benefits would reasonably be expected to facilitate the integration of the younger social assistance beneficiaries in the workplace. This onus has not been met.

The respondent argues that government cannot be held responsible for the “partial failures” of legislation. She insists that the government had a real concern for the situation in which young people found themselves and attempted to craft a program that would benefit them. While the effects stage of the *Oakes* test should not be an opportunity for courts to punish governments for failed legislative undertakings, when the potential deleterious effects of the legislation are so apparent, I do not believe that it is asking too much of the government to craft its legislation more carefully. Given the economic data that the government has presented in evidence, it was entirely foreseeable that upon completion of the programs, the opportunities for young people to integrate into the workforce would continue to be limited. There was no justification presented for leaving them on the reduced benefit at that point in time, regardless of the problem of delays earlier discussed.

Accordingly, I find that s. 29(a) of the Regulation’s *Charter* breach should not be upheld as a justified and reasonable limit under s. 1. In the legislative and social context of the legislation, which provided a safety net for those without means to support themselves, a rights-infringing limitation must be carefully crafted. In this case, the programs left too many opportunities for young people to fall through the seams of the legislation. This is borne out to some degree by the low participation rate among beneficiaries under the age of 30 and the

personne de subvenir à ses besoins. Cette situation constituait un effet préjudiciable grave sur l’égalité et l’estime de soi de l’appelante et des personnes de son groupe. En ce qui concerne l’aspect de l’équation fondé sur les effets bénéfiques, le gouvernement n’était pas tenu de démontrer que les programmes avaient eu un quelconque effet bénéfique concret appréciable sur le bien-être des jeunes. Il lui incombeait néanmoins d’établir qu’il était raisonnable de penser que la réduction des prestations faciliterait l’intégration des jeunes prestataires dans la population active. Cette preuve n’a pas été faite.

L’intimé plaide que le gouvernement ne peut être tenu responsable des « semi-échecs » des mesures législatives. Il insiste sur le fait que le gouvernement se souciait réellement de la situation des jeunes et qu’il a tenté d’élaborer un programme qui leur profiterait. Bien que l’étape du critère établi dans l’arrêt *Oakes*, qui concerne les effets du texte de loi, ne doive pas être, pour les tribunaux, l’occasion de punir les gouvernements pour des mesures législatives infructueuses, lorsque les effets préjudiciables éventuels du texte législatif sont aussi évidents, je ne crois pas que ce soit trop demander au gouvernement de préparer ses mesures législatives avec plus de soin. À la lumière des données économiques déposées en preuve par le gouvernement, il était entièrement prévisible que, après avoir complété les programmes, les jeunes continueraient de ne profiter que de possibilités d’intégration restreintes dans la population active. On n’a aucunement justifié la décision de continuer à ne leur verser que les prestations réduites à ce moment, malgré le problème des périodes d’attente examiné plus tôt.

En conclusion, j’estime que la validité de l’al. 29(a) du Règlement ne peut être confirmée, en vertu de l’article premier, en tant que limite raisonnable et justifiée. Eu égard au contexte législatif et social des mesures législatives litigieuses — qui avaient pour objet de tendre un filet de sécurité sociale à l’intention des personnes n’ayant pas les moyens de subvenir à leurs besoins — toute restriction attentatoire aux droits devait être rédigée avec soin. En l’espèce, les programmes présentaient trop de risques que les jeunes glissent entre les mailles de ce filet. Cette

fact that there was no basis for the assumption that beneficiaries under 30 were living with their parents and had lesser needs. While the respondent argues that no evidence was presented to show that most if any of the 73 percent of recipients under 30 were not participating in the programs for anything more than personal reasons, I would point out that at the s. 1 stage of analysis, it is the government's responsibility to show that the legislation limits the right as little as reasonably possible.

constatation est dans une certaine mesure étayée par le faible taux de participation des bénéficiaires de moins de 30 ans et par le fait que l'hypothèse selon laquelle ces bénéficiaires vivaient chez leurs parents et avaient des besoins moins grands ne reposait sur aucun fondement. Bien que l'intimé affirme qu'il n'a été présenté aucun élément de preuve tendant à établir que, de tous les bénéficiaires de moins de 30 ans qui n'avaient pas participé aux programmes (en l'occurrence 73 p. 100 de ceux-ci), la plupart sinon la totalité de ces personnes se sont abstenues de le faire essentiellement pour des raisons d'ordre personnel, je tiens à souligner qu'à l'étape de l'analyse relative à l'article premier, il incombe au gouvernement de démontrer qu'il portait aussi peu atteinte au droit concerné qu'il lui était raisonnablement possible de le faire.

#### (4) Remedy

#### (4) La réparation

291 The appellant argued that if s. 29(a) was found to have been an infringement on her *Charter* rights, it should be declared invalid under s. 52(1) of the *Constitution Act, 1982*, and that she and the members of her class should be compensated for their losses under s. 24(1) of the *Charter*. Engaging in an elaborate analysis of the proper type of declaratory relief to extend in this case borders on the absurd, given the fact that the legislation in question has been repealed for over a decade. Determining, for instance, the proper duration for which any declaration might be suspended in order to give the government an opportunity to amend its legislation is a purely hypothetical exercise. Nonetheless, given the appellant's claim for pecuniary relief under s. 24(1), a brief outline of the factors to be considered in fashioning a declaration of invalidity in this case may be warranted.

De prétendre l'appelante, s'il est jugé que l'al. 29a) a porté atteinte aux droits que lui garantit la *Charte*, cette disposition devrait être déclarée invalide en application du par. 52(1) de la *Loi constitutionnelle de 1982* et les personnes de son groupe et elle-même devraient être indemnisées de leurs pertes en vertu du par. 24(1) de la *Charte*. S'engager dans une complexe analyse afin d'élaborer le jugement déclaratoire qui conviendrait en l'espèce frôlerait l'absurde, étant donné que la disposition litigieuse a été abrogée il y a plus d'une dizaine d'années. Par exemple, déterminer la période pendant laquelle la déclaration d'invalidité devrait être suspendue pour permettre au gouvernement de modifier le texte en question serait une opération purement théorique. Néanmoins, comme l'appelante demande une réparation pécuniaire en vertu du par. 24(1), il convient sans doute d'exposer brièvement les facteurs devant être pris en compte dans l'élaboration de la déclaration d'invalidité en l'espèce.

292 In determining the appropriate remedy in the case of legislation that is found to violate a *Charter* right, courts must walk a fine line between fulfilling their judicial role of protecting rights and intruding on the legislature's role; *Schachter, supra*. Simply striking down s. 29(a) would have led to the result that all social assistance beneficiaries would

Le tribunal appelé à déterminer la réparation convenable lorsqu'un texte de loi porte atteinte à un droit garanti par la *Charte* doit prendre soin, dans l'exercice de son rôle de protecteur des droits, de ne pas empiéter sur celui du législateur; *Schachter, précité*. Un jugement invalidant seulement l'al. 29a) aurait eu pour effet que tous les bénéficiaires d'aide

have received the full benefit unconditionally. The respondent has argued that the government would never have adopted such a measure, and more importantly, that it would have been unable, from a financial standpoint, to fulfill such a legislative commitment. It is in recognition of this that Robert J.A. held that s. 23 of the Regulation, which set the actual amounts of the benefits, should also be invalidated so that the legislative intent of the Act would not be distorted by the court. The problem that this approach raises is that it may in fact lead to an even more severe transgression of the legislature's intention; it could mean that the *Social Aid Act* no longer supplies anyone with benefits. At the very least, the provision of benefits unconditionally to those under 30 would help to fulfill the statute's objective of providing for the needy. To declare s. 23 invalid would be to completely eliminate the legislative objective.

In *Schachter*, *supra*, Lamer C.J. held that a delayed declaration of invalidity would be appropriate when striking down unconstitutional legislation if immediate relief (1) posed a danger to the public, (2) threatened the rule of law, or (3) deprived deserving persons of benefits. In this case, the invalidation of s. 29(a) would not pose a danger to the public, nor would it deprive deserving persons of benefits, since it would expand the category of beneficiaries. However, given the broad impact of this legislation on Quebec society, as well as the wide range of alternatives that might be taken in order to bring complex social legislation such as this into line with constitutional standards, I believe that suspension of the declaration would have been appropriate in this case. Given the large sums of money spent by legislatures on social assistance programs such as this and the complexity of the programs at issue, a court should not intrude too deeply into the role of legislature in this field. As noted earlier, given that the provision in question is no longer in force, this issue is moot. However, if the legislation was still in place, I would have ordered that the declaration of invalidity be suspended for a period of 18

sociale auraient reçu inconditionnellement le plein montant des prestations. L'intimé a fait valoir que le gouvernement n'aurait jamais adopté une telle mesure et, facteur plus important encore, qu'il aurait été financièrement incapable de s'acquitter d'un tel engagement d'origine législative. C'est pour cette raison que le juge Robert de la Cour d'appel a conclu que l'art. 23 du Règlement, qui fixe le montant des prestations, devait lui aussi être invalidé pour éviter que le tribunal ne dénature l'intention du législateur. Le problème que présente cette démarche est qu'elle pourrait, dans les faits, entraîner une transgression encore plus grave de l'intention du législateur, en ce qu'elle pourrait mettre fin au versement de toute prestation à qui que ce soit en vertu de la *Loi sur l'aide sociale*. À tout le moins, le versement inconditionnel de prestations aux moins de 30 ans contribuerait à la réalisation de l'objectif de la *Loi sur l'aide sociale*, qui est de venir en aide aux personnes dans le besoin. Déclarer l'art. 23 invalide reviendrait à contrecarrer complètement l'objectif visé par cette loi.

Dans l'arrêt *Schachter*, précité, le juge en chef Lamer a conclu qu'il convient de suspendre l'effet de la déclaration d'invalidité d'une mesure législative pour cause d'inconstitutionnalité lorsque l'application immédiate de la réparation (1) pose un danger pour le public, (2) menace la primauté du droit ou (3) prive de bénéfices des personnes admissibles. En l'espèce, l'annulation de l'al. 29a) ne poserait pas un danger pour le public et ne priverait pas de bénéfices des personnes admissibles, puisqu'elle élargirait au contraire la catégorie des bénéficiaires. Cependant, compte tenu de l'incidence considérable des mesures législatives litigieuses sur la société québécoise et le large éventail de solutions de rechange qui pourraient être adoptées pour harmoniser une complexe loi sociale de ce genre avec les normes constitutionnelles, je suis d'avis qu'il aurait convenu de suspendre l'effet de la déclaration d'invalidité en l'espèce. Vu les sommes importantes que les législatures consacrent aux programmes d'aide sociale du genre de celui qui nous intéresse et la complexité des programmes en litige, les tribunaux ne devraient pas s'ingérer de façon trop importante dans les affaires du législateur dans ce domaine. Comme je l'ai mentionné précédemment,

months, the period that the government demonstrated would be required to implement changes to the legislation.

294 The appellant also requests that this Court make an order under s. 24(1) of the *Charter* compensating the members of her group for the difference between the full benefit and the reduced amount during the time they were on the reduced benefit. The appellant argues that without such an order, her rights will not have been given any real effect.

295 On this point, I find myself in substantial agreement with the conclusion of Robert J.A., who refused to grant a monetary award under s. 24(1). As Lamer C.J. held in *Schachter*, where a provision is struck down under s. 52, a retroactive s. 24(1) remedy will not generally be available. The appellant argues that the odd facts of this case may make it one of those extraordinary occasions in which a s. 24(1) remedy could be added to a s. 52 declaration. The facts of this case do not allow for such a result.

296 First, I agree with Robert J.A. that because this case involves a class action, there is more difficulty in ordering a s. 24(1) remedy. It would be impossible for this Court to determine the precise amount that was owed to each individual in the class. Who participated in the programs, and who did not, the number of months during which they did not participate, the amount of the shortfall in benefits at different times, are all impossible to determine.

297 Second, the significant cost that would be incurred by the government were it required to pay damages must be considered. As Lamer C.J. held in *Schachter*, while a consideration of expenses might

étant donné que la disposition contestée n'est plus en vigueur, cette question est devenue théorique. Cependant, si la disposition existait encore, j'aurais ordonné la suspension de la déclaration d'invalidité pendant 18 mois, période qui, comme l'a démontré le gouvernement, serait nécessaire pour mettre en œuvre des modifications à la législation pertinente.

L'appelante demande également à notre Cour de rendre, en vertu du par. 24(1) de la *Charte*, une ordonnance accordant aux membres du groupe dont elle fait partie une indemnité égale à l'écart entre le plein montant des prestations et celui des prestations réduites qu'ils ont touchées. Sans une telle ordonnance, plaide-t-elle, on n'aura pas donné effet vérifiable à ses droits.

Sur ce point, je souscris pour l'essentiel à la conclusion du juge Robert de la Cour d'appel, qui a refusé d'accorder une réparation pécuniaire en vertu du par. 24(1). Comme a déclaré le juge en chef Lamer dans l'arrêt *Schachter*, si une disposition est invalidée en application de l'art. 52, il n'y a généralement pas ouverture à réparation rétroactive en vertu du par. 24(1). Selon l'appelante, les faits inhabituels de la présente affaire pourraient constituer une de ces situations extraordinaires où une réparation fondée sur le par. 24(1) pourrait s'ajouter à une déclaration d'invalidité prononcée en vertu de l'art. 52. Les faits de l'espèce ne justifient pas un tel résultat.

Premièrement, à l'instar du juge Robert, j'estime qu'en raison de l'existence d'un recours collectif en l'espèce, il est plus difficile d'accorder une réparation en vertu du par. 24(1). Il serait impossible à notre Cour d'établir le montant exact dû à chaque membre du groupe. Qui a participé aux programmes? Qui ne l'a pas fait? Pendant combien de mois les intéressés n'ont pas participé à un programme? Quel est le montant des prestations manquantes pour les diverses périodes pertinentes? Voilà autant de questions auxquelles il est impossible de répondre.

Deuxièmement, il faut tenir compte des dépenses importantes que ferait le gouvernement s'il devait verser des dommages-intérêts. Comme a conclu le juge en chef Lamer dans l'arrêt *Schachter*, bien que

not be relevant to the substantive *Charter* analysis, it is relevant to the determination of the remedy. Requiring the government to pay out nearly half a billion dollars, the amount requested, would have a significant impact on the government's fiscal situation, and potentially on the general economy of the province of Quebec.

Thirdly, as I have shown in my reasons, the creation of a social assistance program that is respectful of the equality rights of young people need not necessarily have involved increasing the benefit levels of those under 30 to the level of the 30-year-old beneficiaries. The government might have chosen to improve the coverage given by the programs to those under 30, or, as it did in 1989, to impose conditions on all beneficiaries.

Accordingly, I would deny the appellant's request for an order for damages pursuant to s. 24(1) of the *Charter*.

### C. *Quebec Charter of Human Rights and Freedoms*

#### Section 45 of the *Quebec Charter*

The appellant also claims that s. 29(a) violated her s. 45 rights under the *Quebec Charter*. Section 45 of the *Quebec Charter* reads as follows:

**45.** Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.

The respondent argues that the terms "provided for by law" and "susceptible" have the effect of limiting the degree to which the government must act to provide a decent standard of living. She argues that the section means that the government need only provide, in an efficient manner, the assistance that it defines in its own legislation. In his reasons, Robert J.A. engaged in an extensive analysis of international human rights documents in order to offer context to the interpretation of the section, and in particular, the aforementioned terms. He found that

la prise en compte de considérations budgétaires puisse ne pas être pertinente dans l'analyse de la question de fond touchant la *Charte*, elle l'est dans la détermination de la réparation. Obliger le gouvernement à verser pratiquement un demi-milliard de dollars, en l'occurrence la somme qui est demandée, aurait une incidence appréciable sur sa situation financière et peut-être même sur l'économie générale de la province de Québec.

Troisièmement, comme je l'ai démontré dans mes motifs, la création d'un programme d'aide sociale respectueux des droits à l'égalité des jeunes ne requerrait pas nécessairement que les prestations versées aux moins de 30 ans soient majorées au niveau de celles versées aux 30 ans et plus. Le gouvernement aurait pu choisir d'améliorer les avantages accordés aux moins de 30 ans par les programmes ou, comme il l'a fait en 1989, d'imposer des conditions à tous les bénéficiaires.

Par conséquent, je rejette la demande de dommages-intérêts présentée par l'appelante en vertu du par. 24(1) de la *Charte*.

### C. *La Charte des droits et libertés de la personne du Québec*

#### L'article 45 de la *Charte québécoise*

L'appelante affirme également que l'al. 29a) porte atteinte aux droits que lui garantit l'art. 45 de la *Charte québécoise*, qui est rédigé ainsi :

**45.** Toute personne dans le besoin a droit, pour elle et sa famille, à des mesures d'assistance financière et à des mesures sociales, prévues par la loi, susceptibles de lui assurer un niveau de vie décent.

L'intimé plaide que les termes « prévues par la loi » et « susceptibles » ont pour effet de limiter l'étendue de ce que doit faire le gouvernement pour garantir un niveau de vie décent. Elle prétend que, suivant cette disposition, le gouvernement n'a qu'à fournir de manière efficiente l'aide qu'il définit dans ses mesures législatives. Dans ses motifs, le juge Robert de la Cour d'appel a analysé en profondeur des documents internationaux en matière de droits de la personne pour dégager le contexte permettant d'interpréter la disposition en question et les termes

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in the context of the other social rights enumerated in the *Quebec Charter*, as well as the language of international social charters, the terms “provided for by law” and “susceptible” should not be read restrictively. The appellant, likewise, argues that those terms, instead of limiting the right, create a positive obligation on the state to put in place social assistance by law.

301 When compared to the other social rights enumerated in the *Quebec Charter*, in particular those that are limited by the words “to the extent provided by law” (emphasis added) (e.g., s. 44), I would agree with the appellant that the term “provided for by law” should not be read too restrictively. In my view, the word “susceptible” defines the nature of the benefit to be provided which could encompass social programs such as the ones that were established under the legislation impugned in these proceedings. Thus, I would find that, on its face, s. 45 does create some form of positive right to a minimal standard of living.

302 There is no need, however, to enter into a lengthy examination of whether the legislation in question here provided for social assistance which met the standard required by s. 45. This is because the section must be interpreted in light of the remedial provisions of the *Quebec Charter*. Section 52 of the *Quebec Charter* reads as follows:

**52.** No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

In my view, it is quite clear that the court has no power to declare any portion of a law invalid due to a conflict with s. 45. Section 52 simply cannot apply.

303 The appellant also argues that she should be entitled to damages pursuant to s. 49 of the *Quebec Charter*. Section 49 reads as follows:

susmentionnés en particulier. Il a conclu que, à la lumière des autres droits sociaux énumérés dans la *Charte québécoise* et dans le texte des chartes sociales internationales, les termes « prévues par la loi » et « susceptibles » ne sauraient être interprétés restrictivement. L’appelante avance elle aussi que ces termes ne limitent pas le droit concerné, mais imposent plutôt à l’État l’obligation positive d’établir des mesures d’aide sociale par voie législative.

Lorsqu’on le compare aux autres droits sociaux énumérés dans la *Charte québécoise*, tout particulièrement ceux qui sont limités par les mots « dans la mesure prévue par la loi » (je souligne) (par exemple l’art. 44), je souscris à l’argument de l’appelante selon laquelle l’expression « prévues par la loi » ne devrait pas être interprétée trop restrictivement. À mon avis, le terme « susceptibles » définit la nature des avantages envisagés, qui pourraient être des programmes sociaux tels ceux établis en vertu du texte de loi contesté en l’espèce. Par conséquent, j’estime que, à la lumière de son texte même, l’art. 45 crée une certaine forme de droit positif à un niveau de vie minimal.

Il n’est toutefois pas nécessaire de s’attarder à la question de savoir si, en l’espèce, le texte de loi litigieux assurait une aide sociale respectant la norme prescrite par l’art. 45. La raison en est que la disposition en question doit être interprétée en fonction des dispositions réparatrices de la *Charte québécoise*. Voici, à cet égard, le texte de l’art. 52 de la *Charte québécoise* :

**52.** Aucune disposition d’une loi, même postérieure à la Charte, ne peut déroger aux articles 1 à 38, sauf dans la mesure prévue par ces articles, à moins que cette loi n’énonce expressément que cette disposition s’applique malgré la Charte.

À mon avis, il est très clair que les tribunaux n’ont pas le pouvoir de déclarer invalide tout ou partie d’un texte de loi pour cause d’incompatibilité avec l’art. 45. L’article 52 n’est tout simplement pas applicable.

L’appelante prétend également qu’elle a droit à des dommages-intérêts en vertu de l’art. 49 de la *Charte québécoise*, qui est rédigé ainsi :

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

This Court interpreted s. 49 in *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345. In that case, Gonthier J. held (at paras. 119-21) that:

In my view, the first paragraph of s. 49 and art. 1053 C.C.L.C. are based on the same legal principle of liability associated with wrongful conduct . . . .

It is thus clear that the violation of a right protected by the *Charter* is equivalent to a civil fault. The *Charter* formalizes standards of conduct that apply to all individuals. The legislative recognition of these standards of conduct has to some extent exempted the courts from clarifying their content. This recognition does not, however, make it possible to distinguish in principle the standards of conduct in question from that under art. 1053 C.C.L.C., which the courts apply to the circumstances of each case. The violation of one of the guaranteed rights is therefore wrongful behaviour, which, as the Court of Appeal has recognized, breaches the general duty of good conduct. . . .

The nature of the damages that may be obtained under the first paragraph of s. 49 reinforces the parallel with civil liability. It is understood that the moral and material damages awarded by a court following a *Charter* violation are strictly compensatory in nature. The wording of the provision leaves no doubt in this regard, since it entitles the victim of an unlawful interference with a protected right to obtain “compensation for the moral or material prejudice resulting therefrom”.

In *Quebec (Public Curator) v. Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, L’Heureux-Dubé J. clarified this further by holding, for a unanimous Court (at para. 116), that:

To find that there has been unlawful interference, it must be shown that a right protected by the *Charter* was infringed and that the infringement resulted from wrongful conduct. A person’s conduct will be characterized as wrongful if, in engaging therein, he or she violated a standard of conduct considered reasonable in the circumstances under the general law . . . .

49. Une atteinte illicite à un droit ou à une liberté reconnu par la présente Charte confère à la victime le droit d’obtenir la cessation de cette atteinte et la réparation du préjudice moral ou matériel qui en résulte.

Dans l’arrêt *Béliveau St-Jacques c. Fédération des employées et employés de services publics inc.*, [1996] 2 R.C.S. 345, notre Cour a interprété l’art. 49. Le juge Gonthier a tiré les conclusions suivantes, aux par. 119-121 :

À mon avis, l’art. 49, al. 1 et l’art. 1053 C.c.B.C. relèvent d’un même principe juridique de responsabilité attachée au comportement fautif . . . .

Ainsi, il est manifeste que la violation d’un droit protégé par la *Charte* équivaut à une faute civile. La *Charte* formalise en effet des normes de conduite, qui s’imposent à l’ensemble des citoyens. La reconnaissance législative de ces normes de conduite a dispensé la jurisprudence, dans une certaine mesure, d’en préciser le contenu. Cependant, cette reconnaissance ne permet pas de distinguer, en principe, les normes de conduite en question de celle qui découle de l’art. 1053 C.c.B.C., et que les tribunaux appliquent aux circonstances de chaque espèce. La violation d’un des droits garantis constitue donc un comportement fautif, qui, comme l’a déjà reconnu la Cour d’appel, contrevient au devoir général de bonne conduite . . . .

La nature des dommages-intérêts que permet d’obtenir l’art. 49, al. 1 renforce le rapprochement avec la responsabilité civile. Il est entendu que les dommages moraux et matériels qu’accorde un tribunal suite à une violation de la *Charte* sont de nature strictement compensatoire. Le libellé du texte législatif ne laisse subsister aucun doute à ce sujet, puisqu’il confère à la victime d’une atteinte illicite à un droit protégé le droit d’obtenir « la réparation du préjudice moral ou matériel qui en résulte ».

Dans l’arrêt *Québec (Curateur public) c. Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 R.C.S. 211, le juge L’Heureux-Dubé, exprimant la décision unanime de la Cour, a apporté les précisions suivantes, au par. 116 :

Pour conclure à l’existence d’une atteinte illicite, il doit être démontré qu’un droit protégé par la *Charte* a été violé et que cette violation résulte d’un comportement fautif. Un comportement sera qualifié de fautif si, ce faisant, son auteur transgresse une norme de conduite jugée raisonnable dans les circonstances selon le droit commun . . . .

304 Thus, in order to substantiate a s. 49 claim against the government for having drafted legislation that violates a *Quebec Charter* right, one would need to demonstrate that the legislature has breached a particular standard of care in drafting the legislation. It seems to me unlikely that a government could, under s. 49, be held responsible for having simply drafted faulty legislation. This view was shared by Gonthier J. in *Guimond, supra*, at para. 13, where he quoted approvingly Delisle J.A.:

[TRANSLATION] In terms of the civil law, there is no doubt that the Crown is not negligent when it enacts a law that is subsequently declared invalid, any more than the public official who attends to its implementation.

Thus, on the s. 45 issue, I would find that while the section appears to create some form of right to a statutory social assistance regime providing a minimum standard of living, in this case, that right is unenforceable; neither s. 52 nor s. 49 of the *Quebec Charter* applies.

305 The appellant argues that it makes no sense to have a section that is of no effect. My response to that is two-fold. First, no s. 49 remedy could be substantiated in this case because no wrongful conduct was found to exist. This does not mean that a private actor, or a state official, acting in a wrongful manner, could not, in another case, be found to have violated someone's s. 45 rights. In such a case, the court would be free to award damages. Secondly, even though the section does not provide for financial redress from the government in this case, the section is not without value. Indeed it is not uncommon for governments to outline non-judicial rights in human rights charters. Courts are not the only institutions mandated to enforce constitutional documents. Legislatures also have a duty to uphold them. If, in this case, the court cannot force the government to change

Par conséquent, la personne qui, en vertu de l'art. 49, présente contre l'État une demande reprochant à celui-ci d'être l'auteur d'un texte de loi contrevenant à un droit garanti par la *Charte québécoise* doit démontrer que le législateur a manqué à une norme de diligence donnée dans la rédaction du texte de loi en question. Il me semble improbable que l'État puisse, par application de l'art. 49, être tenu responsable simplement parce qu'il aurait rédigé un texte de loi lacunaire. Le juge Gonthier a souscrit à ce point de vue dans l'arrêt *Guimond*, précité, par. 13, où il a cité et approuvé les propos suivants du juge Delisle de la Cour d'appel :

Sur le plan du droit civil, il ne fait aucun doute que l'État ne commet pas une faute en adoptant une loi qui sera par la suite déclarée invalide, pas plus que le fonctionnaire qui voit à son application.

En conséquence, pour ce qui est de la question de l'art. 45, bien que cette disposition paraisse créer un certain droit à un régime d'aide sociale prévu par la loi et assurant un niveau de vie minimal, j'estime que le respect de ce droit ne peut pas, en l'espèce, être obtenu en justice; ni l'art. 52 ni l'art. 49 de la *Charte québécoise* ne s'appliquent.

L'appelante soutient qu'il n'est pas logique qu'une disposition ne produise pas d'effets. Ma réponse à cet argument comporte deux volets. Premièrement, aucune réparation fondée sur l'art. 49 ne saurait être justifiée en l'espèce, puisqu'on n'a pas conclu à l'existence d'un comportement fautif. Cela ne signifie pas qu'un particulier ou un représentant de l'État qui aurait agi de manière fautive ne pourrait pas, dans une autre situation, être reconnu coupable d'avoir porté atteinte aux droits garantis à une personne par l'art. 45. Dans un tel cas, il serait loisible au tribunal d'accorder des dommages-intérêts. Deuxièmement, même si l'art. 45 ne permet pas d'obtenir de réparation pécuniaire de l'État dans la présente affaire, cette disposition n'est pas sans valeur. De fait, il n'est pas inhabituel pour les législateurs d'énoncer, dans les chartes relatives aux droits de la personne, des droits dont

the law by virtue of s. 45, the *Quebec Charter* still has moral and political force.

### VIII. Conclusion

For these reasons, I would allow the appeal. I would declare s. 29(a) of the Regulation unconstitutional. The constitutional questions are answered as follows:

1. Did s. 29(a) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?

Yes.

2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

3. Did s. 29(a) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?

No.

4. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*.

It is not necessary to answer this question.

on ne peut demander aux tribunaux d'assurer le respect. Les tribunaux ne sont pas les seules institutions chargées de veiller au respect des documents constitutionnels. Les législateurs ont eux aussi l'obligation de les faire respecter. Malgré le fait que, en l'espèce, la Cour ne puisse, en vertu de l'art. 45, contraindre l'État à modifier la loi, la *Charte québécoise* conserve néanmoins sa valeur morale et politique.

### VIII. Conclusion

Pour les motifs qui précèdent, je suis d'avis d'accueillir le pourvoi. Je déclarerais inconstitutionnel l'al. 29a) du Règlement. Voici les réponses données aux questions constitutionnelles :

1. Le paragraphe 29a) du *Règlement sur l'aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, adopté en vertu de la *Loi sur l'aide sociale*, L.R.Q., ch. A-16, violait-il le par. 15(1) de la *Charte canadienne des droits et libertés* pour le motif qu'il établissait une distinction discriminatoire fondée sur l'âge relativement aux personnes seules, aptes au travail, âgées de 18 à 30 ans?

Oui.

2. Dans l'affirmative, cette violation est-elle justifiée dans le cadre d'une société libre et démocratique, en vertu de l'article premier de la *Charte canadienne des droits et libertés*?

Non.

3. Le paragraphe 29a) du *Règlement sur l'aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, adopté en vertu de la *Loi sur l'aide sociale*, L.R.Q., ch. A-16, violait-il l'art. 7 de la *Charte canadienne des droits et libertés* pour le motif qu'il portait atteinte au droit à la sécurité des personnes qu'il visait, et ce d'une façon incompatible avec les principes de justice fondamentale?

Non.

4. Dans l'affirmative, cette violation est-elle justifiée dans le cadre d'une société libre et démocratique, en vertu de l'article premier de la *Charte canadienne des droits et libertés*?

Il n'est pas nécessaire de répondre à cette question.

The following are the reasons delivered by

Version française des motifs rendus par

307 ARBOUR J. (dissenting) — The facts, as well as the history of this litigation, are set out at length in my colleagues' opinions and I need not repeat them here. Essentially, the appellant asserts on her own behalf and on behalf of a class of claimants that a provision of the regulations under the *Social Aid Act*, R.S.Q., c. A-16, in force between 1984 and 1989 which provided for lesser benefits for single adults under the age of 30 than for those 30 and over was unconstitutional as violating ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

LE JUGE ARBOUR (dissidente) — Comme les faits et l'historique des procédures judiciaires sont exposés en détail dans les opinions de mes collègues, je n'ai pas besoin de les répéter. Essentiellement, l'appelante, en son nom et au nom d'un groupe de demandeurs, plaide l'inconstitutionnalité, pour cause de violation des art. 7 et 15 de la *Charte canadienne des droits et libertés*, d'une disposition du règlement d'application de la *Loi sur l'aide sociale*, L.R.Q., ch. A-16, qui était en vigueur de 1984 à 1989 et accordait aux jeunes adultes de moins de 30 ans des prestations inférieures à celles versées aux bénéficiaires âgés de 30 ans et plus.

308 I would allow this appeal on the basis of the appellant's s. 7 *Charter* claim. In doing so, I conclude that the s. 7 rights to "life, liberty and security of the person" include a positive dimension. Few would dispute that an advanced modern welfare state like Canada has a positive moral obligation to protect the life, liberty and security of its citizens. There is considerably less agreement, however, as to whether this positive moral obligation translates into a legal one. Some will argue that there are interpretive barriers to the conclusion that s. 7 imposes a positive obligation on the state to offer such basic protection.

Je suis d'avis d'accueillir le pourvoi en ce qui concerne l'argument de l'appelante fondé sur l'art. 7 de la *Charte*. Ce faisant, j'arrive à la conclusion que le droit d'un individu « à la vie, à la liberté et à la sécurité de sa personne » que lui garantit l'art. 7 comporte une dimension positive. Peu de gens mettraient en doute l'obligation morale positive qu'a un État providence moderne comme le Canada de protéger la vie, la liberté et la sécurité de ses citoyens. Cependant, la question de savoir si cette obligation morale positive se traduit par une obligation légale ne recueille pas un aussi large consensus. Certains soutiennent que, en raison d'obstacles sur le plan de l'interprétation, il est impossible de conclure que l'art. 7 impose à l'État l'obligation positive d'offrir une protection aussi fondamentale.

309 In my view these barriers are all less real and substantial than one might assume. This Court has never ruled, nor does the language of the *Charter* itself require, that we must reject any positive claim against the state — as in this case — for the most basic positive protection of life and security. This Court has consistently chosen instead to leave open the possibility of finding certain positive rights to the basic means of subsistence within s. 7. In my view, far from resisting this conclusion, the language and structure of the *Charter* — and of s. 7 in particular — actually compel it. Before demonstrating all of this it will be necessary to deconstruct the various firewalls that are said to exist around s. 7, precluding this Court from reaching in

À mon avis, ces obstacles sont moins réels et importants qu'on pourrait le supposer. Pas plus que ne l'exige le texte même de la *Charte*, la Cour n'a jamais statué qu'il lui fallait rejeter toute action — comme celle qui nous occupe — demandant à l'État d'intervenir concrètement pour assurer aux citoyens la protection tangible la plus élémentaire en ce qui touche à la vie et à la sécurité. Au contraire, la Cour a constamment choisi de ne pas écarter la possibilité de conclure à l'existence, à l'art. 7, de certains droits positifs à des moyens élémentaires de subsistance. À mon sens, loin de faire obstacle à une telle conclusion, le texte et la structure de la *Charte* — tout particulièrement l'art. 7 de celle-ci — commandent en fait une telle conclusion.

this case what I believe to be an inevitable and just outcome.

### I. Preliminary Concerns

It is often suggested that s. 7 of the *Charter* cannot impose positive legal obligations on government. Before embarking on the usual textual, purposive and contextual analysis required in constitutional interpretation, it is therefore necessary to address the barriers that are traditionally said to preclude *a priori* a positive claim against the state under s. 7.

#### A. *Economic Rights*

There was some discussion in the courts below concerning whether s. 7 extends its protection to the class of so-called “economic rights”. That discussion gets its impetus from certain dicta of Dickson C.J. in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. In *Irwin Toy*, Dickson C.J. compared the wording of s. 7 to similar provisions in the American *Bill of Rights* and noted the following, at p. 1003:

The intentional exclusion of property from s. 7, and the substitution thereof of “security of the person” . . . leads to a general inference that economic rights as generally encompassed by the term “property” are not within the perimeters of the s. 7 guarantee.

This has no relevance to the present appeal. On its face, the statement purports to rule out of s. 7 only those economic rights that are generally encompassed by the term “property”. The appellant in this case makes no claim that could reasonably be construed as a claim to a right of property. Indeed, the claim she does make — namely, to a level of social assistance adequate for the provision of her basic needs of subsistence — is one which Dickson C.J. explicitly excepted from his statement in *Irwin Toy*, at pp. 1003-4:

Avant de démontrer ces propositions, j’estime qu’il sera nécessaire de démanteler les barrières qui, affirme-t-on, entourent l’art. 7 et empêchent la Cour d’arriver en l’espèce à un résultat que je considère juste et incontournable.

### I. Questions préliminaires

On affirme souvent que l’art. 7 de la *Charte* ne saurait avoir pour effet d’assujettir les gouvernements à des obligations légales positives. Avant d’amorcer les analyses textuelle, téléologique et contextuelle requises en matière d’interprétation constitutionnelle, il est donc nécessaire d’examiner les obstacles qui, objecte-t-on généralement, empêcheraient *a priori* de solliciter, en vertu de l’art. 7, l’intervention concrète de l’État.

#### A. *Les droits économiques*

On s’est demandé, devant les juridictions inférieures, si la protection de l’art. 7 s’étendait à la catégorie des droits dits « économiques ». Cet examen a été inspiré par certaines remarques formulées par le juge en chef Dickson dans l’arrêt *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, où ce dernier avait comparé le texte de l’art. 7 aux dispositions similaires de la Constitution américaine et dit ceci, à la p. 1003 :

[L]’exclusion intentionnelle de la propriété de l’art. 7 et son remplacement par la « sécurité de sa personne » [. . .] permet d’en déduire globalement que les droits économiques, généralement désignés par le terme « propriété », ne relèvent pas de la garantie de l’art. 7.

Ces remarques ne sont pas pertinentes dans le présent pourvoi. À première vue, cet énoncé n’entend exclure du champ d’application de l’art. 7 que les droits économiques généralement visés par le terme « propriété ». En l’espèce, l’appelante ne revendique rien qui pourrait raisonnablement être interprété comme un droit de propriété. De fait, l’objet de l’action de l’appelante — savoir un niveau d’aide sociale suffisant pour subvenir à ses besoins essentiels — est un droit du genre de ceux que le juge en chef Dickson, dans l’arrêt *Irwin Toy*, précité, p. 1003-1004, a explicitement exclus de la portée de l’énoncé général, cité plus haut, qu’il fait dans le même arrêt :

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This is not to declare, however, that no right with an economic component can fall within “security of the person”. Lower courts have found that the rubric of “economic rights” embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.

This prudent exercise in judicial restraint was understandable given that, unlike the case here, the question was not directly relevant in *Irwin Toy*. The instant appeal, in contrast, makes obvious why “those economic rights fundamental to human life or survival” should not in fact be treated as of the same ilk as corporate-commercial economic rights. Simply put, the rights at issue here are so intimately intertwined with considerations related to one’s basic health (and hence “security of the person”) — and, at the limit, even of one’s survival (and hence “life”) — that they can readily be accommodated under the s. 7 rights of “life, liberty and security of the person” without the need to constitutionalize “property” rights or interests.

Cela ne signifie pas cependant qu’aucun droit comportant un élément économique ne peut être visé par l’expression « sécurité de sa personne ». Les tribunaux d’instance inférieure ont conclu que la rubrique des « droits économiques » couvre un vaste éventail d’intérêts qui comprennent tant certains droits reconnus dans diverses conventions internationales — tels la sécurité sociale, l’égalité du salaire pour un travail égal, le droit à une alimentation, un habillement et un logement adéquats — que les droits traditionnels relatifs aux biens et aux contrats. Ce serait agir avec précipitation, à notre avis, que d’exclure tous ces droits alors que nous en sommes au début de l’interprétation de la *Charte*. À ce moment-ci, nous ne voulons pas nous prononcer sur la question de savoir si ces droits économiques, fondamentaux à la vie de la personne et à sa survie, doivent être traités comme s’ils étaient de la même nature que les droits économiques des sociétés commerciales.

Cette attitude de retenue judiciaire marquée par la prudence était compréhensible, étant donné que, contrairement à ce qui est le cas dans le présent pourvoi, cette question n’était pas directement pertinente dans l’arrêt *Irwin Toy*. En revanche, la présente affaire illustre clairement pourquoi « [l]es droits économiques, fondamentaux à la vie de la personne et à sa survie » ne devraient pas, dans les faits, être traités comme s’ils étaient de même nature que les droits économiques des sociétés commerciales. En d’autres mots, les droits litigieux en l’espèce sont si intimement liés à des considérations touchant fondamentalement à la santé d’une personne (et, de ce fait, à la « sécurité de sa personne ») — et même, à la limite, à la survie de cette personne (et partant à sa « vie ») — qu’ils peuvent facilement s’intégrer dans le droit « à la vie, à la liberté et à la sécurité de sa personne » prévu à l’art. 7, sans qu’il soit nécessaire de constitutionnaliser les droits ou intérêts de « propriété ».

312 Indeed, the rights at issue in this case are so connected to the sorts of interests that fall under s. 7 that it is a gross mischaracterization to attach to them the label of “economic rights”. Their only kinship to the economic “property” rights that are *ipso facto* excluded from s. 7 is that they involve some economic value. But if this is sufficient to attract the label “economic right”, there are few rights that would not be economic rights. It is in the very nature of rights that they crystallize certain benefits, which

D’ailleurs, le lien entre les droits en litige et ceux visés à l’art. 7 est suffisamment étroit que le fait de les appeler « droits économiques » constitue une grossière erreur de qualification. Le seul attribut qu’ils partagent avec les droits de « propriété » économiques qui sont exclus *ipso facto* de l’art. 7 est le fait qu’ils comportent une certaine valeur économique. Toutefois, si ce seul critère suffit pour qualifier un droit de « droit économique », alors rares sont les droits qui ne feraient

can often be quantified in economic terms. What is truly significant, from the standpoint of inclusion under the rubric of s. 7 rights, is not therefore whether a right can be expressed in terms of its economic value, but as Dickson C.J. suggests, whether it “fall[s] within ‘security of the person’” or one of the other enumerated rights in that section. It is principally because corporate-commercial “property” rights fail to do so, and not because they contain an economic component *per se*, that they are excluded from s. 7. Conversely, it is because the right to a minimum level of social assistance is clearly connected to “security of the person” and “life” that it distinguishes itself from corporate-commercial rights in being a candidate for s. 7 inclusion.

In my view, this tells decisively against any argument that relies upon a supposed economic rights prohibition within s. 7 of the *Charter*. There is, however, a related argument, advanced by Professor Hogg among others, to suggest that the kind of interest claimed by the appellant in this case cannot fall within the scope of s. 7 (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 44-12.1):

The trouble . . . is that it accords to s. 7 an economic role that is incompatible with its setting in the legal rights portion of the Charter — a setting that the Supreme Court of Canada has relied upon as controlling the scope of s. 7.

As I understand the argument it purports to rule out the kind of interest claimed here, not so much because it has an economic component (though that is ostensibly part of the objection), but because it fails to exhibit the characteristics of a “legal right”. I take this last point to be the real thrust of the objection, since the argument would lose its teeth against an historically recognized legal right which nevertheless also had an economic component: for example, the right to a trial by jury in

pas partie de ceux-ci. Il est de l’essence même des droits qu’ils se concrétisent par certains avantages, souvent économiquement quantifiables. Pour décider si un droit est visé par l’art. 7, la considération vraiment pertinente n’est pas de savoir si ce droit peut être défini par sa valeur économique, mais plutôt, comme le suggère le juge en chef Dickson, s’il peut « être visé par l’expression “sécurité de sa personne” » ou par un autre droit énuméré dans cette disposition. C’est principalement parce qu’ils ne sont pas visés par cette expression ou par un autre droit énuméré, que les droits de « propriété » économiques des sociétés commerciales sont exclus du champ d’application de l’art. 7, et non parce qu’ils comportent en soi un aspect économique. À l’inverse, c’est parce qu’il se rattache clairement à la « vie » et à la « sécurité de [la] personne » que le droit à un niveau minimal d’aide sociale se distingue des droits économiques des sociétés commerciales et que son inclusion dans les droits visés par l’art. 7 peut être envisagée.

À mon avis, ces explications réfutent décisivement tout argument fondé sur l’existence d’une supposée exclusion des droits économiques de l’art. 7 de la *Charte*. Il existe toutefois un argument connexe, avancé notamment par le professeur Hogg, voulant que le type de droit que revendique l’appelante en l’espèce ne saurait être visé par l’art. 7 (P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 2, p. 44-12.1) :

[TRADUCTION] Le problème [. . .] est qu’il investit l’art. 7 d’une mission économique incompatible avec son emplacement dans la section de la Charte portant sur les garanties juridiques — cadre qu’a invoqué la Cour suprême du Canada pour délimiter la portée de l’art. 7.

Si je comprends bien cet argument, le type de droit revendiqué en l’espèce serait écarté, non pas tant parce qu’il comporte une dimension économique (quoiqu’il s’agisse manifestement d’une des raisons pour lesquelles on s’oppose à son inclusion), que parce qu’il ne présente pas les caractéristiques d’une « garantie juridique ». Ce dernier point constitue selon moi l’élément central de l’objection, puisque l’argument perdrait toute sa force devant une garantie juridique historiquement reconnue

certain criminal cases, which right inevitably involves incurring additional costs in the administration of justice. I will now turn to this specific issue.

### B. *Legal Rights*

314 The argument is that s. 7 is an umbrella of legal rights and that ss. 8 to 14, using a kind of *ejusdem generis* rule, inform and limit its scope. This restrictive interpretation of s. 7 formed no part of the reasoning in *Irwin Toy* that excluded corporate-commercial property rights from s. 7. Rather, it seems to have had its genesis in the concurring reasons of Lamer J. (as he then was) in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (“*Prostitution Reference*”), at pp. 1171-74, where he observed that:

[T]he guarantees of life, liberty and security of the person are placed together with a set of provisions . . . which are mainly concerned with criminal and penal proceedings. . . . It is significant that the rights guaranteed by s. 7 as well as those guaranteed in ss. 8-14 are listed under the title “Legal Rights”, or in the French version “*Garanties juridiques*”. The use of the term “Legal Rights” suggests a distinctive set of rights different from the rights guaranteed by other sections of the *Charter*. . . .

Section 7 and more specifically ss. 8-14 protect individuals against the state when it invokes the judiciary to restrict a person’s physical liberty through the use of punishment or detention, when it restricts security of the person, or when it restricts other liberties by employing the method of sanction and punishment traditionally within the judicial realm.

315 This approach to s. 7, curtailing its footprint to “legal rights” of the type contained in ss. 8 to 14,

mais comportant néanmoins une dimension économique : par exemple le droit à un procès avec jury dans certaines affaires criminelles, droit qui entraîne inévitablement des coûts additionnels du point de vue de l’administration de la justice. Je vais maintenant examiner l’argument relatif aux garanties juridiques.

### B. *Garanties juridiques*

Suivant cet argument, l’art. 7 déploie une panoplie de garanties juridiques et, si on applique une sorte de règle *ejusdem generis*, les art. 8 à 14 ont pour effet de déterminer la portée de cet article et de la restreindre. Cette interprétation restrictive de l’art. 7 n’était pas un aspect du raisonnement appliqué par la Cour, dans l’arrêt *Irwin Toy*, pour exclure les droits de propriété économiques des sociétés commerciales du champ d’application de l’art. 7. L’interprétation en question semble plutôt tirer son origine des motifs concordants exposés par le juge Lamer (plus tard Juge en chef) dans le *Renvoi relatif à l’art. 193 et à l’al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123 (le « *Renvoi sur la prostitution* »), où ce dernier a fait les observations suivantes, aux p. 1171-1174 :

[L]es garanties relatives à la vie, à la liberté et à la sécurité de la personne font partie d’une série de dispositions [. . .] qui visent principalement les affaires pénales. [. . .] Il est révélateur que les droits garantis par l’art. 7 ainsi que ceux garantis par les art. 8 à 14 se retrouvent sous la rubrique « Garanties juridiques » dans la version française et « *Legal Rights* » dans la version anglaise. L’expression « garanties juridiques » indique qu’il s’agit d’une catégorie de droits distincts, différents des droits garantis par d’autres articles de la *Charte* . . .

L’article 7, et plus spécifiquement les art. 8 à 14, protègent les individus contre l’État lorsqu’il recourt au pouvoir judiciaire pour restreindre la liberté physique d’une personne, par l’imposition d’une peine ou par la détention, lorsqu’il restreint la sécurité de la personne ou lorsqu’il restreint d’autres libertés en employant un mode de sanction et de peine qui relève traditionnellement du domaine judiciaire.

Dans des arrêts plus récents, la Cour a atténué l’interprétation restrictive de l’art. 7 qui avait pour

has been attenuated in more recent cases. For example, in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held (at para. 46) that “[s]ection 7 can extend beyond the sphere of criminal law, at least where there is ‘state action which directly engages the justice system and its administration’” (emphasis added). The recognition in that case that s. 7 protection extends beyond the criminal or penal context was in itself nothing new. What was noteworthy in Bastarache J.’s dictum was the suggestion, implied by his use of the phrase “at least”, that s. 7 might even extend beyond the justice system and its administration. That his use of this phrase should be interpreted permissively rather than restrictively was later confirmed indirectly in *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48. In that case, this Court found that apprehension of a child by an agent of the state, pursuant to legislative authority and in the absence of a judicial order, constituted a deprivation of the parents’ security of the person. While the Court went on to find the deprivation to be in conformity with the principles of fundamental justice, what is significant for present purposes is that the right to security of the person was found to be implicated by state action that had little relation to any judicial or quasi-judicial proceeding. The apprehension itself was entirely disconnected from the justice system and its administration and simply involved implementation of a legislative provision by a government official.

In the light of these recent developments, I think that there is considerable room for doubt as to whether the placement of s. 7 within the “Legal Rights” portion of the *Charter* is controlling of its scope. Moreover, the appeal to a *Charter* sub-heading as a way of limiting the kinds of interests that are protected by a rights-granting provision

effet de limiter la portée de celui-ci aux « garanties juridiques » du type visé aux art. 8 à 14. Par exemple, dans l’arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, 2000 CSC 44, par. 46, la Cour a statué que « [l’]article 7 peut déborder le cadre du droit criminel, au moins dans le cas d’un “acte gouvernemental intéressant directement le système judiciaire et l’administration de la justice” » (je souligne). La reconnaissance, dans cet arrêt, du fait que la protection de l’art. 7 débordait le contexte criminel ou pénal n’avait en soi rien de nouveau. Ce qui vaut d’être souligné relativement à ces remarques du juge Bastarache est que, en utilisant l’expression « au moins », il semble évoquer la possibilité que l’art. 7 puisse même déborder le cadre du système judiciaire et son administration. Subséquemment, dans l’arrêt *Office des services à l’enfant et à la famille de Winnipeg c. K.L.W.*, [2000] 2 R.C.S. 519, 2000 CSC 48, la Cour a confirmé indirectement que l’utilisation de cette expression devait être interprétée largement plutôt que restrictivement. Dans cette affaire, la Cour a jugé que l’appréhension d’un enfant — effectuée par un agent de l’État en vertu d’un pouvoir prévu par un texte de loi, mais en l’absence d’une ordonnance judiciaire — avait pour effet de priver les parents de l’enfant en question de la sécurité de leur personne. Bien que, en définitive, la Cour ait conclu que la privation avait été imposée en conformité avec les principes de justice fondamentale, l’élément important dans le cadre du présent pourvoi est que la Cour a estimé qu’un acte de l’État qui n’avait qu’un faible lien avec une procédure judiciaire ou quasi-judiciaire avait fait entrer en jeu le droit de l’intéressée à la sécurité de sa personne. En soi, l’appréhension était une mesure entièrement dissociée du système judiciaire et de son administration et concernait simplement la mise en œuvre d’une disposition législative par un fonctionnaire.

Compte tenu de ces faits récents, j’estime qu’il est certes permis de se demander si le fait que l’art. 7 figure dans la section « Garanties juridiques » de la *Charte* a pour effet de circonscrire le champ d’application de cet article. En outre, l’utilisation d’un intertitre de la *Charte* comme moyen de restreindre le genre de droits protégés par une disposition

appears to be at odds with the generous and purposive approach that this Court has repeatedly identified as the proper approach to the interpretation of *Charter* rights: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Therens*, [1985] 1 S.C.R. 613; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *Young v. Young*, [1993] 4 S.C.R. 3; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *Vriend v. Alberta*, [1998] 1 S.C.R. 493. Indeed, it is more consistent with the kind of “legalistic” interpretation associated with cases decided under the *Canadian Bill of Rights*, R.S.C. 1985, App. III, and that Dickson J. (as he then was) specifically contrasted with the purposive approach in *Big M Drug Mart*, *supra*, at p. 344:

The meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it [is] meant to protect.

. . . The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. [Emphasis added; emphasis in original deleted.]

Whereas the course of s. 7 jurisprudence may have once supported a legalistic reliance on the sub-heading “Legal Rights” as a way of delimiting the scope of s. 7 protection, the more recent turn in s. 7 jurisprudence indicates that this interpretive device has been supplanted by a purposive and contextual approach to the recognition of constitutionally protected rights.

créatrice de droits paraît incompatible avec l'interprétation libérale et téléologique que la Cour a maintes fois désignée comme étant la démarche appropriée pour interpréter les droits garantis par la *Charte* : *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. Therens*, [1985] 1 R.C.S. 613; *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425; *Young c. Young*, [1993] 4 R.C.S. 3; *R. c. S. (R.J.)*, [1995] 1 R.C.S. 451; *Vriend c. Alberta*, [1998] 1 R.C.S. 493. De fait, le recours aux intertitres correspond davantage au genre d'interprétation « formaliste » que l'on associe aux jugements concernant la *Déclaration canadienne des droits*, L.R.C. 1985, app. III, et que le juge Dickson (plus tard Juge en chef) a précisément opposé à l'interprétation téléologique dans l'arrêt *Big M Drug Mart*, précité, p. 344 :

Le sens d'un droit ou d'une liberté garantis par la *Charte* doit être vérifié au moyen d'une analyse de l'objet d'une telle garantie; en d'autres termes, ils doivent s'interpréter en fonction des intérêts qu'ils visent à protéger.

. . . Comme on le souligne dans l'arrêt *Southam*, l'interprétation doit être libérale plutôt que formaliste et viser à réaliser l'objet de la garantie et à assurer que les citoyens bénéficient pleinement de la protection accordée par la *Charte*. [Je souligne; soulignement dans l'original supprimé.]

Bien que, à une certaine époque, la jurisprudence de la Cour relative à l'art. 7 ait pu s'appuyer sur une interprétation formaliste fondée sur l'intertitre « Garanties juridiques » pour délimiter l'étendue de la protection conférée par l'art. 7, il ressort des arrêts plus récents sur la question que cette technique d'interprétation a été remplacée par l'application d'une démarche téléologique et contextuelle en matière de reconnaissance des droits protégés par la Constitution.

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Finally, one should not underestimate the significance of the historical context in which Lamer J. made his comments in the *Prostitution Reference*, *supra*. At the time, almost all s. 7 cases involved

Enfin, il ne faut pas sous-estimer l'importance du contexte historique des commentaires du juge Lamer dans le *Renvoi sur la prostitution*, précité. À l'époque, presque toutes les décisions relatives

challenges to state action in the context of criminal proceedings. It might then have appeared that this was the range of interests that s. 7 was meant to protect. The evolution of the case law no longer compels that conclusion. As s. 7 jurisprudence has developed, new kinds of interests, quite apart from those engaged by one's dealings with the justice system and its administration, have been asserted and found to be deserving of s. 7 protection. To now continue to insist upon the restrictive significance of the placement of s. 7 within the "Legal Rights" portion of the *Charter* would be to freeze constitutional interpretation in a manner that is inconsistent with the vision of the Constitution as a "living tree" which has always been part of the Canadian constitutional landscape. As this Court recognized in *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180:

The doctrine of the constitution as a living tree mandates that narrow technical approaches are to be eschewed . . . It also suggests that the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the *Charter*. The tree is rooted in past and present institutions, but must be capable of growth to meet the future.

In spite of this, some will suggest that we must distinguish cases like *K.L.W.*, *supra*, from the instant appeal on the basis that it is difficult to point to any affirmative state action in the present case which could properly be said to constitute a violation of one of the enumerated rights in s. 7. Whatever the merits of this argument, it is important to keep it distinct from the "Legal Rights" argument which has been the focus of the present discussion. The significance of cases like *Blencoe* and *K.L.W.* in the context of this discussion is that they make room for the kind of interest at issue in this appeal by relaxing any supposed requirement that the right claimed under s. 7 display the characteristics of a "legal right" similar in nature to those at stake in the administration of criminal justice. Whether these cases — or others — would also bar the present action by imposing another requirement of

à l'art. 7 portaient sur la contestation d'un acte accompli par l'État dans le cadre de procédures criminelles. Il a pu alors sembler qu'il s'agissait de l'éventail de droits que l'art. 7 était censé protéger. Compte tenu de l'évolution de la jurisprudence, cette conclusion ne s'impose toutefois plus. Au fur et à mesure de l'évolution de la jurisprudence relative à l'art. 7, les plaideurs ont invoqué de nouveaux droits très distincts de ceux qui sont en cause lorsque le système judiciaire et l'administration de la justice sont concernés, et les tribunaux ont jugé que ces droits étaient protégés par l'art. 7. Continuer aujourd'hui à insister sur l'effet restrictif qu'aurait le fait que l'art. 7 se trouve dans la section des « Garanties juridiques » de la *Charte* équivaldrait à figer l'interprétation constitutionnelle, et ce d'une manière incompatible avec la conception — qui fait depuis toujours partie du paysage constitutionnel canadien — selon laquelle la Constitution est un « arbre vivant ». Comme l'a reconnu la Cour dans l'arrêt *Renvoi : Circonscriptions électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158, p. 180 :

La doctrine qui compare la Constitution à un arbre nous oblige à écarter les interprétations étroites et formalistes [. . .] Elle indique aussi que le passé joue un rôle critique mais non-exclusif dans la détermination du contenu des droits et libertés conférés par la *Charte*. L'arbre est enraciné dans les institutions passées et présentes, mais il doit pouvoir croître pour faire face à l'avenir.

Certains avanceront néanmoins qu'il y a lieu de distinguer le présent pourvoi d'affaires telles que l'arrêt *K.L.W.*, précité, puisqu'il est difficile en l'espèce de mettre le doigt sur une mesure étatique concrète qui, pourrait-on affirmer, contrevient à l'un des droits énumérés à l'art. 7. Indépendamment de la valeur de cet argument, il importe de le séparer de celui fondé sur les « Garanties juridiques » qui vient d'être examiné. La pertinence, dans le cadre de cet examen, d'affaires tels les arrêts *Blencoe* et *K.L.W.*, est qu'elles ouvrent la porte à la reconnaissance du type de droit en litige dans le présent pourvoi en assouplissant toute prétendue exigence voulant que le droit invoqué en vertu de l'art. 7 doive posséder les caractéristiques d'une « garantie juridique » de nature similaire à celles que met en jeu l'administration de la justice criminelle. Quant à

affirmative (or positive) state action as a *sine qua non* of s. 7 protection is a different question, to which I now turn.

C. *Negative vs. Positive Rights and the Requirement of State Action*

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There is a suggestion that s. 7 contains only negative rights of non-interference and therefore cannot be implicated absent any positive state action. This is a view that is commonly expressed but rarely examined. It is of course true that in virtually all past s. 7 cases it was possible to identify some definitive act on the part of the state which could be said to constitute an interference with life, liberty or security of the person and consequently ground the claim of a s. 7 violation. It may also be the case that no such definitive state action can be located in the instant appeal, though this will largely depend on how one chooses to define one's terms and, in particular, the phrase "state action". One should first ask, however, whether there is in fact any requirement, in order to ground a s. 7 claim, that there be some affirmative state action interfering with life, liberty or security of the person, or whether s. 7 can impose on the state a duty to act where it has not done so. (I use the terms "affirmative", "definitive" or "positive" to mean an identifiable action in contrast to mere inaction.) No doubt if s. 7 contemplates the existence only of negative rights, which are best described as rights of "non-interference", then active state interference with one's life, liberty or security of the person by way of some definitive act will be necessary in order to engage the protection of that section. But if, instead, s. 7 rights include a positive dimension, such that they are not merely rights of non-interference but also what might be described as rights of "performance", then they may be violable by mere inaction or failure by the state to actively provide the conditions necessary for their fulfilment. We must not sidestep a determination of this issue by assuming from the start that s. 7

savoir si ces arrêts — ou d'autres — feraient également obstacle à la présente action en exigeant, comme condition *sine qua non* d'application de la protection garantie par l'art. 7, l'existence d'une mesure étatique concrète (ou positive), il s'agit d'une question différente, que je vais maintenant examiner.

C. *Droits négatifs par opposition à droits positifs et existence obligatoire d'une mesure étatique*

On prétend que l'art. 7 n'accorde que des droits « négatifs » — à savoir des garanties de non-intrusion — et qu'il ne saurait donc entrer en jeu en l'absence de mesure étatique positive. Fréquemment exprimée, cette opinion est toutefois rarement examinée. Certes, il est vrai que dans pratiquement tous les arrêts antérieurs concernant l'art. 7, on trouvait un acte gouvernemental précis qui pouvait être considéré comme une atteinte à la vie, à la liberté ou à la sécurité de la personne et permettait de fonder une action en justice reprochant la violation de l'art. 7. Peut-être ne pourra-t-on pas relever la présence d'une telle mesure étatique précise dans le présent pourvoi, quoique cela dépendra largement de la définition qu'on donnera des différentes notions pertinentes, particulièrement l'expression « mesure étatique ». Cependant, il faut d'abord se demander si la présentation d'une demande fondée sur l'art. 7 requiert effectivement comme préalable l'existence d'une mesure étatique concrète portant atteinte à la vie, à la liberté ou à la sécurité de la personne, ou si l'art. 7 peut avoir pour effet d'imposer à l'État l'obligation d'agir lorsqu'il ne l'a pas fait. (J'utilise les termes « concrète », « précise » ou « positive » au sens d'une mesure identifiable par opposition à la simple inaction.) Il ne fait aucun doute que si l'art. 7 ne vise que des droits négatifs — qu'on peut décrire de façon plus juste comme étant des garanties de « non-intrusion » — il faudra alors démontrer, pour qu'entre en jeu la protection prévue par cet article, que l'État a, par quelque mesure précise, attenté de façon active à la vie, à la liberté ou à la sécurité de la personne de l'intéressé. Cependant, si les droits consacrés à l'art. 7 comportent plutôt une dimension positive, de sorte qu'ils ne sont pas simplement des garanties de non-intrusion, mais également ce qu'on pourrait appeler des garanties d'« intervention »,

includes a requirement of affirmative state action. That would be to beg the very question that needs answering.

It is not often clear whether the theory of negative rights underlying the view that s. 7 can only be invoked in response to a definitive state action is intended to be one of general application, extending to the *Charter* as a whole, or one that applies strictly to s. 7. As a theory of the *Charter* as a whole, any claim that only negative rights are constitutionally recognized is of course patently defective. The rights to vote (s. 3), to trial within a reasonable time (s. 11(b)), to be presumed innocent (s. 11(d)), to trial by jury in certain cases (s. 11(f)), to an interpreter in penal proceedings (s. 14), and minority language education rights (s. 23) to name but some, all impose positive obligations of performance on the state and are therefore best viewed as positive rights (at least in part). By finding that the state has a positive obligation in certain cases to ensure that its labour legislation is properly inclusive, this Court has also found there to be a positive dimension to the s. 2(d) right to associate (*Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94). Finally, decisions like *Schachter v. Canada*, [1992] 2 S.C.R. 679, and *Vriend, supra*, confirm that “[i]n some contexts it will be proper to characterize s. 15 as providing positive rights” (*Schachter, supra*, at p. 721). This list is illustrative rather than exhaustive.

Moreover, there is no sense in which the actual language of s. 7 limits its application to circumstances where there has been positive state interference. It is sometimes suggested that the requirement is implicit in the use of the concept of “deprivation” within s. 7. This is highly implausible. *The Shorter Oxford English Dictionary* (3rd ed. 1973), vol. 1, at p. 524, defines the term “deprive” in such a way as

ils sont alors susceptibles de violation du seul fait de l’inaction de l’État ou du défaut de celui-ci de pourvoir activement à la mise en place des conditions nécessaires à leur respect. Nous ne devons pas contourner l’analyse de cette question en supposant, d’entrée de jeu, que l’art. 7 exige l’existence d’une mesure étatique positive. Nous éluderions ainsi la question même à laquelle nous devons répondre.

Il est souvent difficile de dire si la théorie des droits négatifs sur laquelle repose cette opinion se veut d’application générale et serait donc applicable à l’ensemble de la *Charte*, ou si elle s’applique strictement à l’art. 7. En tant que théorie applicable à l’ensemble de la *Charte*, tout argument affirmant que la Constitution ne reconnaît que des droits négatifs serait manifestement erronée. Le droit de vote (art. 3), le droit d’être jugé dans un délai raisonnable (al. 11b)), le droit d’être présumé innocent (al. 11d)), le droit de bénéficier d’un procès avec jury dans certains cas (al. 11f)), le droit à un interprète dans des procédures pénales (art. 14) et les droits à l’instruction dans la langue de la minorité (art. 23) pour ne nommer que ceux-là, imposent tous à l’État des obligations positives d’intervention et il convient donc de les considérer comme des droits positifs (du moins en partie). En concluant que l’État a, dans certains cas, l’obligation positive de faire en sorte que ses lois du travail soient dûment inclusives, la Cour a également jugé que la liberté d’association consacrée à l’al. 2d) comportait une dimension positive (*Dunmore c. Ontario (Procureur général)*, [2001] 3 R.C.S. 1016, 2001 CSC 94). Enfin, la Cour a confirmé, notamment dans les arrêts *Schachter c. Canada*, [1992] 2 R.C.S. 679, et *Vriend*, précité, que, « [d]ans certains contextes, il conviendra de dire que l’art. 15 confère des droits positifs » (*Schachter*, précité, p. 721). Cette liste se veut illustrative plutôt qu’exhaustive.

Qui plus est, le texte de l’art. 7 ne limite d’aucune façon son application aux seuls cas où on est en présence d’une mesure attentatoire concrète de la part de l’État. On prétend parfois que le concept de « *deprivation* » évoqué dans le texte anglais de l’art. 7 emporte implicitement cette exigence. Cet argument est très peu plausible. Suivant la définition du verbe « *deprive* » que donne le *Shorter Oxford*

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to include, not only active taking away, divesting, or dispossession, but also mere “keep[ing] out of [or] debar[ing] from”. In other words, the concept of deprivation is sufficiently broad to embrace withholdings that have the effect of erecting barriers in the way of the attainment of some object.

322 Nor does the phrase “principles of fundamental justice” contain a requirement of positive state action by necessary implication, particularly when one rejects a restrictive interpretation of s. 7 confining it to a “Legal Rights” umbrella. If s. 7 were nothing more than a composite of the other “legal rights”, one might think that it only comes into play when the machinery of justice is activated by the state. But I have already indicated why in my view we must reject the assumption that s. 7 protects only against the kinds of incursions one might expect to suffer in connection with one’s dealings with the justice system and its administration. This obliterates the foundation for the idea that the phrase “principles of fundamental justice” includes an implicit requirement of positive state action. It also leaves s. 7 bereft of any trace of language that might contain a requirement of positive state action before a breach may occur.

323 In fact, the context in which s. 7 is found within the *Charter*’s structure favours the conclusion that it can impose on the state a positive duty to act. Even though s. 7 cannot be reduced to an “umbrella” of the “legal rights” contained in ss. 8 to 14, there is often overlap between the two. This Court has in the past emphasized the connection of these sections to s. 7 itself. In *Re B.C. Motor Vehicle Act*, *supra*, at pp. 502-3, Lamer J. indicated that ss. 8 to 14 are “illustrative” of the principles of fundamental justice that are referred to in s. 7 (see also, the *Prostitution Reference*, *supra*, at pp. 1171-72). Given this, if some of these “principles of fundamental justice” in ss. 8 to 14 entrench positive rights, one should expect that s. 7 rights would also contain a positive

*English Dictionary* (3<sup>e</sup> éd. 1973), vol. 1, p. 524, ce mot s’entend non seulement du fait de retirer, dépouiller, dessaisir ou déposséder d’une façon active, mais aussi le simple fait [TRADUCTION] « d’exclure [*de*] [ou] de refuser [*à*] ». En d’autres termes, le concept de « *deprivation* » est suffisamment large pour englober les privations dont l’effet est d’ériger des obstacles à la réalisation d’un objectif.

L’expression « principes de justice fondamentale » n’exige pas non plus, par implication nécessaire, l’existence d’une mesure étatique concrète, particulièrement si l’on rejette l’interprétation restrictive de l’art. 7 selon laquelle cette disposition se limite à une panoplie de « Garanties juridiques ». Si l’article 7 ne constituait qu’un ensemble composite des autres « garanties juridiques », sans plus, on pourrait croire qu’il n’entre en jeu que dans les cas où l’État met en branle l’appareil judiciaire. Cependant, j’ai déjà expliqué pourquoi, à mon avis, nous devons rejeter l’hypothèse voulant que l’art. 7 ne protège une personne que contre le genre d’atteintes dont elle pourrait être victime dans ses rapports avec le système judiciaire et son administration. Cette conclusion enlève tout le fondement à l’idée que l’expression « principes de justice fondamentale » exige implicitement l’existence d’une mesure étatique concrète. Cette conclusion dépouille également l’art. 7 de tout élément de texte susceptible d’exiger l’existence d’une telle mesure.

En fait, la position de l’art. 7 dans la structure de la *Charte* milite en faveur de la conclusion selon laquelle cet article peut avoir pour effet d’imposer à l’État l’obligation d’agir, d’intervenir. Même si l’art. 7 ne peut se réduire à la « panoplie » des « garanties juridiques » prévues aux art. 8 à 14, les champs d’application de ces dispositions se superposent souvent. La Cour a déjà souligné le lien qui existe entre ces articles et l’art. 7. Dans le *Renvoi : Motor Vehicle Act de la C.-B.*, précité, p. 502-503, le juge Lamer a indiqué que les art. 8 à 14 sont des « exemples » de principes de justice fondamentale visés à l’art. 7 (voir aussi le *Renvoi sur la prostitution*, précité, p. 1171-1172). En conséquence, si certains des « principes de justice fondamentale »

dimension. No doubt this is what prompted Lamer C.J. to make the following observation in *Schachter, supra*, at p. 721: “the right to life, liberty and security of the person is in one sense a negative right, but the requirement that the government respect the ‘fundamental principles of justice’ may provide a basis for characterizing s. 7 as a positive right in some circumstances”.

Finally, the case law is consistent with the view that s. 7 includes a positive dimension. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 107, this Court explicitly held that s. 7 provided a positive right to state-funded counsel in the context of a child custody hearing. Lamer C.J. put the point quite baldly: “The omission of a positive right to state-funded counsel in s. 10 . . . does not preclude an interpretation of s. 7 that imposes a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing.”

One must resist the temptation to dilute the obvious significance of this decision by attempting to locate the threat to security of the person in *G. (J.)* in state action. It is of course true that the proceedings at issue in *G. (J.)* were initiated by the government. But Lamer C.J. pointed out that it was not the actions of the state in initiating the proceedings, *per se*, that gave rise to the potential s. 7 violation. Rather, “[t]he potential s. 7 violation . . . would have been the result of the failure of the Government of New Brunswick to provide the appellant with state-funded counsel . . . after initiating proceedings under Part IV of the *Family Services Act*” (*G. (J.)*, *supra*, at para. 91 (emphasis added)). This focus on state omission rather than state action is consistent with Lamer C.J.’s characterization of the state’s obligation to provide counsel as a positive obligation. It is in the very nature of such obligations that

prévus aux art. 8 à 14 consacrent des droits positifs, on devrait s’attendre à ce que les droits visés à l’art. 7 comportent également une dimension positive. C’est nul doute ce qui a incité le juge en chef Lamer à faire l’observation suivante dans l’arrêt *Schachter*, précité, p. 721 : « le droit à la vie, à la liberté et à la sécurité de la personne constitue en un sens un droit négatif, mais l’exigence voulant que le gouvernement respecte “les principes de justice fondamentale” peut permettre de qualifier l’art. 7 de droit positif dans certaines circonstances ».

Enfin, la jurisprudence étaye l’opinion que l’art. 7 comporte une dimension positive. Dans l’arrêt *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, par. 107, la Cour a explicitement jugé que l’art. 7 créait un droit positif aux services d’un avocat rémunéré par l’État dans le cadre d’audiences relatives à la garde d’enfants. Le juge en chef Lamer l’a énoncé de façon très catégorique : « [l]’absence de mention d’un droit positif à des services d’avocats rémunérés par l’État à l’art. 10 [ . . . ] n’écarte pas la possibilité d’interpréter l’art. 7 comme imposant aux gouvernements l’obligation constitutionnelle positive de fournir des services d’avocats dans les cas où cela est nécessaire à l’équité de l’audience. »

Il faut résister à la tentation d’atténuer l’importance évidente de cet arrêt en essayant d’assimiler la menace à la sécurité de la personne dont il était question dans l’arrêt *G. (J.)* à la mesure prise par l’État. Il est vrai que, dans cette affaire, c’est le gouvernement qui avait intenté les procédures en cause. Cependant, le juge en chef Lamer a fait remarquer que la violation potentielle de l’art. 7 ne découlait pas des actes de l’État, à savoir l’engagement des procédures. Au contraire, « [l]a contravention potentielle à l’art. 7 [ . . . ] aurait été attribuable à l’omission du gouvernement du Nouveau-Brunswick de fournir à l’appelante l’assistance d’un avocat rémunéré par l’État en vertu du programme d’aide juridique [ . . . ], après avoir entamé des procédures sous le régime de la partie IV de la *Loi sur les services à la famille* » (*G. (J.)*, précité, par. 91 (je souligne)). L’importance attachée à l’omission de l’État plutôt qu’à ses actes est compatible avec le fait que

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they can be violated by mere inaction, or failure to perform the actions that one is duty-bound to perform.

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In *Blencoe, supra*, this Court considered whether a state-caused delay in moving forward a human rights complaint violated the psychological integrity, and hence personal security, of the individual against whom the complaint was being made by subjecting him to prolonged and undue stigma. Bastarache J. stated at para. 57 that in order for state interference with an individual's psychological integrity to engage s. 7, "the psychological harm must be state imposed, meaning that the harm must result from the actions of the state" (emphasis deleted). This passage may appear to support the idea that positive state action is required to engage s. 7. There are, however, good reasons to find that it is not. For example, there are special problems relating to causation in the context of s. 7 claims involving psychological integrity which may support the need for a requirement of state action in such cases, without importing that requirement into s. 7 as a whole. Moreover, while this Court found on the particular facts of that case that there was no s. 7 violation, it also allowed that such state-caused delay might sometimes constitute a s. 7 violation, even if "only in exceptional cases" (*Blencoe*, at para. 83). In other words, *Blencoe* held that state-caused delay — the inertia (or lack of action) in moving a case forward — was not in itself incompatible with the s. 7 requirement that the impugned harm must result from "actions of the state". Therefore, *Blencoe* does not hold that all s. 7 protection is limited to cases in which one's life, liberty or security of the person is violated by positive state action. Quite the contrary, it implies that such protection will sometimes be engaged by mere state inaction.

le juge en chef Lamer a qualifié d'obligation positive l'obligation du gouvernement de fournir l'assistance d'un avocat. De par leur nature même, ces obligations sont susceptibles d'être violées par simple inaction de leur débiteur ou par le défaut de celui-ci d'accomplir les actes auxquels il est tenu.

Dans l'arrêt *Blencoe*, précité, la Cour s'est demandé si le délai — imputable à l'État — mis à donner suite à une plainte en matière de droits de la personne violait l'intégrité psychologique et, de ce fait, la sécurité personnelle de l'individu faisant l'objet de la plainte en lui faisant subir une stigmatisation prolongée et injustifiée. Au paragraphe 57, le juge Bastarache a déclaré que, pour que l'atteinte par l'État à l'intégrité psychologique d'une personne fasse entrer en jeu l'art. 7, « le préjudice psychologique doit être causé par l'État, c'est-à-dire qu'il doit résulter d'un acte de l'État » (soulignement supprimé). Ce passage peut sembler étayer l'idée qu'une mesure étatique concrète est nécessaire pour déclencher l'application de l'art. 7. Il existe toutefois de bonnes raisons permettant de conclure que ce n'est pas le cas. Par exemple, les demandes fondées sur l'art. 7 qui mettent en jeu l'intégrité psychologique des intéressés soulèvent des questions de causalité qui pourraient justifier qu'on exige la présence d'une mesure étatique dans de telles affaires, sans subordonner l'application de l'art. 7 à cette exigence dans tous les cas. En outre, bien que, à la lumière des faits propres à cette affaire, la Cour ait jugé qu'il n'y avait pas eu violation de l'art. 7, elle a également reconnu qu'un délai imputable à l'État pouvait parfois entraîner une telle violation, même si « [c]e n'est que dans des cas exceptionnels » (*Blencoe*, précité, par. 83). Autrement dit, il a été jugé dans l'arrêt *Blencoe* qu'un délai imputable à l'État — en l'occurrence l'inertie (ou l'inaction) dans le traitement d'une plainte — n'était pas en soi incompatible avec l'existence d'une condition requérant, pour l'application de l'art. 7, que le préjudice reproché résulte de « mesures étatiques ». Par conséquent, la Cour n'a pas conclu, dans *Blencoe*, que la protection de l'art. 7 se limite aux atteintes à la vie, à la liberté et à la sécurité de la personne qui sont imputables à une mesure étatique concrète. Bien au contraire, il ressort implicitement de cet arrêt que la simple inaction de l'État pourra parfois faire jouer cette protection.

Nor does there appear to be any support for the opposite conclusion in other case law emanating from this Court. Far from it, by impliedly sanctioning state inaction as a sufficient ground for making a s. 7 claim in at least some circumstances, *Blencoe* and *G. (J.)* are entirely consistent with other Supreme Court case law on point, sparse as it is. Thus, in *Dunmore*, *supra*, at para. 22, this Court held that “exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom”. *Dunmore* confirms that state inaction — the mere failure of the state to exercise its legislative choice in connection with the protected interests of some societal group, while exercising it in connection with those of others — may at times constitute “affirmative interference” with one’s *Charter* rights. Thus in certain contexts, the state is under a positive duty to extend legislative protections where it fails to do so inclusively.

Of course, it may well be that in order for such positive obligations to arise the state must first do something that will bring it under a duty to perform. But even if this is so, it is important to recognize that the kind of state action required will not be action that is causally determinative of a right violation, but merely action that “triggers”, or gives rise to, a positive obligation on the part of the state. Depending on the context, we might even expect to see altogether different kinds of state action giving rise to a positive obligation under s. 7. In the judicial context, it will be natural to find such a state action in the initiation by the state of judicial proceedings. In the legislative context, however, it may be more appropriate, following cases like *Vriend* and *Dunmore*, to search for it in the state’s decision to exercise its legislative choice in a non-inclusive manner that significantly affects a person’s enjoyment of a *Charter* right. In other words, in certain contexts the state’s choice to legislate over some matter may constitute state action giving rise to a positive obligation under s. 7.

Il ne semble pas non plus qu’on puisse trouver d’appui en faveur de la conclusion inverse dans d’autres arrêts de la Cour. Bien au contraire, en reconnaissant implicitement que, à tout le moins dans certaines situations, l’inaction de l’État suffisait à justifier une demande fondée sur l’art. 7, les arrêts *Blencoe* et *G. (J.)* sont tout à fait compatibles avec les autres arrêts pertinents de la Cour, si peu nombreux soient-ils. Ainsi, dans l’arrêt *Dunmore*, précité, par. 22, la Cour a statué que « l’exclusion d’un régime de protection peut, dans certains contextes, équivaloir à une entrave manifeste à l’exercice réel d’une liberté garantie ». L’arrêt *Dunmore* confirme que l’inaction de l’État — le simple fait pour l’État de ne pas légiférer à l’égard des droits protégés d’un groupe donné de la société, tout en le faisant à l’égard des droits d’autres groupes — peut parfois constituer une « entrave manifeste » à l’exercice par une personne des droits qui lui sont garantis par la *Charte*. En conséquence, dans certains contextes, l’État a l’obligation positive d’agir et d’étendre la protection de la loi à ceux auxquels il ne l’a pas accordée initialement.

Évidemment, il est fort possible que, pour que naissent de telles obligations positives, l’État doive d’abord accomplir quelque chose qui entraînera pour lui l’obligation d’agir. Mais même si c’est le cas, il importe de reconnaître qu’on n’exigera pas que la mesure étatique soit de nature à constituer une cause déterminante de la violation d’un droit, mais simplement qu’il s’agisse d’une mesure qui « crée » ou fasse naître une obligation d’agir de la part de l’État. Selon le contexte, on pourrait même s’attendre à ce que, pour l’application de l’art. 7, des mesures étatiques de types tout à fait différents fassent naître une obligation positive. En contexte judiciaire, il va de soi que l’introduction de procédures judiciaires par l’État constitue une mesure étatique. En contexte législatif toutefois, dans la foulée d’arrêts comme *Vriend* et *Dunmore*, il convient peut-être de rechercher cette mesure dans la décision de l’État de légiférer d’une manière non-inclusive, portant ainsi atteinte de façon importante à la jouissance par une personne d’un droit garanti par la *Charte*. En d’autres mots, la décision de l’État de légiférer sur une question peut, dans certaines situations, constituer une mesure étatique faisant naître, pour l’application de l’art. 7, une obligation positive.

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The finding that s. 7 may impose positive obligations on the state brings us directly to a frequently expressed objection in the context of claims like the ones at issue in the present case that courts cannot enforce positive rights of an individual to the basic means of basic subsistence. The suggestion is that they cannot do so without being drawn outside their proper judicial role and into the realm of deciding complex matters of social policy better left to legislatures. I turn now to this concern.

#### D. *Justiciability*

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I found the obstacles to positive claims considered in the last sections to be unfounded under a correct interpretation of the *Charter*. In contrast, the concern I discuss now may present a barrier to some claimants under particular circumstances. However, it does not do so in the present case for reasons I explain below. The ostensible difficulty that confronts the appellant here is the general assertion that positive claims against the state for the provision of certain needs are not justiciable because deciding upon such claims would require courts to dictate to the state how it should allocate scarce resources, a role for which they are not institutionally competent. Professor Hogg, *supra*, puts the point as follows (at p. 44-12.1):

[This] involves a massive expansion of judicial review, since it would bring under judicial scrutiny all of the elements of the modern welfare state . . . . As Oliver Wendell Holmes would have pointed out, these are the issues upon which elections are won and lost . . . .

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While the claim asserted here hardly in itself has the potential to bring “all of the elements of the modern welfare state” under judicial scrutiny, the concern raised by this justiciability argument is a valid one. Questions of resource allocation typically involve delicate matters of policy. Legislatures

La conclusion selon laquelle l’art. 7 peut avoir pour effet d’imposer à l’État des obligations positives nous amène directement à l’objection qui est souvent formulée dans les actions du genre de celles dont nous sommes saisis et qui veut que les tribunaux ne puissent contraindre le respect des droits positifs d’une personne aux moyens de subsistance élémentaires. Cette objection suppose que les tribunaux sont incapables de s’acquitter de cette tâche sans s’écarter des fonctions judiciaires qui leur incombent et s’aventurer dans le domaine complexe de la politique sociale, qu’il est préférable de laisser au législateur. Je vais maintenant examiner cet argument.

#### D. *La justiciabilité*

J’ai conclu, dans les sections précédentes des présents motifs, qu’une lecture appropriée de la *Charte* permettait d’éliminer les obstacles aux actions sollicitant l’intervention de l’État qui ont été examinés. Par contre, l’argument que j’aborde maintenant peut, dans certaines circonstances, être opposé avec succès à certains demandeurs. Toutefois, pour les raisons exposées ci-après, ce n’est pas le cas en l’espèce. La difficulté évidente à laquelle se heurte l’appelante dans la présente affaire est l’argument selon lequel les actions demandant à l’État d’intervenir concrètement afin de pourvoir à certains besoins ne sont pas justiciables au motif que, pour statuer sur ces actions, les tribunaux devraient dicter à l’État comment répartir des ressources limitées, rôle pour lequel ils ne sont pas institutionnellement compétents. Voici comment le professeur Hogg, *op. cit.*, s’exprime à ce sujet (à la p. 44-12.1) :

[TRADUCTION] [Ce rôle] élargirait considérablement la portée du contrôle judiciaire, puisque l’on assujettirait tous les aspects de l’État providence moderne au pouvoir de contrôle des tribunaux. [. . .] Comme l’aurait souligné Oliver Wendell Holmes, il s’agit là des questions sur lesquelles reposent l’issue des élections . . . .

Bien que le droit invoqué en l’espèce risque peu d’amener les tribunaux à se pencher sur « tous les aspects de l’État providence moderne », l’argument de la justiciabilité soulève une préoccupation valable. La répartition des ressources fait habituellement intervenir de délicates questions de politique

are better suited than courts to addressing such matters, given that they have the express mandate of the taxpayers as well as the benefits of extensive debate and consultation.

It does not follow, however, that courts are precluded from entertaining a claim such as the present one. While it may be true that courts are ill-equipped to decide policy matters concerning resource allocation — questions of how much the state should spend, and in what manner — this does not support the conclusion that justiciability is a threshold issue barring the consideration of the substantive claim in this case. As indicated above, this case raises altogether a different question: namely, whether the state is under a positive obligation to provide basic means of subsistence to those who cannot provide for themselves. In contrast to the sorts of policy matters expressed in the justiciability concern, this is a question about what kinds of claims individuals can assert against the state. The role of courts as interpreters of the *Charter* and guardians of its fundamental freedoms against legislative or administrative infringements by the state requires them to adjudicate such rights-based claims. One can in principle answer the question of whether a *Charter* right exists — in this case, to a level of welfare sufficient to meet one's basic needs — without addressing how much expenditure by the state is necessary in order to secure that right. It is only the latter question that is, properly speaking, non-justiciable.

Of course, in practice it will often be the case that merely knowing whether the right exists is of little assistance to the claimant. For, unless we also know what is required, or how much expenditure is needed, in order to safeguard the right, it will usually be difficult to know whether the right has been violated. This difficulty does not arise in the present

générale. Les législateurs sont mieux placés que les tribunaux pour résoudre ces questions, puisque les électeurs leur ont expressément confié le mandat de le faire et qu'ils ont l'avantage de pouvoir en débattre longuement et de procéder à de longues consultations à cet égard.

Toutefois, il ne s'ensuit pas que les tribunaux sont préclus de connaître d'une action comme celle dont nous sommes saisis. Bien qu'il puisse être vrai que les tribunaux ne sont pas équipés pour trancher des questions de politique générale touchant à la répartition des ressources — c'est-à-dire la question de savoir combien l'État devrait dépenser et comment il devrait le faire — ce facteur ne permet pas de conclure que la justiciabilité constitue une condition préalable faisant échec à l'examen au fond du présent litige. Comme on l'a indiqué plus tôt, le présent pourvoi soulève une question tout à fait différente, celle de savoir si l'État a l'obligation positive d'intervenir pour fournir des moyens élémentaires de subsistance aux personnes incapables de subvenir à leurs besoins. Contrairement au genre de questions de politique générale que soulève le problème de la justiciabilité, nous sommes en présence de la question de savoir quels types de droits les particuliers peuvent invoquer contre l'État. Dans leur rôle d'interprètes de la *Charte* et de protecteurs des libertés fondamentales contre les atteintes de nature législative ou administrative susceptibles de leur être portées par l'État, les tribunaux sont requis de statuer sur les revendications en justice de tels droits. Il est possible, en principe, de répondre à la question de savoir si la *Charte* reconnaît un droit donné — en l'occurrence le droit pour une personne de recevoir un niveau d'aide suffisant pour lui permettre de subvenir à ses besoins essentiels — sans se demander combien l'État devrait déboursier pour garantir ce droit. Seule cette dernière question est, à proprement parler, non justiciable.

Certes, il arrive souvent en pratique que le simple fait de savoir si le droit en question existe ou non ne soit d'aucune utilité au demandeur. En effet, à moins de connaître également les mesures ou les dépenses qui sont requises pour garantir le respect du droit en question, il sera normalement difficile de déterminer si celui-ci a été violé. Cette difficulté ne se pose pas

case. Once a right to a level of welfare sufficient to meet one's basic needs is established, there is no question on the facts of this case that the right has been violated. This Court need not enter into the arena of determining what would satisfy such a "basic" level of welfare because that determination has already been made by the legislature, which is itself the competent authority to make it.

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Indeed, the very welfare scheme that is challenged here includes provisions that set out the basic amount. Section 23 of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, provides that the amount receivable is established according to the "ordinary needs" ("*besoins ordinaires*") of the recipients. The bare minimum a single adult aged 30 or over can receive is \$466. This is the amount that was deemed by the legislature itself to be sufficient to meet the "ordinary needs" of a single adult. The present case comes before us on the basis that the government failed to provide a level of assistance that, according to its own standards, was necessary to meet the ordinary needs of adults aged 18 to 29. The only outstanding questions are whether this is in fact established and, if so, whether the claimants had a right to the provision of their ordinary needs.

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Thus any concern over the justiciability of positive claims against the state has little bearing on this case. At any rate, these issues, to some extent, obscure the real question. At this stage we are less concerned with what, if anything, the state must do in order to bring itself under a positive obligation than with whether s. 7 can support such positive obligations to begin with. I have already indicated several reasons for thinking that it can. I now want to supplement these reasons by means of an interpretive analysis of s. 7. As it turns out, any acceptable approach to *Charter* interpretation — be it textual, contextual, or purposive — quickly makes apparent that interpreting the rights contained in s. 7 as including a positive component is not only possible, but also necessary.

en l'espèce. Une fois établie l'existence du droit de l'individu à un niveau d'aide suffisant pour lui permettre de subvenir à ses besoins essentiels, les faits de la présente affaire démontrent clairement qu'il y a eu atteinte à ce droit. La Cour n'a pas à répondre à la question de savoir quel serait le niveau « minimum » d'aide sociale, puisque le législateur, qui est l'autorité compétente en la matière, a déjà fait cette détermination.

En effet, le régime d'aide sociale contesté en l'espèce comporte des dispositions fixant la prestation de base. L'article 23 du *Règlement sur l'aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, précise que la somme à laquelle a droit un bénéficiaire est établie en fonction de ses « besoins ordinaires » (« *ordinary needs* »). Le minimum que reçoit un adulte seul de 30 ans et plus s'élève à 466 \$ : voilà la somme que le législateur lui-même a jugée suffisante pour répondre aux « besoins ordinaires » d'un adulte seul. Dans la présente affaire, on reproche au gouvernement de ne pas avoir fourni le niveau d'aide qui, au regard des normes qu'il avait lui-même fixées, était nécessaire pour satisfaire aux besoins ordinaires des adultes âgés de 18 à 29 ans. Les seules questions qu'il reste à trancher consistent à déterminer si ce fait a été établi et, dans l'affirmative, si les demandeurs avaient droit à ce qu'on pourvoit à leurs besoins ordinaires.

Par conséquent, toute question touchant à la justiciabilité des actions sollicitant l'intervention de l'État a peu d'incidence en l'espèce. Quoi qu'il en soit, ces discussions occultent dans une certaine mesure la véritable question. À ce stade-ci, nous nous intéressons moins à ce que l'État doit faire — à supposer qu'il doive faire quelque chose — pour être assujéti à une obligation positive qu'à la question préliminaire de savoir si l'art. 7 peut même servir de fondement à de telles obligations. J'ai déjà fait état de plusieurs raisons tendant à indiquer qu'il le peut. J'aimerais maintenant les compléter en procédant à une analyse interprétative de l'art. 7. Comme on pourra le constater, toute démarche acceptable en matière d'interprétation de la *Charte* — qu'elle soit textuelle, contextuelle ou téléologique — fait vite ressortir qu'il est non seulement possible, mais également nécessaire, de conclure que les droits visés à l'art. 7 comportent une dimension positive.

## II. Analysis of Section 7 of the Charter

### A. Textual Interpretation: The Language of Section 7

My colleague Bastarache J. rightly notes that “[w]ithout some link to the language of the *Charter*, the legitimacy of the entire process of *Charter* adjudication is brought into question” (para. 214). With this in mind, I set out s. 7 in its entirety:

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

I have drawn attention to the conjunction in s. 7 for two reasons: first, it constitutes an integral part of the grammatical structure of the section; and second, up until now, it has not been the subject of much judicial attention.

This is surprising. The two parts of the section could as easily have been punctuated to form more or less separate sentences. Indeed the French version of s. 7 is so punctuated. It reads as follows:

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

My reasons for emphasizing this grammatical point are straightforward. Past judicial treatments of the section have habitually read out of the English version of s. 7 the conjunction *and*, with it, the entire first clause. The result is that we typically speak about s. 7 guaranteeing only the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. On its face, this is a questionable construction of the language of s. 7: for it equates the protection of the second clause alone with the protection of the section as a whole. We no doubt would be less likely to make this equation had the two clauses been punctuated rather than conjoined. As it turns out, moreover, our failure to have due regard for the structure of the section has potentially

## II. Analyse de l’art. 7 de la Charte

### A. L’interprétation textuelle : le libellé de l’art. 7

Mon collègue le juge Bastarache souligne à juste titre que, « [e]n l’absence de quelque lien que ce soit avec le texte même de la *Charte*, la légitimité de tout le processus juridictionnel relatif à la *Charte* est remise en question » (par. 214). À la lumière de cette observation, je reproduis ci-après intégralement le texte anglais de l’art. 7 :

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. [Je souligne.]

J’attire l’attention du lecteur sur la conjonction « *and* » dans l’art. 7 pour deux raisons : premièrement, elle fait partie intégrante de la structure grammaticale de la disposition; deuxièmement, elle a jusqu’à maintenant peu retenu l’attention des tribunaux.

Ce fait est étonnant. On aurait aisément pu séparer les deux parties de la phrase par un signe de ponctuation et en faire deux phrases plus ou moins indépendantes. De fait, c’est ainsi que se présente la version française, dont voici le texte :

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

Les raisons pour lesquelles j’insiste sur cet aspect grammatical sont simples. Dans la jurisprudence relative à cette disposition, on a généralement fait abstraction de la conjonction « *and* » figurant dans la version anglaise de l’art. 7 et, partant, de toute la première partie de la disposition. Voilà pourquoi on considère habituellement que l’art. 7 garantit uniquement le droit qu’il ne soit porté atteinte à la vie, à la liberté et à la sécurité de la personne qu’en conformité avec les principes de justice fondamentale. Il s’agit à première vue d’une interprétation discutable du texte de l’art. 7, car elle considère que la protection accordée par le deuxième membre de phrase et celle accordée par la disposition dans son ensemble ne font qu’une. De toute évidence, nous aurions vraisemblablement été moins enclins à faire

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dramatic consequences for the scope of the s. 7 guarantee. This was implicitly recognized by Lamer J. in *Re B.C. Motor Vehicles Act, supra*, at p. 500:

It is clear that s. 7 surely protects the right not to be deprived of one's life, liberty and security of the person when that is done in breach of the principles of fundamental justice. The outcome of this case is dependent upon the meaning to be given to that portion of the section which states "and the right not to be deprived thereof except in accordance with the principles of fundamental justice". On the facts of this case it is not necessary to decide whether the section gives any greater protection, such as deciding whether, absent a breach of the principles of fundamental justice, there still can be, given the way the section is structured, a violation of one's rights to life, liberty and security of the person under s. 7. [Emphasis added.]

The quoted passage indicates that, from the earliest stages of s. 7 interpretation, this Court has considered it a very live issue whether the first clause in s. 7 involves some greater protection than that accorded by the second clause alone.

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It is in fact arguable, as Professor Hogg, *supra*, points out (at p. 44-3), "that s. 7 confers two rights": a right, set out in the section's first clause, to "life, liberty and security of the person" full stop (more or less); and a right, set out in the section's second clause, not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. Wilson J. explicitly considered this interpretation of s. 7 in *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 488. Although in that case she expressed misgivings regarding the feasibility of the interpretation, she ultimately left its status undecided. In fact, in *Re B.C. Motor Vehicle Act, supra*, at p. 523, which was heard later in the same year, she may have overcome her earlier misgivings and impliedly accepted the two-rights interpretation by stating that a

cette équation si, dans la version anglaise, les deux membres de phrases avaient été séparés par un signe de ponctuation plutôt que par une conjonction. De plus, il s'avère que notre omission de tenir dûment compte de la structure de la disposition pourrait entraîner d'importantes conséquences du point de vue de l'étendue de la garantie offerte par l'art. 7. Le juge Lamer a implicitement reconnu cette possibilité dans le *Renvoi : Motor Vehicle Act de la C.-B.*, précité, p. 500 :

Il ne fait pas de doute que l'art. 7 garantit le droit de ne pas se voir porter atteinte à sa vie, à sa liberté et à la sécurité de sa personne lorsque cela est fait contrairement aux principes de justice fondamentale. L'issue de la présente affaire dépend du sens à donner à la partie de l'article où on dit : « il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale ». D'après les faits de la présente affaire, il n'est pas nécessaire de déterminer si l'article accorde une plus grande protection, notamment si, en l'absence d'une violation des principes de justice fondamentale, il peut quand même y avoir, compte tenu de la formulation de l'article, une atteinte au droit à la vie, à la liberté et à la sécurité de la personne, que garantit l'art. 7. [Je souligne.]

Il ressort de cet extrait que, depuis ses toutes premières décisions sur l'interprétation de l'art. 7, la Cour a considéré que la question de savoir si la première partie de l'art. 7 accorde une protection plus large que celle prévue par la seule deuxième partie de cette disposition est loin d'être théorique.

Comme le souligne le professeur Hogg, *op. cit.*, il est possible de soutenir [TRADUCTION] « que l'art. 7 confère deux droits » (p. 44-3) : le droit, énoncé dans la première partie de la disposition, « à la vie, à la liberté et à la sécurité de sa personne », point à la ligne (plus ou moins), ainsi que le droit, énoncé dans la deuxième partie de la disposition, à ce qu'il ne soit porté atteinte à la vie, à la liberté ou à la sécurité d'une personne qu'en conformité avec les principes de justice fondamentale. Madame le juge Wilson s'est expressément penchée sur cette interprétation dans l'arrêt *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, p. 488. Bien que, dans cette affaire, elle ait exprimé des réserves quant à la possibilité d'une telle interprétation, madame le juge Wilson n'a pas tranché la question en définitive. En fait, dans le *Renvoi : Motor Vehicle Act de*

deprivation of life, liberty or security of the person would require s. 1 justification even if the principles of fundamental justice were satisfied. Her statement in this regard is consistent with the notion that the first clause in s. 7 affords additional protection, over and above that afforded in the second clause, with the result that mere compliance with the principles of fundamental justice does not in itself guarantee that the rights to life, liberty and security of the person will not be violated.

The two-rights interpretation of s. 7 has fallen into relative obscurity since these latest references to it by Lamer and Wilson JJ. in *Re B.C. Motor Vehicle Act*, *supra*. To some extent, this was to be expected. As indicated above, this Court has most often had occasion to visit issues of s. 7 interpretation in criminal, or quasi-criminal, contexts. In those contexts, there is little need to concern ourselves with any potentially self-standing right in the first clause of s. 7. Since what we are concerned with in such penal cases is the constitutional validity of positive state action that actively deprives individuals of their liberty, it is not surprising that the s. 7 analysis would focus only upon the second clause, which deals with those types of deprivation. *Re B.C. Motor Vehicles Act* was a case in point. Unlike Lamer J. in that case, however, we have not always been careful in such cases to delineate the scope of our s. 7 discussion. This has led to a general impression that s. 7 is reduced to the right contained in the second clause.

As I have already suggested, this is not a plausible construction of the text of s. 7. Only by ignoring the structure of s. 7 — by effectively reading out

*la C.-B.*, précité, p. 523, pourvoi entendu plus tard au cours de la même année que l'affaire susmentionnée, madame le juge Wilson a peut-être surmonté les réserves qu'elle avait exprimées plus tôt dans l'année et implicitement accepté l'interprétation prônant l'existence d'un double droit lorsqu'elle a affirmé que, même en cas de respect des principes de justice fondamentale, une atteinte à la vie, à la liberté ou à la sécurité de sa personne devra être justifiée au regard de l'article premier. Son affirmation sur ce point est compatible avec l'idée que la première partie de l'art. 7 offre une protection additionnelle, en sus de celle prévue à la deuxième partie, et qu'en conséquence le simple respect des principes de justice fondamentale n'est pas garant en soi de l'absence d'atteinte aux droits d'un individu à la vie, à la liberté et à la sécurité de sa personne.

L'interprétation prônant l'existence d'un double droit garanti par l'art. 7 est restée dans une obscurité relative depuis que les juges Lamer et Wilson en ont fait état dans le *Renvoi : Motor Vehicle Act de la C.-B.*, précité. Cette situation était dans une certaine mesure prévisible. Comme je l'ai indiqué plus tôt, la Cour est plus souvent qu'autrement appelée à interpréter l'art. 7 en contexte criminel ou quasi-criminel. Dans ces cas, il y a peu de raisons de s'interroger sur l'existence potentielle d'un droit distinct dans la première partie de l'art. 7. En effet, étant donné que, dans ces affaires pénales, nous nous intéressons à la validité constitutionnelle d'une mesure étatique positive ayant pour effet de priver concrètement une personne de sa liberté, il n'est pas étonnant que l'analyse fondée sur l'art. 7 ne s'attache qu'à la deuxième partie de la disposition, qui vise précisément ces types de privations. Le *Renvoi : Motor Vehicle Act de la C.-B.*, précité, illustre bien ce point. Cependant, contrairement à ce qu'a fait le juge Lamer dans cet arrêt, nous n'avons pas toujours pris soin, dans de telles affaires, de bien circonscrire la portée de notre analyse fondée sur l'art. 7, et c'est ce qui a fait naître l'impression que l'art. 7 se résume au droit prévu à la deuxième partie de la disposition.

Comme je l'ai indiqué précédemment, il ne s'agit pas d'une interprétation plausible du texte de l'art. 7. Ce n'est qu'en faisant abstraction de la

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the conjunction and, with it, the first clause — is it possible to conclude that it protects exclusively “the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice”. There may be some question as to how far, precisely, the protection of s. 7 extends beyond this, but that the section’s first clause affords some additional protection seems, as a purely textual matter, beyond reasonable objection.

structure de l’art. 7 — c’est-à-dire en le réaménageant par la suppression de la conjonction « and » dans la version anglaise de la disposition et, partant, de la première partie de la disposition — qu’il est possible de conclure que cet article protège exclusivement « *the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice* » (« le droit de n’être privé de la vie, de la liberté et de la sécurité de sa personne qu’en conformité avec les principes de justice fondamentale »). Il est permis de se demander jusqu’où, précisément, s’étend la protection de l’art. 7, mais il semble qu’on ne puisse raisonnablement nier que, d’un point de vue purement textuel, la première partie de la disposition offre une protection additionnelle.

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The instant appeal requires us to consider, perhaps for the first time, what this additional protection might consist of. Without wanting to limit the possibilities at this early stage of interpreting the first clause, there are at least two alternatives that present themselves. The first was alluded to by both Lamer and Wilson JJ. in *Re B.C. Motor Vehicle Act*, *supra*. In essence, it entails reading the first clause as providing for a completely independent and self-standing right, one which can be violated even absent a breach of fundamental justice, but requiring a s. 1 justification in the event of such violation. This interpretation gets its starting point from the fact that the first clause of s. 7 makes no mention of the principles of fundamental justice. It follows, the thinking goes, that the right to life, liberty and security of the person provided for in the first clause can be violated even where the state conducts itself in accordance with the principles of fundamental justice. And since the justificatory analysis under s. 1 was, at an early stage of *Charter* jurisprudence, given a very limited role in the context of s. 7 violations primarily because it was thought that the violation of a right in breach of fundamental justice could almost never be justified, this interpretation restores to s. 1 a more active role to play in the context of at least some s. 7 violations.

Dans le présent pourvoi, nous sommes appelés, peut-être pour la première fois, à nous demander en quoi pourrait consister cette protection additionnelle. Sans vouloir limiter les possibilités si tôt dans l’interprétation de la première partie de la disposition, signalons qu’il existe au moins deux possibilités. Les juges Lamer et Wilson ont évoqué la première dans le *Renvoi : Motor Vehicle Act de la C.-B.*, précité. Essentiellement, suivant cette interprétation, la première partie établirait un droit entièrement distinct et autonome, auquel il peut avoir été porté atteinte même en l’absence de violation des principes de justice fondamentale, sous réserve qu’en pareils cas il faut justifier cette atteinte au regard de l’article premier. À la base, cette interprétation repose sur le fait que la première partie de l’art. 7 ne renferme aucune mention des principes de justice fondamentale. Il s’ensuivrait qu’il peut y avoir atteinte au droit à la vie, à la liberté et à la sécurité de la personne consacré dans la première partie, même lorsque l’État agit en conformité avec les principes de justice fondamentale. De plus, étant donné que, dans les premiers arrêts sur la *Charte*, l’analyse de la justification au regard de l’article premier ne jouait qu’un rôle très limité dans les affaires reprochant des violations de l’art. 7 — principalement parce qu’on estimait qu’une atteinte à un droit résultant d’une violation des principes de justice fondamentale ne pouvait presque jamais se justifier —, cette interprétation reconnaît à l’article premier un rôle plus grand dans le contexte d’au moins certaines violations de l’art. 7.

Another possible interpretation of what the additional protection afforded by the first clause of s. 7 consists of focuses less on the omission of any reference to the principles of fundamental justice, and more on its failure to make any mention of the term “deprivation”. There is indeed something plausible in the idea that, by omitting such language, the first clause extends the right to life, liberty and security of the person beyond protection against the kinds of state action that have habitually been associated with the term “deprivation”. Essentially, this interpretation would suggest that by omitting the term “deprivation” in the first clause, the section implies that it is at most in connection with the right afforded in the second clause, if at all (see *supra*, at para. 321), that there must be positive state action in order to ground a violation; the right granted in the first clause would be violable merely by state inaction.

I need not decide here which of these two interpretations, if any, is to be preferred. Indeed, they do not appear to be mutually exclusive. For the purposes of the present appeal, it suffices to raise the following two points: first, either interpretation is preferable to the way s. 7 has habitually been interpreted to this point in time, not only textually but also, as I will now demonstrate, from the standpoints of contextual and purposive analysis; and second, either interpretation accommodates — indeed demands — recognition of the sort of interest claimed by the appellant in this case.

#### B. Purposive Analysis

The proper approach to the definition of the rights and freedoms guaranteed by the *Charter* is, as I have mentioned (at para. 316), a purposive one. In *Big M Drug Mart, supra*, Dickson J. stated at p. 344:

The meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it [is] meant to protect.

Une autre interprétation possible de la protection additionnelle conférée par la première partie de l’art. 7 consiste à s’attacher moins à l’absence de mention des principes de justice fondamentale et plutôt à l’absence du terme « *deprivation* » en anglais. Il est en effet plausible que, du fait de l’absence de ce terme, la première partie de la disposition élargisse le droit à la vie, à la liberté et à la sécurité de la personne au-delà de la protection contre les mesures étatiques habituellement associées à ce terme. Essentially, cette interprétation suggère que, en raison de l’absence du terme « *deprivation* » dans la première partie de la disposition, il s’ensuivrait que c’est tout au plus à l’égard du droit garanti dans la deuxième partie, à supposer que ce soit même le cas (voir le par. 321), qu’il faut établir l’existence d’une mesure étatique positive pour fonder une plainte de violation de ce droit; le droit garanti dans la première partie de la disposition serait susceptible de violation par simple inaction de l’État.

Je n’ai pas à décider en l’espèce si l’une ou l’autre de ces interprétations doit être retenue. D’ailleurs, elles ne paraissent pas s’exclure mutuellement. Pour l’examen du présent pourvoi, il suffit de mentionner les deux points suivants : premièrement, chacune de ces interprétations est préférable à la façon dont l’art. 7 a été interprété jusqu’à maintenant, non seulement d’un point de vue textuel, mais aussi, comme je vais le démontrer, du point de vue de l’analyse contextuelle et téléologique; deuxièmement, ces deux interprétations permettent — de fait exigent — la reconnaissance du type de droit que revendique l’appelante en l’espèce.

#### B. L’analyse téléologique

Comme je l’ai évoqué plus tôt (au par. 316), la démarche qu’il convient d’adopter pour définir les droits et libertés garantis par la *Charte* est l’analyse téléologique. Dans l’arrêt *Big M Drug Mart*, précité, le juge Dickson a dit ceci, à la p. 344 :

Le sens d’un droit ou d’une liberté garantis par la *Charte* doit être vérifié au moyen d’une analyse de l’objet d’une telle garantie; en d’autres termes, ils doivent s’interpréter en fonction des intérêts qu’ils visent à protéger.

... The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. [Emphasis deleted.]

An interpretation of s. 7 which reduces it to the right contained in the second clause — the “deprivation” clause — is seriously at odds with any purposive interpretation of the right to life guaranteed by the section. Indeed, if that interpretation were to be accepted, it would effectively denude the right to life of any purpose whatsoever, rendering it essentially vacuous.

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Professor Hogg, *supra*, implies as much when he argues that “[s]o far as ‘life’ is concerned, the section has little work to do” (p. 44-6). This is only true, however, if we understand the s. 7 guarantee as it has been habitually understood. For in that case, the protection of the section would extend only to “deprivations” of life that were not in accordance with the principles of fundamental justice. And since “principles of fundamental justice” has so far been interpreted to invoke the basic tenets of the “legal system”, narrowly defined to include only courts and tribunals that perform court-like functions, the purpose of guaranteeing the right to life would seem limited on this interpretation to guarding against capital punishment, which is the only obvious way in which the “legal system”, so defined, could potentially trench on a person’s right to life. But, as Professor Hogg points out, such a purpose might just as well be served by s. 12 of the *Charter*, which protects individuals against cruel and unusual punishment. In effect, then, on this interpretation the s. 7 guarantee of the right to life would be purposeless, and the right itself emptied of any meaningful content.

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One should not readily accept that the right to life in s. 7 means virtually nothing. To begin with, this result violates basic standards of interpretation by suggesting that the *Charter* speaks essentially

... Comme on le souligne dans l’arrêt *Southam*, l’interprétation doit être libérale plutôt que formaliste et viser à réaliser l’objet de la garantie et à assurer que les citoyens bénéficient pleinement de la protection accordée par la *Charte*. [Soulignement supprimé.]

Considérer que l’art. 7 se résume au droit prévu à la deuxième partie de la disposition — la clause relative à l’« atteinte » — va sérieusement à l’encontre de toute interprétation téléologique du droit à la vie garanti par cet article. De fait, si l’on retenait cette interprétation, on priverait ainsi le droit à la vie de tout objet utile, le rendant essentiellement vide de sens.

C’est ce que laisse implicitement entendre le professeur Hogg, *op. cit.*, lorsqu’il affirme que, [TRADUCTION] « [e]n ce qui concerne la “vie”, la disposition a un rôle très limité » (p. 44-6). Ce n’est toutefois vrai que si on interprète la garantie de l’art. 7 au sens où on l’entend habituellement, puisque, dans un tel cas, la protection conférée par cette disposition ne viserait que les « atteintes » à la vie qui ne seraient pas conformes aux principes de justice fondamentale. De plus, comme on a jusqu’à maintenant considéré, dans l’interprétation des « principes de justice fondamentale », que ceux-ci mettaient en jeu les préceptes fondamentaux du « système juridique », qui a été défini restrictivement et ne s’entend que des tribunaux judiciaires et des tribunaux administratifs qui exercent des fonctions à caractère judiciaire, il semblerait, suivant cette interprétation, que le droit à la vie se limite à la protection contre la peine de mort, seul moyen évident par lequel le « système juridique », ainsi défini, pourrait porter atteinte au droit à la vie d’une personne. Cependant, comme le souligne le professeur Hogg, l’art. 12 de la *Charte* — qui protège une personne contre les peines cruelles et inusitées — pourrait tout aussi bien permettre de réaliser cet objectif. Par conséquent, selon cette interprétation, la garantie relative au droit à la vie prévue par l’art. 7 serait dans les faits sans objet et le droit lui-même vidé de tout contenu utile.

On ne devrait pas accepter d’emblée que le droit à la vie prévu à l’art. 7 soit virtuellement vide de sens. Tout d’abord, une telle conclusion est contraire aux principes d’interprétation les plus

in vain in respect of this fundamental right. More importantly, however, it threatens to undermine the coherence and purpose of the *Charter* as a whole. After all, the right to life is a prerequisite — a *sine qua non* — for the very possibility of enjoying all the other rights guaranteed by the *Charter*. To say this is not to set up a hierarchy of *Charter* rights. No doubt a meaningful right to life is reciprocally conditioned by these other rights: they guarantee that human life has dignity, worth and meaning. Nevertheless, the centrality of the right to life to the *Charter* as a whole is obvious. Indeed, it would be anomalous if, while guaranteeing a complex of rights and freedoms deemed to be necessary to human fulfilment within society, the *Charter* had nothing of significance to say about the one right that is indispensable for the enjoyment of all of these others.

Thus, in my view, any interpretation of the *Charter* that leaves the right to life such a small role to play is one that threatens to impugn the coherence of the whole *Charter*. Far from being a poor relation of other *Charter* rights — one which deserves protection merely as a negative right, while certain other *Charter* rights are granted recognition as full-blown positive rights — the right to life is, in a very real sense, their essential progenitor. So much so that to deny any real significance to the *Charter* guarantee of the right to life would be to undercut the significance of every other *Charter* guarantee.

A purposive interpretation of s. 7 as a whole requires that all the rights embodied in it be given meaning. But by leaving no meaningful role to be played by the right to life, the habitual interpretation of s. 7 threatens not only the coherence, but also the purpose of the *Charter* as a whole. In order to avoid this result, we must recognize that the state can potentially infringe the right to life, liberty and security of the person in ways that go beyond violating the right contained in the second clause of s. 7. Whether one chooses to characterize matters by stating: (a) that it is not merely active “deprivations”

élémentaires, car elle laisse entendre que la disposition de la *Charte* sur ce droit fondamental est rédigée en termes essentiellement creux. Facteur plus important encore, cette interprétation risque de miner la cohérence et l’objet de la *Charte* dans son ensemble. Après tout, le droit à la vie constitue une condition préalable — *sine qua non* — à la possibilité même de jouir de tous les autres droits garantis par la *Charte*. Cela ne revient pas à hiérarchiser les droits garantis par la *Charte*. Il ne fait aucun doute qu’un véritable droit à la vie est réciproquement tributaire de ces autres droits, qui garantissent à la vie humaine, dignité, valeur et sens. Néanmoins, le caractère central du droit à la vie dans la *Charte* est évident. D’ailleurs, il serait anormal que la *Charte* garantisse un ensemble de droits et libertés jugés nécessaires à l’épanouissement de l’être humain au sein de la société sans exprimer quoi que ce soit d’important sur le droit indispensable à la jouissance de tous les autres.

Par conséquent, j’estime que toute interprétation de la *Charte* qui aurait pour effet de limiter à ce point le rôle du droit à la vie risque de miner la cohérence de l’ensemble de la *Charte*. Loin d’être le parent pauvre des autres droits de la *Charte* — c’est-à-dire un droit qui ne mérite une protection qu’à titre de droit négatif, alors que d’autres droits prévus par la *Charte* sont reconnus comme des droits positifs à part entière — le droit à la vie est, dans un sens très réel, la source de ces droits, tant et si bien que refuser d’accorder toute importance concrète au droit à la vie garanti par la *Charte* aurait pour effet d’amoinrir l’importance de chacune des autres garanties de la *Charte*.

L’interprétation téléologique de l’ensemble de l’art. 7 requiert que l’on donne un sens à tous les droits qui y sont consacrés. Toutefois, en n’attribuant aucun rôle concret au droit à la vie, l’interprétation habituellement donnée à l’art. 7 menace non seulement la cohérence de la *Charte* dans son ensemble, mais également son objet. Pour éviter ce résultat, il nous faut reconnaître qu’il peut arriver que l’État porte atteinte au droit à la vie, à la liberté et à la sécurité de la personne autrement qu’en violant le droit prévu à la deuxième partie de l’art. 7. Qu’on exprime cette opinion en disant

of life, liberty and security of the person (as opposed to the mere withholdings) that s. 7 is concerned with; or (b) that s. 7 can be violated even absent a breach of the “principles of fundamental justice”; the basic point is that s. 7 must be interpreted as protecting something more than merely negative rights. Otherwise, the s. 7 right to life will be reduced to the function of guarding against capital punishment — a possibly redundant function in light of s. 12 — with all of the intolerable conceptual difficulties attendant upon such an interpretation.

### C. Contextual Analysis

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Quite apart from its specific relation to the right to life guaranteed in s. 7, the structure and purpose of the *Charter* also provide relevant context for the interpretation of *Charter* rights more generally. This idea was implicit in this Court’s dicta regarding constitutional interpretation in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 50:

Our Constitution has an internal architecture, or what the majority of this Court in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57, called a “basic constitutional structure”. The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole.

What holds for “the Constitution as a whole” also holds for its constituent parts, including the *Charter*. Individual elements in the *Charter* are linked to one another, and must be understood by reference to the structure of the *Charter* as a whole. Support for this interpretive approach can be located in *Big M Drug Mart*, *supra*, at p. 344: “the purpose of [any] right or freedom . . . is to be sought by reference to the character and the larger objects of the *Charter* itself”.

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Clearly, positive rights are not at odds with the purpose of the *Charter*. Indeed, the *Charter* compels the state to act positively to ensure the protection of a significant number of rights, including, as

(a) que l’art. 7 ne vise pas de simples « atteintes » actives à la vie, à la liberté et à la sécurité de la personne (par opposition à de simples négations de ces droits) ou (b) qu’il peut y avoir violation de l’art. 7 même en l’absence d’un manquement aux « principes de justice fondamentale », cette interprétation revient essentiellement à considérer que l’art. 7 protège davantage que de simples droits négatifs. Dans le cas contraire, le rôle du droit à la vie garanti par l’art. 7 se résumerait à la protection contre la peine de mort — faisant ainsi potentiellement double emploi avec l’art. 12 —, avec toutes les difficultés conceptuelles intolérables qui découlent d’une telle interprétation.

### C. L’analyse contextuelle

Indépendamment du lien précis qu’ils ont avec le droit à la vie prévu à l’art. 7, la structure et l’objet de la *Charte* établissent également un contexte pertinent aux fins d’interprétation, de façon plus générale, des droits garantis par la *Charte*. Cette idée ressort implicitement des remarques suivantes, formulées par la Cour en matière d’interprétation constitutionnelle dans le *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 50 :

Notre Constitution a une architecture interne, ce que notre Cour à la majorité, dans *SEFPO c. Ontario (Procureur général)*, [1987] 2 R.C.S. 2, à la p. 57, a appelé une « structure constitutionnelle fondamentale ». Chaque élément individuel de la Constitution est lié aux autres et doit être interprété en fonction de l’ensemble de sa structure.

Ce qui vaut pour l’ensemble de la Constitution vaut également pour ses éléments constitutifs, y compris la *Charte*. Chaque élément individuel de la *Charte* est lié aux autres et doit être interprété en fonction de l’ensemble de sa structure. Le passage suivant de l’arrêt *Big M Drug Mart*, précité, p. 344, appuie cette méthode d’interprétation : « l’objet du droit ou de la liberté [. . .] doit être déterminé en fonction de la nature et des objectifs plus larges de la *Charte* elle-même ».

Il est clair que les droits positifs ne sont pas incompatibles avec l’objet de la *Charte*. De fait, celle-ci impose à l’État l’obligation d’agir concrètement en vue d’assurer la protection d’un nombre

I mentioned earlier (at para. 320), the protection of the right to vote (s. 3), the right to an interpreter in penal proceedings (s. 14), and the right of minority English- or French-speaking Canadians to have their children educated in their first language (s. 23). Positive rights are not an exception to the usual application of the *Charter*, but an inherent part of its structure. The *Charter* as a whole can be said to have a positive purpose in that at least some of its constituent parts do.

Also instructive is s. 1. The great conceptual challenge faced by courts under s. 1 is to identify limitations to individual rights or freedoms that properly respect those rights or freedoms, without subverting them to majoritarian interests. Questions regarding the limits of individual rights can be characterized just as well in terms of delineating the scope of those rights. We can therefore expect to learn a great deal about rights definition in general, and in the context of this case specifically, by paying careful attention to the way in which this Court has handled such issues in the context of s. 1. Properly understood, the justificatory enterprise in s. 1 demonstrates that the rights-granting provisions in the *Charter* include a positive dimension.

This Court developed early on a general approach to s. 1 justification, focussing on the kinds of considerations appropriate to the justificatory analysis. That general approach was expressed in Dickson C.J.'s landmark judgment in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 135:

It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*)

appréciable de droits, notamment, comme je l'ai indiqué plus tôt (au par. 320), le droit de vote (art. 3), le droit à l'assistance d'un interprète dans des procédures pénales (art. 14) et le droit des minorités francophone ou anglophone au Canada de faire instruire leurs enfants dans leur langue (art. 23). Les droits positifs ne constituent pas l'exception dans l'application ordinaire de la *Charte*, mais ils font partie intégrante de la structure de celle-ci. Il est possible d'affirmer que l'objet de la *Charte* — celle-ci étant considérée dans son ensemble — a une dimension positive, en ce sens que au moins certains de ses éléments constitutifs possèdent un tel caractère.

L'article premier jette lui aussi de la lumière sur cette question. Le grand défi conceptuel que doivent relever les tribunaux dans l'application de cette disposition consiste à définir, à l'égard des droits et libertés individuels, des restrictions qui permettent de respecter dûment ces droits et libertés, sans les subordonner indûment aux intérêts de la majorité. Les questions concernant les restrictions dont sont assortis les droits individuels peuvent tout aussi bien être qualifiées de questions touchant à la détermination de l'étendue de ces droits. On peut donc espérer en apprendre beaucoup sur la définition des droits en général, tout particulièrement dans le présent pourvoi, en examinant attentivement la façon dont la Cour a tranché ces questions dans le cadre de l'application de l'article premier. Si on le considère comme il doit l'être, le processus de justification prévu par l'article premier démontre que les dispositions créatrices de droits de la *Charte* comportent invariablement une dimension positive.

Dès le départ, la Cour a élaboré une démarche générale à l'égard de la justification prévue par l'article premier, démarche axée sur le genre de considérations qui conviennent dans cette analyse. Cette démarche a été exprimée en termes on ne peut plus clairs par le juge en chef Dickson dans l'arrêt de principe *R. c. Oakes*, [1986] 1 R.C.S. 103, p. 135 :

Il importe de souligner dès l'abord que l'article premier remplit deux fonctions : premièrement, il enchâsse dans la Constitution les droits et libertés énoncés dans les dispositions qui le suivent; et, deuxièmement, il établit explicitement les seuls critères justificatifs (à part ceux

against which limitations on those rights and freedoms must be measured.

We sometimes lose sight of the primary function of s. 1 — to constitutionally guarantee rights — focussed as we are on the section’s limiting function.

353 Our oversight in this regard is perhaps exacerbated by the fact that the two functions served by s. 1 appear, at first blush, to conflict with one another. In what sense, after all, can one be said to be guaranteeing *Charter* rights, even as one places limits upon them? The answer lies in part in the other “limiting” sections (s. 33 and s. 38 of the *Constitution Act, 1982*): the justified limits to *Charter* rights that are permitted under s. 1 must not be confused with exceptions, denials, or other forms of restriction that would abrogate or derogate from the rights themselves (*Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 86). Dickson C.J. provides the remainder of the solution in the passage that follows, *Oakes, supra*, at p. 136:

A second contextual element of interpretation of s. 1 is provided by the words “free and democratic society”. Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society . . . . The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [Emphasis added.]

In this way, the two functions served by s. 1 are prevented from operating at cross purposes, as it were, because the very values that underlie and are the genesis of the rights and freedoms guaranteed by the *Charter* are the values that must be invoked in demonstrating that a limit on those rights and freedoms is justified. This “unity of values” underlying the dual functions of s. 1 ensures that due regard and

de l’art. 33 de la *Loi constitutionnelle de 1982*) auxquels doivent satisfaire les restrictions apportées à ces droits et libertés.

Il nous arrive parfois d’oublier le rôle principal de l’article premier — c’est-à-dire garantir constitutionnellement les droits énoncés dans la *Charte* —, absorbés comme nous le sommes par le rôle restrictif de cette disposition.

Cet oubli de notre part s’explique peut-être aussi par le fait que les deux rôles que joue l’article premier semblent, de prime abord, incompatibles. Après tout, comment peut-on prétendre garantir les droits énoncés dans la *Charte* et, du même souffle, les assortir de restrictions? La réponse réside en partie dans les autres dispositions « limitatives » (art. 33 et 38 de la *Loi constitutionnelle de 1982*) : il ne faut pas confondre les restrictions justifiées aux droits prévus par la *Charte* avec les exceptions, négations et autres formes de restriction qui auraient pour effet de déroger à ces droits ou de les abroger (*Procureur général du Québec c. Quebec Association of Protestant School Boards*, [1984] 2 R.C.S. 66, p. 86). Le juge en chef Dickson complète la réponse dans le passage suivant de l’arrêt *Oakes*, précité, p. 136 :

Un second élément contextuel d’interprétation de l’article premier est fourni par l’expression « société libre et démocratique ». L’inclusion de ces mots à titre de norme finale de justification de la restriction des droits et libertés rappelle aux tribunaux l’objet même de l’enchâssement de la *Charte* dans la Constitution : la société canadienne doit être libre et démocratique. Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique [. . .]. Les valeurs et les principes sous-jacents d’une société libre et démocratique sont à l’origine des droits et libertés garantis par la *Charte* et constituent la norme fondamentale en fonction de laquelle on doit établir qu’une restriction d’un droit ou d’une liberté constitue, malgré son effet, une limite raisonnable dont la justification peut se démontrer. [Je souligne.]

Ainsi, on évite que les deux rôles joués par l’article premier ne soient pour ainsi dire contradictoires, car les valeurs qui sous-tendent les droits et libertés garantis par la *Charte* et qui en sont à la source sont précisément celles qui doivent être invoquées pour démontrer que la restriction dont on assortit ces droits et libertés est justifiée. Cette [TRADUCTION] « identité de valeurs » à la base du double rôle de

protection is given to *Charter* rights even as justified limits are placed upon them (see L. E. Weinrib, “The Supreme Court of Canada and Section One of the Charter” (1988), 10 *Sup. Ct. L. Rev.* 469, at p. 483). In fact, it would not be far from the truth to state that the types of limits that are justified under s. 1 are those, and only those, that not only respect the content of *Charter* rights but also further those rights in some sense — or to use the language of s. 1 itself, “guarantee” them — by further advancing the values at which they are directed.

To say this is in part to recognize that limitations on rights are necessary if only to harmonize competing rights, or to give the fullest expression possible to conflicting rights. Freedom of religion, for example, can only be fulfilled for all by guarding against establishment, thereby ensuring the existence of the positive conditions necessary for all to express their own religious views: *Big M Drug Mart, supra*; *Plantation Indoor Plants Ltd. v. Attorney General of Alberta*, [1985] 1 S.C.R. 366. Freedom of the press cannot trump the right to a fair trial (see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480), which in turn cannot override privacy interests (see *R. v. O’Connor*, [1995] 4 S.C.R. 411; *R. v. Mills*, [1999] 3 S.C.R. 668). In every case, the courts will search for the proper accommodation that will give the fullest expression to each of the clashing rights. See also *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Smith v. Jones*, [1999] 1 S.C.R. 455.

In that sense, *Charter* rights and freedoms find protection in s. 1, not only because they are guaranteed in that section, but because limitations on some rights are required by the positive protection of others. This approach to s. 1 justification, which invokes the values that underpin the *Charter* as the only suitable basis for limiting those rights, confirms that *Charter* rights contain a positive

l’article premier garantit le respect et la protection dus aux droits protégés par la *Charte*, même lorsque ceux-ci sont assujettis à des restrictions justifiées (voir L. E. Weinrib, « The Supreme Court of Canada and Section One of the Charter » (1988), 10 *Sup. Ct. L. Rev.* 469, p. 483). En fait, on pourrait peut-être même aller jusqu’à dire que les restrictions justifiées au regard de l’article premier sont celles — et uniquement celles — qui non seulement respectent les droits garantis par la *Charte* mais ont également pour effet de les renforcer d’une certaine façon — ou, pour reprendre les termes de l’article premier, les « garanti[ssent] » — en consolidant les valeurs qu’ils visent à soutenir.

En disant cela, on reconnaît en partie qu’il peut s’avérer nécessaire de restreindre des droits, ne serait-ce que pour concilier des droits opposés ou permettre à de tels droits de s’exprimer le plus complètement possible. Par exemple, la liberté de religion ne peut être garantie à chacun qu’en la protégeant contre l’ordre établi et en permettant ainsi la réunion des conditions positives nécessaires pour que tous puissent exprimer leurs opinions religieuses : *Big M Drug Mart*, précité; *Plantation Indoor Plants Ltd. c. Procureur général de l’Alberta*, [1985] 1 R.C.S. 366. La liberté de presse ne saurait avoir préséance sur le droit à un procès équitable (voir *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480), lequel ne peut l’emporter sur le droit à la vie privée (voir *R. c. O’Connor*, [1995] 4 R.C.S. 411; *R. c. Mills*, [1999] 3 R.C.S. 668). Dans tous les cas, les tribunaux recherchent le compromis propre à permettre le respect le plus intégral possible de chacun des droits en conflit. Voir également *R. c. McClure*, [2001] 1 R.C.S. 445, 2001 CSC 14; *Smith c. Jones*, [1999] 1 R.C.S. 455.

En ce sens, les droits et libertés prévus par la *Charte* sont protégés par l’article premier, non seulement parce qu’on y énonce qu’ils sont garantis, mais aussi parce qu’il arrive que, pour protéger concrètement certains droits, il faille en restreindre d’autres. Cette façon de voir le processus de justification prévu par l’article premier, démarche qui considère les valeurs sous-tendant la *Charte* comme le seul

dimension. Constitutional rights are not simply a shield against state interference with liberty; they place a positive obligation on the state to arbitrate competing demands arising from the liberty and rights of others.

356 In other words, the justificatory mechanism in place in s. 1 of the *Charter* reflects the existence of a positive right to *Charter* protection asserted in support of alleged interference by the state with the rights of others. If such positive rights exist in that form in s. 1, they must, *a fortiori*, exist in the various *Charter* provisions articulating the existence of the rights. For instance, if one's right to life, liberty and security of the person can be limited under s. 1 by the need to protect the life, liberty or security of others, it can only be because the right is not merely a negative right but a positive one, calling for the state not only to abstain from interfering with life, liberty and security of the person but also to actively secure that right in the face of competing demands.

357 This concludes my interpretive analysis of s. 7. In my view, the results are unequivocal: every suitable approach to *Charter* interpretation, including textual analysis, purposive analysis, and contextual analysis, mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension.

358 It remains to show that the interest claimed in this case falls within the range of entitlements that the state is under a positive obligation to provide under s. 7. In one sense it seems obvious that it does. As I have already suggested, a minimum level of welfare is so closely connected to issues relating to one's basic health (or security of the person), and potentially even to one's survival (or life interest), that it appears inevitable that a positive right to life, liberty and security of the person must provide for it.

fondement justifiant de restreindre les droits concernés, confirme que les droits consacrés par la *Charte* comportent une dimension positive. Les droits constitutionnels ne servent pas simplement de bouclier contre les atteintes à la liberté commises par l'État, mais ils ont également pour effet d'imposer à l'État l'obligation positive d'arbitrer les revendications conflictuelles découlant des droits et libertés de chacun.

En d'autres termes, le mécanisme de justification instauré par l'article premier de la *Charte* traduit l'existence d'un droit positif à la protection de la *Charte* qui est invoqué lorsqu'on reproche à l'État de porter atteinte aux droits de certains. Si de tels droits positifs existent sous cette forme à l'article premier, ils doivent à plus forte raison exister dans les dispositions mêmes de la *Charte* reconnaissant l'existence des droits invoqués. Par exemple, si le droit d'un individu à la vie, à la liberté et à la sécurité de sa personne peut, par application de l'article premier, être restreint en raison de la nécessité de protéger la vie, la liberté ou la sécurité d'autrui, ce ne peut être que parce que ce droit n'est pas simplement un droit négatif mais aussi un droit positif, qui commande à l'État non seulement de s'abstenir de porter atteinte à la vie, à la liberté et à la sécurité d'une personne, mais également de garantir activement ce droit en présence de revendications conflictuelles.

Ceci complète mon analyse interprétative de l'art. 7. Les résultats sont clairs : toute interprétation valable de la *Charte*, qu'il s'agisse d'une analyse téléologique, textuelle ou encore contextuelle, mène à la conclusion que le droit de chacun à la vie, à la liberté et à la sécurité de sa personne garanti par l'art. 7 comporte une dimension positive.

Il reste à démontrer que le droit revendiqué en l'espèce fait partie de ceux que l'État a l'obligation positive d'accorder en vertu de l'art. 7. D'une certaine manière, il semble évident que ce soit le cas. Comme je l'ai mentionné plus tôt, il existe un lien si étroit entre un niveau minimal d'aide sociale et des questions touchant à la santé fondamentale d'une personne (ou sa sécurité), voire à sa subsistance (ou droit à la vie), qu'il semble inévitable qu'un droit positif à la vie, à la liberté et à la sécurité de la

Indeed in this case the legislature has in fact chosen to legislate in respect of welfare rights. Thus determining the applicability of the foregoing general principles to the case at bar requires only that we analyse this case through the lens of the underinclusiveness line of cases, of which *Dunmore, supra*, is the chief example.

### III. Application to the Case at Bar

As my colleague Bastarache J. observes, “[t]he question of whether a fundamental freedom can be infringed through the lack of government action was canvassed most recently in the case of *Dunmore, supra*” (para. 220). This Court recognized in that case that underinclusive legislation might in some contexts constitute “affirmative interference with the effective exercise of a protected freedom” (*Dunmore, supra*, at para. 22). In the process, we confirmed, at para. 23, L’Heureux-Dubé J.’s earlier comment in *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1039, that “a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required”.

The combined effect of these statements is at least two-fold. Most obviously, they stand for the proposition that the *Charter*’s fundamental freedoms can be infringed even absent overt state action. Mere restraint on the part of government from actively interfering with protected freedoms is not always enough to ensure *Charter* compliance; sometimes government inaction can effectively constitute such interference.

Beyond that, however, the statements also confirm that in some contexts the fundamental freedoms enumerated in the *Charter* place the state under a positive obligation to ensure that its legislation is properly inclusive. Indeed, as I have already stressed, positive rights distinguish themselves from negative rights precisely in that they are violable by mere inaction, such as the failure on the part of the state

personne pourvoit à la fourniture de ce niveau d’assistance. D’ailleurs, en l’espèce, l’État avait choisi de légiférer sur les droits relatifs à l’aide sociale. Par conséquent, pour décider si les principes généraux susmentionnés s’appliquent à la présente affaire, il nous suffit d’analyser celle-ci sous l’éclairage de la jurisprudence sur la non-inclusion, dont l’arrêt *Dunmore*, précité, constitue le principal exemple.

### III. L’application des principes à l’espèce

Comme le signale mon collègue le juge Bastarache, « [p]lus récemment, dans l’arrêt *Dunmore*, précité, notre Cour s’est demandée si l’absence d’intervention gouvernementale peut porter atteinte à une liberté fondamentale » (par. 220). Dans cette affaire, la Cour a reconnu qu’une loi dont la portée est trop limitative pourrait, dans certains contextes, constituer « une entrave manifeste à l’exercice réel d’une liberté garantie » (*Dunmore*, précité, par. 22). Au paragraphe 23 de cet arrêt, nous avons confirmé les commentaires que le juge L’Heureux-Dubé avait formulés précédemment dans l’arrêt *Haig c. Canada*, [1993] 2 R.C.S. 995, p. 1039, à savoir qu’« il pourrait se présenter une situation dans laquelle il ne suffirait pas d’adopter une attitude de réserve pour donner un sens à une liberté fondamentale, auquel cas une mesure gouvernementale positive s’imposerait peut-être ».

Ces énoncés produisent au moins deux effets. De toute évidence, ils appuient la proposition selon laquelle il peut être porté atteinte aux libertés fondamentales garanties par la *Charte* même en l’absence d’intervention directe de l’État. Le simple fait pour l’État de s’abstenir de porter activement atteinte aux libertés protégées n’est pas dans tous les cas suffisant pour garantir le respect de la *Charte*; l’inaction de l’État peut parfois constituer effectivement une telle atteinte.

Par ailleurs, ces énoncés confirment également que, dans certains contextes, les libertés fondamentales énumérées dans la *Charte* imposent à l’État l’obligation positive de veiller à ce que ses lois soient suffisamment inclusives. En effet, comme je l’ai souligné plus tôt, les droits positifs se distinguent des droits négatifs précisément en ceci qu’ils sont susceptibles de violation par simple inaction,

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to include all those who should be included under a regime of protective legislation. Thus, in holding that the state cannot shield itself from *Charter* scrutiny under the pretext that underinclusive legislation does not constitute active interference with a fundamental freedom, *Dunmore* affirmed that the *Charter* provides for positive rights.

par exemple par omission de l'État d'inclure dans un régime de protection légale toutes les personnes qui devraient être visées. En conséquence, comme il a été jugé dans l'arrêt *Dunmore* que l'État ne peut soustraire une loi à un examen fondé sur la *Charte* en prétendant que le caractère non inclusif de cette loi ne constitue pas une atteinte active à une liberté fondamentale, cette décision a confirmé que la *Charte* garantit des droits positifs.

362 Of course, such positive rights to inclusion in a legislative regime had previously been recognized by this Court in the s. 15(1) context in *Vriend, supra*. In that case, a unanimous Court observed that there is nothing in the wording of s. 32 of the *Charter* “to suggest that a positive act encroaching on rights is required” (emphasis in original). Rather, s. 32 is “worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority” (*Vriend*, at para. 60, quoting D. Poithier “The Sounds of Silence: *Charter* Application when the Legislative Declines to Speak” (1996), 7 *Constitutional Forum* 113, at p. 115). The primary significance of *Dunmore*, from the perspective of the instant appeal, is that it extended the positive right to legislative inclusion to *Charter* claims going beyond the equality context.

Évidemment, de tels droits positifs à l'inclusion dans un régime légal avaient déjà été reconnus par la Cour dans l'arrêt *Vriend*, précité, dans le contexte du par. 15(1). Dans cette affaire, la Cour a unanimement souligné que rien dans le texte de l'art. 32 de la *Charte* n'indiquait « qu'une action positive empiétant sur les droits soit nécessaire » (souligné dans l'original). Cette disposition est plutôt « rédigé[e] d'une manière assez générale pour viser les obligations positives du législateur, de telle sorte que la *Charte* s'appliquera même lorsque le législateur refuse d'exercer son pouvoir » (*Vriend*, par. 60, citant D. Poithier « The Sounds of Silence : *Charter* Application when the Legislature Declines to Speak » (1996), 7 *Forum constitutionnel* 113, p. 115). Dans le cadre du présent pourvoi, l'intérêt premier de l'arrêt *Dunmore* est qu'il a élargi le champ d'application du droit positif à l'inclusion dans un régime légal aux demandes fondées sur la *Charte* qui débordent le contexte de l'égalité.

363 It would, in my view, be inaccurate to suggest in the light of this that claims of underinclusion are the natural province of s. 15. I think it is preferable to approach such claims by first attempting to ascertain the threat that is posed by a given piece of underinclusive legislation. Where the threat is to one of the specifically enumerated fundamental rights and freedoms guaranteed by the *Charter*, it will be appropriate to entertain the claim of underinclusion under the section that provides for that freedom. Admittedly, there will be cases in which underinclusion is based on a prohibited ground and threatens human dignity, and therefore is properly treated under s. 15(1), even though it does not implicate any of the other enumerated *Charter* rights. To that extent, s. 15(1) is perhaps the proper

À mon avis, compte tenu de ce qui précède, il serait inexact de suggérer que les plaintes de non-inclusion relèvent naturellement de l'art. 15. J'estime qu'il est préférable de les examiner en s'attachant d'abord à évaluer la menace que représente une mesure législative non inclusive. Lorsque la menace vise une liberté ou un droit fondamental expressément énuméré et garanti par la *Charte*, il convient d'examiner cette plainte de non-inclusion au regard de la disposition reconnaissant le droit ou la liberté en question. Il faut reconnaître qu'il se présentera des cas où la non-inclusion est fondée sur un motif de distinction illicite et menace la dignité humaine, et où il conviendra en conséquence d'examiner la demande en vertu du par. 15(1), même si elle ne soulève pas d'autres droits énumérés dans

venue for addressing certain kinds of claims of underinclusion *per se*.

But we must not conclude from this that claims based upon the underinclusiveness of legislation sit uneasily under the protection provided by other specifically enumerated *Charter* rights. As my colleague observes, total exclusion of a group from a statutory scheme protecting a certain right may in some circumstances engage that right to such an extent that the exclusion in essence infringes the substantive right as opposed to the equality right protected under s. 15(1).

*Dunmore* articulated the criteria necessary for making a *Charter* claim based on underinclusion outside the context of s. 15. In my view, these criteria are satisfied in this case. They are as follows:

1. The claim must be grounded in a fundamental *Charter* right or freedom rather than in access to a particular statutory regime (*Dunmore*, at para. 24).
2. A proper evidentiary foundation must be provided, before creating a positive obligation under the *Charter*, by demonstrating that exclusion from the regime constitutes a substantial interference with the exercise and fulfillment of a protected right (*Dunmore*, at para. 25).
3. It must be determined whether the state can truly be held accountable for any inability to exercise the right or freedom in question (*Dunmore*, at para. 26).

These criteria are directed at ensuring that the necessary conditions for making out virtually any *Charter* claim are in place. To begin with, the claim must be grounded in an appropriate *Charter* right. That is, it must be grounded in a substantive right outside of s. 15, rather than in exclusion from a statutory regime itself, which exclusion could at best

la *Charte*. Sous cet angle, le par. 15(1) constitue peut-être la disposition au regard de laquelle il convient d'examiner certaines plaintes de non-inclusion comme telles.

Cependant, il ne faut pas conclure de ce qui précède que l'examen des demandes reprochant le caractère non-inclusif d'une mesure législative cadrerait mal avec la protection prévue par d'autres droits garantis par la *Charte* et expressément énumérés dans celle-ci. Comme le mentionne mon collègue, le fait d'exclure totalement un groupe du champ d'application d'un régime légal protégeant un droit donné peut, dans certaines circonstances, porter une atteinte telle à ce droit que c'est alors essentiellement le droit substantiel qui est violé plutôt que le droit à l'égalité garanti par le par. 15(1).

Dans l'arrêt *Dunmore*, on a énoncé les critères de validité des plaintes de non-inclusion présentées en vertu de la *Charte*, en dehors du contexte de l'art. 15. Je suis d'avis que ces critères, qui sont énoncés ci-après, sont respectés en l'espèce.

1. L'argument doit reposer sur une liberté ou un droit fondamental garanti par la *Charte*, plutôt que sur l'accès à un régime légal précis (*Dunmore*, par. 24).
2. Pour que le tribunal puisse conclure à une obligation positive prévue par la *Charte*, il doit exister une preuve appropriée, démontrant que l'exclusion du régime légal crée une entrave substantielle à l'exercice du droit protégé (*Dunmore*, par. 25).
3. Il faut déterminer si l'État peut vraiment être tenu responsable de toute incapacité d'exercer la liberté ou le droit fondamental en question (*Dunmore*, par. 26).

Ces critères permettent de s'assurer que sont réunies les conditions de validité nécessaires d'une demande fondée sur la *Charte*, et ce dans pratiquement tous les cas. Tout d'abord, la demande doit être fondée sur un droit approprié garanti par la *Charte*, à savoir un droit substantiel prévu par une autre disposition que l'art. 15, plutôt que sur la simple

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implicate the equality guarantee. Beyond this, however, all successful *Charter* claims require that the claimant establish both that his or her right has been interfered with and that it is the government that is responsible for such interference. The second and third criteria are directed at establishing the presence of these two conditions. While establishing their presence is often a relatively straightforward matter in cases where it is the infringement of a negative right that is claimed — one must simply be able to point to a positive government action that infringes the right or freedom — the case is somewhat different here. Because claims based upon underinclusion essentially call upon the courts to find a positive obligation on the part of government to actively secure fulfilment of a *Charter* right, it would be both extremely difficult (if not impossible) for claimants to point to some positive state act that constitutes an interference with their *Charter* rights, and inappropriate to expect this of them. Instead, their claim will essentially be grounded in a lack of effective state action. We must be sensitive to this difference in conducting our analysis of the criteria. With this in mind, I will now consider each of them in turn.

A. *Is the Claim Grounded in an Appropriate Charter Right?*

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In *Dunmore*, this Court distinguished underinclusion cases that are superficially similar such as *Haig*, *supra*, and *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627 (“*NWAC*”), on the basis that the *Charter* claims made in the latter cases constituted nothing more than a demand for access to a particular statutory regime (at para. 24):

[I]n *Haig*, the majority of this Court held that “(a) government is under no constitutional obligation to extend (a referendum) to anyone, let alone to everyone”, and further that “(a) referendum as a platform of expression is . . . a matter of legislative policy and not of

exclusion d’un régime légal, exclusion qui tout au plus ferait intervenir la garantie d’égalité. Outre cela, toutefois, pour que la demande fondée sur la *Charte* soit accueillie, l’intéressé doit établir à la fois qu’on a porté atteinte au droit qu’il invoque et que l’État est responsable de cette atteinte. Les deuxième et troisième critères visent à s’assurer du respect de ces deux exigences. Dans les cas où le demandeur plaide la violation d’un droit négatif, il est souvent relativement simple de prouver le respect de ces exigences, puisqu’il suffit alors au demandeur d’être en mesure d’indiquer la mesure gouvernementale concrète qui contrevient à la liberté ou au droit invoqué. Nous sommes par contre ici en présence d’une situation assez différente. Puisque, dans le cadre d’une plainte de non-inclusion, on demande essentiellement au tribunal de conclure que le gouvernement avait l’obligation positive de garantir activement le respect d’un droit reconnu par la *Charte*, il serait d’une part extrêmement difficile (voire impossible) pour le demandeur de faire état de quelque mesure étatique concrète portant atteinte aux droits que lui garantit la *Charte* et, d’autre part, déraisonnable de s’attendre à ce qu’il le fasse. L’action du demandeur reprochera plutôt essentiellement l’absence de mesure étatique efficace. Nous devons être conscients de cette distinction dans notre analyse fondée sur ces critères. À la lumière de ces remarques, je vais maintenant examiner ces critères à tour de rôle.

A. *L’argument repose-t-il sur un droit approprié garanti par la Charte?*

Dans l’arrêt *Dunmore*, précité, par. 24, la Cour a distingué le pourvoi dont elle était saisie d’affaires de non-inclusion en apparence semblables, comme les arrêts *Haig*, précité, et *Assoc. des femmes autochtones du Canada c. Canada*, [1994] 3 R.C.S. 627 (« *AFAC* »), en affirmant que les demandes fondées sur la *Charte* présentées dans ces arrêts n’étaient rien d’autre que des demandes d’accès à un régime légal particulier :

[D]ans *Haig*, la majorité de la Cour conclut qu’un « gouvernement n’a aucune obligation constitutionnelle d’offrir (un référendum) à qui que ce soit, et encore moins à tous » et qu’un « référendum en tant que tribune pour favoriser l’expression relève (. . .) de la politique

constitutional law” (p. 1041 (emphasis in original)). Similarly, in *NWAC*, the majority of this Court held that “[i]t cannot be claimed that NWAC has a constitutional right to receive government funding aimed at promoting participation in the constitutional conferences” (p. 654). In my view, the appellants in this case do not claim a constitutional right to general inclusion in [a statutory regime], but simply a constitutional freedom to organize a trade association. This freedom to organize exists independently of any statutory enactment . . . .

The instant appeal is also distinguishable from *Haig* and *NWAC*, and on all fours with *Dunmore* itself, in this respect.

Though it is true that the claimants in the present case attack the underinclusiveness of the regulations under the *Social Aid Act* under s. 15 on the basis that exclusion from the statutory regime on a prohibited ground in itself constitutes an affront to human dignity, their s. 7 claim is entirely independent of this. Under s. 7, their claim is not that exclusion from the statutory regime is illicit *per se*, but that it violates their self-standing right to security of the person (and potentially their right to life as well). As in *Dunmore*, this right exists independently of any statutory enactment.

The distinction between the s. 7 claim and the s. 15 claim can be illustrated as follows: if it were the case that the claimants could meet their basic needs through means outside of the *Social Aid Act* — for instance through an independent government program providing for subsidized housing, food vouchers, etc., in exchange for the performance of works of public service — their s. 7 claim would entirely disappear, but their s. 15 claim would potentially remain intact inasmuch as it would still be open to them to argue that being forced to resort to these alternative means somehow violated their human dignity. The problem in this case, by way of contrast, is that exclusion from this statutory regime effectively excludes the claimants from any real possibility of having their basic needs met through any means whatsoever. Thus, it is not exclusion from the particular statutory regime that is at stake but, more

législative et non du droit constitutionnel » (p. 1041 (souligné dans l’original)). De même, dans *AFAC*, la majorité de la Cour conclut : « (o)n ne saurait prétendre que l’AFAC a, en vertu de la Constitution, le droit de recevoir des deniers publics pour promouvoir sa participation aux conférences constitutionnelles » (p. 654). J’estime que les appelants en l’espèce ne revendiquent pas un droit constitutionnel à l’inclusion générale dans [un régime légal], mais simplement la liberté constitutionnelle de former une association syndicale. Cette liberté existe indépendamment de tout texte législatif . . . .

Le présent pourvoi peut lui aussi être distingué des arrêts *Haig* et *AFAC*, mais il correspond en tous points à l’arrêt *Dunmore* sur cette question.

Bien qu’il soit exact que, en l’espèce, les demandeurs contestent le caractère non-inclusif du règlement d’application de la *Loi sur l’aide sociale* en vertu de l’art. 15 au motif que le fait d’être exclu du régime légal pour un motif de distinction illicite en soi constitue un affront à la dignité humaine, l’argument qu’ils présentent en application de l’art. 7 repose sur un fondement tout à fait distinct. En effet, ils ne prétendent pas, dans cet argument, que leur exclusion du régime légal est en soi illicite, mais qu’elle contrevient à leur droit autonome à la sécurité de leur personne (et peut-être aussi à leur droit à la vie). Tout comme dans l’arrêt *Dunmore*, il s’agit d’un droit qui existe indépendamment de tout texte législatif.

On peut illustrer ainsi la distinction qui existe entre la demande fondée sur l’art. 7 et celle fondée sur l’art. 15 : si le demandeur était en mesure de subvenir à ses besoins essentiels par d’autres moyens que ceux prévus par la *Loi sur l’aide sociale* — par exemple, grâce à un programme gouvernemental distinct offrant des subventions au logement, des bons d’alimentation et autres mesures du genre, en contrepartie de l’exécution de travaux communautaires — sa demande fondée sur l’art. 7 perdrait toute justification, mais celle basée sur l’art. 15 pourrait demeurer valable dans la mesure où il lui serait toujours loisible de plaider que le fait d’avoir été contraint de recourir à ces solutions de rechange a, d’une certaine manière, porté atteinte à sa dignité humaine. À l’opposé, le problème en l’espèce est que l’exclusion des demandeurs du régime légal les prive effectivement de toute possibilité concrète de

basically, the claimants' fundamental rights to security of the person and life itself.

B. *Is there a Sufficient Evidentiary Basis to Establish that Exclusion from the Social Aid Act Substantially Interfered with the Fulfilment and Exercise of the Claimants' Fundamental Right to Security of the Person?*

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In order to address adequately the question that is posed here, we must first be clear about what would be sufficient to constitute the required evidentiary basis. In *Dunmore*, *supra*, at para. 25, Bastarache J. stated the requirement as follows:

[T]he evidentiary burden in these cases is to demonstrate that exclusion from a statutory regime permits a substantial interference with the exercise of protected s. 2(d) activity. Such a burden was implied by Dickson C.J. in the *Alberta Reference* . . . where he stated that positive obligations may be required "where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms" (p. 361). [Emphasis deleted.]

For clarity, Bastarache J. went on to add that "[t]hese dicta do not require that the exercise of a fundamental freedom be impossible, but they do require that the claimant seek more than a particular channel for exercising his or her fundamental freedoms" (para. 25 (emphasis added)).

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In view of this, one must avoid placing undue emphasis on whatever (often remote) possibility there might have been that the claimants could have satisfied their basic needs through private means, whether in the open market or with the assistance of other private actors such as family members or charitable groups. There is simply no requirement that they prove they exhausted all other avenues of relief before turning to public assistance. On the contrary, all that is required is that the claimants show that the lack of government intervention "substantially impede[d]" the enjoyment of their s. 7 rights. This requirement is best put in language that mirrors that

pourvoir à leurs besoins essentiels. Par conséquent, ici, ce qui est en jeu n'est pas l'exclusion du régime légal concerné mais, essentiellement, les droits fondamentaux des demandeurs à la sécurité de leur personne et à la vie même.

B. *La preuve permet-elle d'établir que l'exclusion des demandeurs du champ d'application de la Loi sur l'aide sociale a substantiellement entravé l'exercice par ceux-ci de leur droit fondamental à la sécurité de leur personne?*

Pour être en mesure d'examiner adéquatement la question qui se soulève à cette étape-ci, nous devons d'abord indiquer clairement ce qui constitue une preuve suffisante. Dans l'arrêt *Dunmore*, précité, par. 25, le juge Bastarache a exprimé ainsi l'exigence applicable à cet égard :

La charge de preuve consiste [. . .] à démontrer que l'exclusion du régime légal permet une entrave substantielle à l'exercice de l'activité protégée par l'al. 2b). Cette charge ressort implicitement de la remarque du juge en chef Dickson dans le *Renvoi relatif à l'Alberta* [. . .] selon laquelle des obligations positives peuvent être nécessaires lorsque « l'absence d'intervention gouvernementale est effectivement susceptible de porter atteinte sensiblement à la jouissance de libertés fondamentales » (p. 361). [Soulignements supprimés.]

Par souci de clarté, le juge Bastarache a ajouté ceci : « [c]es observations ne disent pas que l'exercice d'une liberté fondamentale doit être impossible, mais que le demandeur doit rechercher davantage qu'une voie particulière pour l'exercice de ses libertés fondamentales » (par. 25 (je souligne)).

Compte tenu de ce qui précède, il faut éviter d'accorder trop d'importance à la possibilité (souvent lointaine) que les demandeurs auraient pu satisfaire à leurs besoins essentiels au moyen de ressources privées, soit en exploitant les possibilités du marché du travail soit en recourant à l'aide d'autres intervenants privés comme des membres de leur famille ou des œuvres de bienfaisance. Ils ne sont absolument pas tenus de prouver qu'ils ont épuisé tous les autres moyens de subsistance avant de faire appel à l'aide sociale. Au contraire, il leur suffit d'établir que l'absence d'intervention de l'État « [a] port[é] atteinte sensiblement » à la jouissance des droits

used by L'Heureux-Dubé J. in *Haig, supra*, that the claimants must show that government intervention was necessary in order to render their s. 7 rights meaningful.

There is ample evidence in this case that the legislated exclusion of young adults from the full benefits of the social assistance regime substantially interfered with their s. 7 rights, in particular their right to security of the person. Welfare recipients under the age of 30 were allowed \$170/month. The various remedial programs put in place in 1984 simply did not work: a startling 88.8 percent of the young adults who were eligible to participate in the programs were unable to increase their benefits to the level payable to adults 30 and over. In these conditions, the physical and psychological security of young adults was severely compromised during the period at issue. This was compellingly illustrated by the appellant's own testimony and by that of her four witnesses: a social worker, a psychologist, a dietician and a community physician. The sizeable volume of the appellant's record prohibits an exhaustive exposé of the dismal conditions in which many young welfare recipients lived. I will nevertheless outline the evidence illustrating how the exclusion of young adults from the full benefits of the social assistance regime amounted to a substantial interference with their fundamental right to security of the person and drove them to resort to other demeaning and often dangerous means to ensure their survival.

On \$170/month, paying rent is impossible. Indeed, in 1987, the rent for a bachelor apartment in the Montreal Metropolitan Area was approximately \$237 to \$412/month, depending on the location. Two-bedroom apartments went for about \$368 to \$463/month. As a result, while some welfare

que leur garantit l'art. 7. La meilleure façon de formuler cette exigence consiste à s'inspirer des termes utilisés par le juge L'Heureux-Dubé dans l'arrêt *Haig*, précité, et de dire que les demandeurs doivent démontrer que l'intervention du gouvernement était nécessaire pour donner effet aux droits que leur garantit l'art. 7.

En l'espèce, la preuve établit amplement que le fait, dans le texte de loi, d'avoir exclu les jeunes adultes du plein bénéfice des avantages du régime d'aide sociale a porté substantiellement atteinte aux droits que leur garantit l'art. 7, tout particulièrement le droit à la sécurité de leur personne. Les bénéficiaires d'aide sociale de moins de 30 ans touchaient 170 \$ par mois. Les divers programmes de rattrapage mis en place en 1984 ne fonctionnaient tout simplement pas : un pourcentage renversant (88,8 p. 100) des jeunes adultes qui y étaient admissibles n'arrivaient pas à toucher le niveau de prestations payables aux bénéficiaires de 30 ans et plus. Dans ces conditions, la sécurité physique et psychologique des jeunes adultes a été sérieusement compromise au cours de la période en question. Cette constatation a été illustrée de façon convaincante par le témoignage de l'appelante et celui de ses quatre témoins : un travailleur communautaire, une psychologue, une diététiste et une médecin spécialisée en santé communautaire. Compte tenu de l'ampleur considérable du dossier produit par l'appelante, il n'est pas possible de dresser un tableau exhaustif des conditions épouvantables dans lesquelles vivaient de nombreux jeunes bénéficiaires d'aide sociale. Je vais néanmoins faire état de certains éléments de preuve illustrant en quoi l'exclusion des jeunes adultes du plein bénéfice du régime d'aide sociale constituait une atteinte substantielle à leur droit fondamental à la sécurité de leur personne et les contraignait à recourir à d'autres moyens dégradants et souvent dangereux pour assurer leur subsistance.

Avec une somme de 170 \$ par mois, il est impossible de se payer un loyer. De fait, en 1987, le loyer mensuel d'un studio dans la région métropolitaine de Montréal oscillait approximativement de 237 \$ à 412 \$, selon l'endroit où il était situé. Celui des appartements comptant deux chambres à

recipients were able to live with parents, many became homeless. During the period at issue, it is estimated that over 5 000 young adults lived on the streets of the Montreal Metropolitan Area. Arthur Sandborn, a social worker, testified that young welfare recipients would often combine their funds and share a small apartment. After paying rent however, very little money was left to pay for the other basic necessities of life, including hot water, electricity and food. No telephone meant further marginalization and made job hunting very difficult, as did the inability to afford suitable clothes and transportation.

coucher variait de 368 \$ à 463 \$. Par conséquent, alors que certains bénéficiaires d'aide sociale ont été en mesure d'habiter chez leurs parents, bon nombre d'entre eux sont devenus des sans-abri. Au cours de la période en cause, on estime que plus de 5 000 jeunes adultes vivaient dans les rues de la région métropolitaine de Montréal. Monsieur Arthur Sandborn, travailleur communautaire, a témoigné que les jeunes prestataires mettaient souvent leur argent en commun et partageaient un petit appartement. Toutefois, après avoir payé le loyer, il ne leur restait que très peu d'argent pour se procurer les autres choses essentielles, notamment l'eau chaude, l'électricité et la nourriture. De plus, le fait qu'ils n'avaient pas le téléphone exacerbait leur marginalisation et compliquait grandement la recherche d'un emploi, tout comme le fait qu'ils n'avaient pas les moyens de se vêtir convenablement et de se déplacer.

(1) Interference with Physical Security of the Person

(1) Atteinte à la sécurité physique de la personne

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The exclusion of welfare recipients under the age of 30 from the full benefits of the social assistance regime severely interfered with their physical integrity and security. First, there are the health risks that flow directly from the dismal living conditions that \$170/month afford. Obviously, the inability to pay for adequate clothing, electricity, hot water or, in the worst cases, for any shelter whatsoever, dramatically increases one's vulnerability to such ailments as the common cold or influenza. According to Dr. Christine Colin, persons living in poverty are six times more likely to develop diseases like bronchial infections, asthma and emphysema than persons who live in decent conditions. Dr. Colin also testified that the poor not only develop more health problems, but are also more severely affected by their ailments than those who live in more favourable conditions.

L'exclusion des bénéficiaires de moins de 30 ans du groupe admissible au plein montant des prestations d'aide sociale a porté gravement atteinte à leur intégrité physique et à la sécurité de leur personne. Premièrement, qu'il suffise de mentionner les risques pour la santé qui découlent directement de la situation d'indigence que crée une prestation mensuelle de 170 \$. De toute évidence, l'incapacité de se payer des vêtements convenables, l'électricité, l'eau chaude ou, dans les pires cas, un toit, accroît énormément la vulnérabilité d'une personne aux maladies comme le rhume ou la grippe. Selon le D<sup>r</sup> Christine Colin, les personnes qui vivent dans la pauvreté sont six fois plus susceptibles de contracter des maladies comme les bronchites, l'asthme et l'emphysème que celles qui vivent dans des conditions convenables. Le D<sup>r</sup> Colin a également témoigné que non seulement les personnes pauvres éprouvent-elles plus de problèmes de santé, mais elles sont aussi plus sévèrement affectées par leur maladie que celles vivant dans des conditions plus favorables.

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Second, the malnourishment and undernourishment of young welfare recipients also result in a

Deuxièmement, la malnutrition et la sous-alimentation des jeunes bénéficiaires d'aide sociale

plethora of health problems. In 1987, the cost of proper nourishment for a single person was estimated at \$152/month, that is 89 percent of the \$170/month allowance. Jocelyne Leduc-Gauvin, a dietician, gave detailed evidence of the effects of poor and insufficient nourishment. Malnourished young adults suffer from lethargy and from various chronic problems such as obesity, anxiety, hypertension, infections, ulcers, fatigue and an increased sensitivity to pain. Malnourished women are prone to gynecological disorders, high rates of miscarriage and abnormal pregnancies. Children born to malnourished mothers tend to be smaller and are often afflicted by congenital deficiencies such as poor vision and learning disorders. Like many welfare recipients under the age of 30, the appellant suffered the consequences of malnutrition. As noted by Ms. Leduc-Gauvin, there is a sad irony in the fact that those who were left to fend for themselves on a lean \$170/month — young adults aged 18 to 29 — in fact required a higher daily intake of calories and nutrients than older adults.

In order to eat, many young welfare recipients benefited from food banks, soup kitchens and like charitable organizations. But since these could not be relied upon consistently other avenues had to be pursued. While some resorted to theft, others turned to prostitution. Dumpsters and garbage cans were scavenged in search of edible morsels of food, exposing the hungry youths to the risks of food poisoning and contamination. In one particular case reported by Mr. Sandborn, two young adults paid a restaurateur \$10/month for the right to sit in his kitchen and eat whatever patrons left in their plates.

(2) Interference with Psychological Security of the Person

The psychological and social consequences of being excluded from the full benefits of the social

se traduisent également par une pléthore de problèmes de santé. En 1987, on évaluait le coût d'une bonne alimentation pour une personne seule à 152 \$ par mois, soit 89 p. 100 de la prestation mensuelle de 170 \$. Jocelyne Leduc-Gauvin, diététiste, a déposé en détail sur les effets d'une alimentation insuffisante et carentielle. Les jeunes adultes victimes de malnutrition souffrent de léthargie et de divers problèmes chroniques tels que l'obésité, l'anxiété, l'hypertension, les infections, les ulcères, la fatigue et la sensibilité accrue à la douleur. Les femmes dénutries sont plus vulnérables aux troubles gynécologiques et elles ont un taux élevé de fausses couches et des grossesses anormales. Les enfants de ces femmes ont tendance à être plus petits et souffrent souvent de problèmes congénitaux comme une mauvaise vue et des troubles d'apprentissage. À l'instar de nombreux prestataires de moins de 30 ans, l'appelante souffrait des conséquences de la malnutrition. Comme l'a souligné M<sup>me</sup> Leduc-Gauvin, il est tristement ironique que les personnes qui étaient appelées à se débrouiller avec une maigre prestation mensuelle de 170 \$ — les jeunes adultes âgés de 18 à 29 ans — avaient en fait besoin d'un apport quotidien calorique et nutritif plus élevé que leurs aînées.

Afin de se nourrir, de nombreux jeunes prestataires ont fait appel aux banques d'alimentation, soupes populaires et autres organisations de bienfaisance du genre. Cependant, comme il n'était pas possible de recourir systématiquement à ces ressources, d'autres moyens devaient être envisagés. Certains se sont tournés vers le vol, d'autres vers la prostitution. De jeunes affamés fouillaient les bennes à rebuts et les poubelles à la recherche de restes comestibles, s'exposant ainsi à des risques d'intoxication alimentaire et de contamination. Monsieur Sandborn a signalé le cas de deux jeunes adultes qui versaient à un restaurateur la somme de 10 \$ par mois pour avoir le droit de s'asseoir dans la cuisine du restaurant et de manger ce que les clients avaient laissé dans leurs assiettes.

(2) Atteinte à la sécurité psychologique de la personne

Les conséquences psychologiques et sociales de l'exclusion des jeunes adultes du plein bénéfice du

assistance regime were equally devastating. The hardships and marginalization of poverty propel the individual into a spiral of isolation, depression, humiliation, low self-esteem, anxiety, stress and drug addiction. According to a 1987 enquiry by Santé Québec, one out of five indigent young adults attempted suicide or had suicidal thoughts. The situation was even more alarming among homeless youths in Montreal, 50 percent of whom reportedly attempted to take their own lives.

régime d'aide sociale étaient également dévastatrices. Les privations et la marginalisation rattachées à la pauvreté engagent la personne dans un engrenage d'isolement, de dépression, d'humiliation, de faible estime de soi, d'anxiété, de stress et de pharmacodépendance. Selon une enquête effectuée en 1987 par Santé Québec, un jeune adulte nécessiteux sur cinq a tenté de se suicider ou pensé à le faire. La situation était encore plus alarmante chez les jeunes sans-abri de Montréal, dont 50 p. 100 auraient, a-t-on rapporté, tenté de s'enlever la vie.

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In my view, this evidence overwhelmingly demonstrates that the exclusion of young adults from the full benefits of the social assistance regime substantially interfered with their fundamental right to security of the person and, at the margins, perhaps with their right to life as well. Freedom from state interference with bodily or psychological integrity is of little consolation to those who, like the claimants in this case, are faced with a daily struggle to meet their most basic bodily and psychological needs. To them, such a purely negative right to security of the person is essentially meaningless: theirs is a world in which the primary threats to security of the person come not from others, but from their own dire circumstances. In such cases, one can reasonably conclude that positive state action is what is required in order to breathe purpose and meaning into their s. 7 guaranteed rights.

À mon avis, la preuve démontre de façon irrésistible que l'exclusion des jeunes adultes du plein bénéfice du régime d'aide sociale a porté substantiellement atteinte à leur droit fondamental à la sécurité de leur personne et peut-être même, dans certains cas extrêmes, à leur droit à la vie. Le droit de ne pas être victime d'atteintes par l'État à leur intégrité physique ou psychologique est une bien mince consolation pour les personnes qui, comme les demandeurs en l'espèce, doivent quotidiennement lutter pour subvenir à leurs besoins physiques et psychologiques les plus élémentaires. Pour eux, un tel droit purement négatif à la sécurité de la personne est essentiellement sans effet : dans leur monde, les menaces à la sécurité de leur personne ne viennent pas principalement d'autrui, mais bien des circonstances extrêmement difficiles dans lesquelles ils vivent. Dans ces cas, il est raisonnablement possible de conclure qu'une intervention concrète de l'État est nécessaire pour donner sens et effet aux droits garantis par l'art. 7.

*C. Can the State Be Held Accountable for the Claimants' Inability to Exercise their Section 7 Rights?*

*C. L'État peut-il être tenu responsable de l'incapacité des demandeurs à exercer les droits que leur garantit l'art. 7?*

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In one sense, there appears to be considerable overlap between this third criterion for making out a successful underinclusion claim and the second criterion just discussed. In fact, once one establishes in accordance with the second criterion that a claimant's fundamental rights cannot be effectively exercised without government intervention, it is difficult to see what more would be required in order to demonstrate state accountability.

D'un certain point de vue, ce troisième critère applicable pour établir le bien-fondé d'une plainte de non-inclusion semble, dans une large mesure, faire double emploi avec le deuxième critère que je viens d'examiner. En fait, dès que le demandeur a établi, conformément à ce deuxième critère, qu'il ne peut exercer ses droits fondamentaux de façon effective sans une intervention du gouvernement, il est difficile d'imaginer ce qu'il faut de plus pour démontrer la responsabilité de l'État.

The absence of a direct, positive action by the state may appear to create particular problems of causation. Of course, state accountability in this context cannot be conceived of along the same lines of causal responsibility as where there is affirmative state action that causally contributes to, and in some cases even determines, the infringement. By contrast, positive rights are violable by mere inaction on the part of the state. This may mean that one should not search for the same kind of causal nexus tying the state to the claimants' inability to exercise their fundamental freedoms. Such a nexus could only ever be established by pointing to some positive state action giving rise to the claimants' aggrieved condition. While this focus on state action is appropriate where one is considering the violation of a negative right, it imports a requirement that is inimical to the very idea of positive rights.

Among the immediate implications of this is that the claimants in this case need not establish, in order to satisfy the third criterion, that the state can be held causally responsible for the socio-economic environment in which their s. 7 rights were threatened, nor do they need to establish that the government's inaction worsened their plight. Here, as in all claims asserting the infringement of a positive right, the focus is on whether the state is under an obligation of performance to alleviate the claimants' condition, and not on whether it can be held causally responsible for that condition in the first place.

All of which indicates that government accountability in the context of claims of underinclusion is to be understood simply in terms of the existence of a positive state obligation to redress conditions for which the state may or may not be causally responsible. On this view, the third criterion serves the purpose of ensuring not only that government intervention is needed to secure the effective exercise of a claimant's fundamental rights or freedoms, but also that it is obligatory. This accords with much of the dicta in *Dunmore* explaining how it is

L'absence d'une mesure concrète et directe de l'État peut sembler créer certains problèmes en ce qui concerne la causalité. Il est évident que, dans le présent contexte, la responsabilité de l'État ne peut être considérée selon les paramètres ordinaires de responsabilité causale applicables lorsqu'il existe une mesure étatique concrète qui contribue causalement à l'atteinte ou même, dans certaines situations, constitue cette atteinte. À l'opposé, les droits positifs peuvent être violés par simple inaction de l'État. Cela peut vouloir dire qu'il ne faut pas rechercher le même type de lien de causalité rattachant l'État à l'incapacité des demandeurs d'exercer leurs libertés fondamentales. Un tel lien ne pourrait être établi qu'en trouvant une mesure étatique concrète ayant donné naissance au préjudice subi par les demandeurs. Bien qu'il soit approprié de s'attacher à déterminer l'existence ou non d'une mesure étatique lorsqu'on s'interroge sur la violation d'un droit négatif, une telle démarche a pour effet d'introduire une exigence incompatible avec la notion même de droits positifs.

Cette situation a notamment comme conséquence immédiate en l'espèce que, pour satisfaire au troisième critère, les demandeurs n'ont pas à prouver que l'État peut être tenu causalement responsable de l'environnement socio-économique dans lequel les droits que leur garantit l'art. 7 ont été menacés, ni d'ailleurs que l'inaction de l'État a aggravé leur sort. Dans la présente affaire, comme dans toute demande reprochant la violation d'un droit positif, il s'agit d'abord et avant tout de déterminer si l'État a l'obligation d'agir pour soulager la situation pénible des demandeurs et non pas s'il était à l'origine, sur le plan causal, de cette situation.

Tout cela indique que, dans le contexte d'une plainte de non-inclusion, la responsabilité de l'État dépend simplement de l'existence d'une obligation étatique positive de remédier à une situation dont il pourrait ou non être causalement responsable. Selon ce point de vue, le troisième critère fait en sorte que non seulement l'intervention de l'État est nécessaire pour garantir l'exercice effectif des libertés et droits fondamentaux du demandeur, mais également qu'elle a un caractère obligatoire. Ce point de vue s'accorde avec la plupart des observations

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possible for government accountability to be established, not only by underinclusion that “orchestrates” or “encourages” the violation of fundamental freedoms, but also by underinclusion that “sustains” the violation (*Dunmore*, at para. 26). In conceiving of state accountability in terms of the breach of a positive duty of performance, it becomes possible for the first time to recognize how underinclusive legislation can violate a fundamental right by effectively turning a blind eye to, or sustaining, independently existing threats to that right.

formulées dans l’arrêt *Dunmore* et explique comment la responsabilité de l’État peut être établie non seulement lorsqu’une mesure non inclusive « orchestre » ou « encourage » la violation de libertés fondamentales, mais également lorsqu’une telle mesure « tolère » la violation (*Dunmore*, par. 26). En considérant que la responsabilité de l’État peut découler de la violation d’une obligation positive d’agir, il devient pour la première fois possible de reconnaître comment une mesure législative non inclusive peut contrevenir à un droit fondamental en faisant abstraction de menaces pesant de façon indépendante sur ce droit, en d’autres termes en les tolérant.

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A focus on state obligation was also the driving force behind this Court’s finding in *Dunmore* that the government could be held accountable for the violation of the claimants’ s. 2(d) rights in that case. It led to the search for a “minimum of state action” (para. 28) that would bring the government within reach of the *Charter* by engaging s. 32. Ultimately, the minimum of state action was satisfied in *Dunmore* by the mere fact that the government had chosen to legislate over matters of association. In this Court’s view, that choice triggered a state obligation that invoked *Charter* scrutiny and removed any possibility of the state claiming lack of responsibility for the violation of associational rights (at para. 29):

L’existence d’une obligation étatique a également constitué le principal fondement de la conclusion de la Cour, dans l’arrêt *Dunmore*, selon laquelle l’État pouvait dans cette affaire être tenu responsable de la violation des droits garantis aux demandeurs par l’al. 2d). La Cour s’est en conséquence demandé s’il existait un « minimum d’action gouvernementale » (par. 28) ayant pour effet d’assujettir le gouvernement à la *Charte* par application de l’art. 32. En définitive, dans l’arrêt *Dunmore*, l’exigence relative au minimum d’action gouvernementale était respectée du seul fait que le gouvernement avait choisi de légiférer en matière d’association. De l’avis de la Cour, cette décision avait créé pour l’État une obligation susceptible de contrôle au regard de la *Charte* et avait écarté toute possibilité que l’État plaide l’absence de responsabilité à l’égard de la violation des droits d’association (au par. 29) :

Once the state has chosen to regulate a private relationship such as that between employer and employee . . . it is unduly formalistic to consign that relationship to a “private sphere” that is impervious to *Charter* review. As Dean P.W. Hogg has stated, “(t)he effect of the governmental action restriction is that there is a private realm in which people are not obliged to subscribe to ‘state’ values, and into which constitutional norms do not intrude. The boundaries of that realm are marked, not by an *a priori* definition of what is ‘private’, but by the absence of statutory or other governmental intervention” (see *Constitutional Law of Canada* (loose-leaf ed.), at p. 34-27).

Une fois que l’État a décidé de réglementer une relation d’ordre privé, comme celle entre employeur et employé, [. . .] il est trop formaliste d’assigner cette relation à un « domaine privé » qui échappe au contrôle fondé sur la *Charte*. Selon le doyen P.W. Hogg, [TRADUCTION] « l’effet de la restriction de l’action gouvernementale est qu’il existe un domaine privé à l’intérieur duquel les personnes ne sont pas obligées de souscrire aux valeurs de “l’État” et à l’intérieur duquel les normes constitutionnelles n’interviennent pas. Les limites de ce domaine sont établies non pas par une définition a priori de ce qui est “privé”, mais par l’absence d’intervention gouvernementale, législative ou autre » (voir *Constitutional Law of Canada* (éd. feuilles mobiles), p. 34-27).

There can be no doubt that these dicta apply with equal force to the instant appeal.

The *Social Aid Act* is quite clearly directed at addressing basic needs relating to the personal security and survival of indigent members of society. It is almost a cliché that the modern welfare state has developed in response to an obvious failure on the part of the free market economy to provide these basic needs for everyone. Were it necessary, this Court could take judicial notice of this fact in assessing the relevance of the *Social Aid Act* to the claimants' s. 7 rights. As it happens, any such necessity is mitigated by the fact that s. 6 of the Act explicitly sets out its objective: to provide supplemental aid to those who fall below a subsistence level.

Additional support for the proposition that the *Social Aid Act* is directed at securing the interests that s. 7 of the *Charter* was meant to protect can be found in various statements made by the Quebec government in a policy paper that ultimately led to the reform of the social assistance regime in 1989, putting an end to the differential treatment between younger and older welfare recipients. This paper was published in 1987 by the government of Quebec, and signed by Pierre Paradis (the then Minister of Manpower and Income Security). It is entitled *Pour une politique de sécurité du revenu*. In it, the Quebec government unequivocally states that it [TRANSLATION] “recognizes its duty and obligation to provide for the essential needs of persons who are unable to work.” It then goes on to state that it must [TRANSLATION] “resolutely tackle the deficiencies” of the social assistance programs, which, it admits, “remain barriers to the autonomy and emancipation of welfare recipients”. On the same page, the government specifically identifies the difference in treatment between younger and older welfare recipients as such a deficiency, describing it as a [TRANSLATION] “problem”.

Il ne fait aucun doute que ces remarques s'appliquent au présent pourvoi et produisent le même effet.

La *Loi sur l'aide sociale* vise très clairement à répondre aux besoins essentiels des citoyens nécessiteux en matière de sécurité personnelle et de subsistance. C'est presque un lieu commun de dire que l'État providence moderne a vu le jour par suite de l'incapacité évidente du régime de la libre entreprise de pourvoir aux besoins essentiels de chacun. Si la chose était nécessaire, la Cour pourrait prendre connaissance d'office de ce fait dans l'appréciation de l'importance de la *Loi sur l'aide sociale* en ce qui concerne les droits garantis aux demandeurs par l'art. 7. Il se trouve que ce besoin est atténué par le fait que l'art. 6 de la Loi énonce expressément l'objectif de celle-ci : fournir une aide complémentaire aux personnes dont les moyens de subsistance sont inférieurs à un niveau donné.

Le bien-fondé de la proposition selon laquelle la *Loi sur l'aide sociale* vise à garantir les droits que l'art. 7 de la *Charte* est censé protéger est également étayé par diverses déclarations du gouvernement du Québec, qui sont consignées dans un énoncé de politique ayant abouti à la réforme du régime d'aide sociale en 1989, réforme qui a aboli la différence de traitement entre les jeunes bénéficiaires d'aide sociale et leurs aînés. Ce document, intitulé *Pour une politique de sécurité du revenu*, a été publié en 1987 par le gouvernement du Québec, sous la plume de M. Pierre Paradis (ministre de la Main-d'œuvre et de la Sécurité du Revenu à l'époque). Dans ce document, le gouvernement du Québec dit sans équivoque que « l'État se reconnaît le devoir et l'obligation de pourvoir aux besoins essentiels des personnes incapables au travail ». Il poursuit en affirmant qu'« [i]l faut [. . .] s'attaquer résolument aux failles » des programmes d'aide sociale « qui [. . .] demeurent autant d'entraves à l'autonomie et à l'émancipation du bénéficiaire ». Dans la même page, le gouvernement dit expressément que la différence de traitement entre les jeunes bénéficiaires et leurs aînés fait partie des déficiences du régime, la qualifiant de « problème ».

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At the very least, these statements indicate that the *Social Aid Act* constituted an excursion into regulating the field of interests that generally fall within the rubric of s. 7 of the *Charter*. Legislative intervention aimed at providing for essential needs touching on the personal security and survival of indigent members of society is sufficient to satisfy whatever “minimum state action” requirement might be necessary in order to engage s. 32 of the *Charter*. By enacting the *Social Aid Act*, the Quebec government triggered a state obligation to ensure that any differential treatment or underinclusion in the provision of these essential needs did not run afoul of the fundamental rights guaranteed by the *Charter*, and in particular by s. 7. It failed to discharge this obligation. The evidence shows that the underinclusion of welfare recipients aged 18 to 29 under the *Social Aid Act* substantially impeded their ability to exercise their right to personal security (and potentially even their right to life). In the circumstances, I must conclude that this effective lack of government intervention constituted a violation of their s. 7 rights.

#### IV. The Principles of Fundamental Justice

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Under most circumstances, it would now be necessary to determine whether this *prima facie* violation of the appellant’s s. 7 rights was “in accordance with the principles of fundamental justice”. Such an inquiry appears to have no application to this case for two reasons. First, my analysis indicates that the protection of positive rights is most naturally grounded in the first clause of s. 7, which provides a free-standing right to life, liberty and security of the person and makes no mention of the principles of fundamental justice. Moreover, as Lamer J. observed in *Re B.C. Motor Vehicle Act*, *supra*, at p. 503 “the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.” But positive rights, by nature violable by mere inaction on the part of the state, do not bring the justice system into motion by empowering agents of the state to actively curtail

Ces déclarations indiquent à tout le moins que la *Loi sur l’aide sociale* constituait une incursion dans la réglementation de droits qui relèvent habituellement de l’art. 7 de la *Charte*. Une intervention législative destinée à pourvoir aux besoins essentiels des citoyens nécessiteux en matière de sécurité personnelle et de subsistance est suffisante pour satisfaire à toute condition d’application de l’art. 32 de la *Charte* qui requerrait l’existence d’un « minimum d’action gouvernementale ». En édictant la *Loi sur l’aide sociale*, le gouvernement du Québec a fait naître pour l’État l’obligation de s’assurer que toute différence de traitement ou non-inclusion concernant la prestation de ces services essentiels n’est pas incompatible avec les droits fondamentaux garantis par la *Charte*, tout particulièrement l’art. 7. Il ne s’est pas acquitté de cette obligation. La preuve démontre que la non-inclusion, dans la *Loi sur l’aide sociale*, des bénéficiaires d’aide sociale âgés de 18 à 29 ans a porté sensiblement atteinte à leur capacité d’exercer leur droit à la sécurité de leur personne (et peut-être même leur droit à la vie). Dans les circonstances, il me faut conclure que cette absence concrète d’intervention gouvernementale a constitué une violation des droits garantis par l’art. 7 à ces bénéficiaires.

#### IV. Les principes de justice fondamentale

Dans la plupart des cas, il serait maintenant nécessaire de se demander si cette atteinte à première vue aux droits garantis par l’art. 7 à l’appelante a été portée « en conformité avec les principes de justice fondamentale ». Cet examen ne semble pas requis en l’espèce, et ce pour deux raisons. Premièrement, mon analyse révèle que la protection des droits positifs découle naturellement de la première partie de l’art. 7, qui reconnaît à chacun un droit autonome à la vie, à la liberté et à la sécurité de sa personne, sans faire mention des principes de justice fondamentale. En outre, comme l’a souligné le juge Lamer dans le *Renvoi : Motor Vehicle Act de la C.-B.*, p. 503, « les principes de justice fondamentale se trouvent dans les préceptes fondamentaux de notre système juridique. Ils relèvent non pas du domaine de l’ordre public en général, mais du pouvoir inhérent de l’appareil judiciaire en tant que gardien du système judiciaire ». Cependant, les droits positifs — susceptibles de violation par simple inaction de l’État — ne

the life, liberty and security of the person of individuals. The source of a positive rights violation is in the legislative process, which is of course itself quite distinct from the “inherent domain of the judiciary” and “the justice system” as it has been traditionally conceived. Indeed, the kinds of considerations that would serve to justify the decision to enact one form of protective legislation over another “lie in the realm of . . . public policy”, which this Court has specifically divorced from the principles of fundamental justice. The principles of fundamental justice therefore have little relevance in the present circumstances, which invoke the inherent domain of the legislature and not that of the justice system.

In view of this, any limitation that might be placed on the s. 7 right asserted in this case — if not in all cases where it is a positive right that is asserted — must be found, not in the principles of fundamental justice, but in the reasonable limits prescribed by law that can be justified in a free and democratic society. Accordingly, it is to s. 1 that we must turn.

#### V. Section 1 of the Charter

As is apparent from the above, there is an onerous burden placed on claimants who seek to establish a positive right violation under s. 7 of the *Charter*. Apart from the justiciability concern — which, though not an issue in this case, may at times present a significant obstacle in the way of finding such a violation — claimants are faced with the unenviable task of providing a sound evidentiary basis for the conclusion that their s. 7 rights are rendered essentially meaningless without active government intervention.

The difficulty faced by claimants in this regard is partially justified by the fact that, once a violation of s. 7 has been established and there is a shift in

font pas entrer en jeu le système judiciaire en habilitant des agents de l'État à restreindre activement les droits de certains individus à la vie, à la liberté et à la sécurité de leur personne. La violation de droits positifs découle du processus législatif, lui-même évidemment très distinct « du pouvoir inhérent de l'appareil judiciaire » et du « système judiciaire » selon la conception traditionnelle de ces notions. De fait, les diverses considérations invoquées pour justifier la décision d'édicter une loi protectrice d'un certain type plutôt que d'un autre « relèvent [. . .] du domaine de l'ordre public », domaine que la Cour a expressément distingué des principes de justice fondamentale. Ces principes ont en conséquence peu de pertinence dans les présentes circonstances, qui sont l'apanage du législateur et non du système judiciaire.

Compte tenu de ce qui précède, la validité de toute limite susceptible de restreindre le droit garanti par l'art. 7 qui est revendiqué dans la présente affaire — voire dans toutes celles où un droit positif est invoqué — doit être appréciée au regard non pas des principes de justice fondamentale, mais plutôt de la question de savoir s'il s'agit d'une limite qui est raisonnable et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique. En conséquence, nous allons procéder à l'examen fondé sur l'article premier.

#### V. L'article premier de la Charte

Il ressort clairement de ce qui précède qu'une lourde tâche attend les demandeurs qui tentent d'établir, au regard de l'art. 7 de la *Charte*, la violation d'un droit positif. Indépendamment de la question de la justiciabilité — qui, bien qu'elle ne se pose pas en l'espèce, peut à l'occasion constituer un obstacle important à la conclusion qu'il existe une telle violation —, les demandeurs ont la tâche peu enviable d'apporter des éléments de preuve suffisamment solides pour permettre au tribunal de conclure que les droits que leur garantit l'art. 7 sont essentiellement inefficaces sans intervention active de l'État.

La difficulté à laquelle se heurte les demandeurs à cet égard s'explique en partie par le fait que le gouvernement doit s'acquitter d'une tâche aussi lourde

the burden of showing that the violation is demonstrably justified as a reasonable limit prescribed by law, a similarly onerous task awaits the government. Lamer C.J.'s comments in *G. (J.)*, *supra*, at para. 99, indicate why this must be so:

Section 7 violations are not easily saved by s. 1. . . . This is so for two reasons. First, the rights protected by s. 7 — life, liberty, and security of the person — are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice . . . be upheld as a reasonable limit demonstrably justified in a free and democratic society.

Of course, only the first of these two rationales applies to the case at bar. Since there is no need to find that the violation of a positive right under s. 7 accords with the principles of fundamental justice, the second rationale does not come into play. To that extent, the violation of such a right may be somewhat easier to justify under s. 1. Still, the rights enshrined in s. 7, whether positive or negative, are of sufficient importance that they “cannot ordinarily be overridden by competing social interests”.

390 There are, in addition, more general constraints on s. 1 justification discussed above, such that a limitation on *Charter* rights under that section will only be justified where it furthers the values at which the rights are themselves directed. These constraints magnify the difficulty of the government's task in showing that the impugned violation is justified.

391 In this case, the legislated differential treatment, or underinclusion, is purportedly directed at: (1) preventing the attraction of young adults to social assistance; and (2) facilitating their integration into the workforce by encouraging participation in the employment programs. Insofar as either of these “double objectives” is understood as being

dès qu'une violation de l'art. 7 a été établie et qu'il y a déplacement de la charge de la preuve obligeant l'État à montrer qu'il s'agit d'une violation dont la justification peut se démontrer en tant que limite raisonnable prescrite par une règle de droit. Les commentaires suivants du juge en chef Lamer dans l'arrêt *G. (J.)*, précité, par. 99, indiquent pourquoi il doit en être ainsi :

Il n'est pas facile de sauver une atteinte à l'art. 7 par application de l'article premier [. . .] Deux raisons expliquent ceci. D'abord, les intérêts protégés par l'art. 7 — la vie, la liberté et la sécurité de la personne — revêtent une grande importance et généralement, des exigences sociales concurrentes ne pourront prendre le pas sur eux. Ensuite, le non-respect des principes de justice fondamentale [. . .] sera rarement reconnu comme une limite raisonnable dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Il va de soi que seule la première de ces deux raisons s'applique en l'espèce. Comme il n'est pas nécessaire de décider si la violation d'un droit positif garanti par l'art. 7 est conforme aux principes de justice fondamentale, la deuxième raison n'entre pas en jeu. Dans cette mesure la violation d'un tel droit pourrait être un peu plus facile à justifier au regard de l'article premier. Néanmoins, les droits consacrés à l'art. 7 — qu'il s'agisse de droits positifs ou de droits négatifs — sont à ce point importants que, « généralement, des exigences sociales concurrentes ne pourront prendre le pas sur eux ».

De plus, comme on l'a vu précédemment, des contraintes plus générales s'appliquent à la justification requise par l'article premier, de sorte que, suivant cette disposition, la limitation de droits garantis par la *Charte* ne sera justifiée que si elle sert les valeurs qui sous-tendent ces droits. Ces contraintes accentuent la difficulté à laquelle se heurte le gouvernement lorsqu'il doit justifier la violation contestée.

En l'occurrence, la différence de traitement — ou non-inclusion — prévue par la loi est censée : (1) prévenir l'effet d'attraction du régime d'aide sociale sur les jeunes adultes; (2) favoriser l'intégration de ces derniers dans la population active en encourageant leur participation aux programmes d'emploi. Dans la mesure où l'un ou l'autre de ces « deux

principally driven by cost considerations, it would fail (barring cases of prohibitive cost) to be pressing and substantial. However, it is possible to frame these objectives in such a way as to ensure that they are properly adapted to the justificatory analysis under s. 1 by focusing instead on their long-term tendency to promote the liberty and inherent dignity of young people. Thus framed, they might indeed satisfy the “pressing and substantial objective” requirement under *Oakes*.

The problem, in my view, is that subsequent stages of the *Oakes* analysis raise doubts concerning the appropriateness of framing the objectives in this manner. For example, it is difficult to accept that denial of the basic means of subsistence is rationally connected to values of promoting the long-term liberty and inherent dignity of young adults. Indeed, the long-term importance of continuing education and integration into the workforce is undermined where those at whom such “help” is directed cannot meet their basic short-term subsistence requirements. Without the ability to secure the immediate needs of the present, the future is little more than a far-off possibility, remote both in perception and in reality. We have already seen, for example, how the inability to afford a telephone, suitable clothes and transportation makes job hunting difficult if not impossible. More drastically, inadequate food and shelter interfere with the capacity both for learning as well as for work itself. There appears, therefore, to be little rational connection between the objectives, as tentatively framed, and the means adopted in pursuit of those objectives.

Moreover, I agree with Bastarache J.’s finding that those means were not minimally impairing in a number of ways: (1) not all of the programs provided participants with a full top-up to the basic level; (2) there were temporal gaps in the availability of the various programs to willing participants; (3) some of the most needy welfare recipients — the illiterate and severely undereducated — could not participate

objectifs » serait inspiré par des considérations financières, il ne serait pas (sauf en cas de dépenses faramineuses) urgent et réel. Cependant, il est possible de formuler ces objectifs de façon à les adapter à l’analyse justificative faite en vertu de l’article premier, en mettant plutôt l’accent sur le fait qu’ils tendent à favoriser à long terme la liberté et la dignité inhérente des jeunes. Ainsi formulés, ces objectifs pourraient en effet satisfaire à la condition requérant l’existence d’un « objectif urgent et réel » que prévoit le critère élaboré dans l’arrêt *Oakes*.

À mon avis, le problème est que l’application des étapes subséquentes de l’analyse prévue par l’arrêt *Oakes* soulève des doutes quant à l’opportunité de formuler les objectifs de cette manière. Par exemple, il est difficile d’accepter que la négation des moyens élémentaires de subsistance puisse avoir un lien rationnel avec les valeurs qu’on tend à favoriser, à savoir la liberté et la dignité inhérente des jeunes adultes à long terme. De fait, la valeur à long terme de la formation permanente et de l’intégration dans la population active est compromise lorsque ceux à qui « l’aide » s’adresse sont incapables de pourvoir à leurs besoins essentiels à court terme. Pour les personnes incapables de subvenir à leurs besoins immédiats, le futur ne représente tout au plus qu’une distante possibilité, autant dans leur esprit que dans leur réalité. Par exemple, nous avons vu plus tôt comment l’incapacité de se payer le téléphone, des vêtements convenables et des déplacements rendait difficile, sinon impossible, la recherche d’un emploi. Facteur plus grave encore, le fait d’être privé d’une alimentation et d’un logement convenables affectent autant la capacité d’apprendre que celle de travailler. Par conséquent, il ne semble pas y avoir de lien vraiment rationnel entre les objectifs, tels qu’ils ont été proposés, et les moyens adoptés pour les réaliser.

En outre, à l’instar du juge Bastarache, j’estime que l’atteinte causée par ces moyens n’était pas minimale, et ce pour plusieurs raisons : (1) ce ne sont pas tous les programmes qui permettaient aux participants de hausser leurs prestations au niveau de la prestation de base; (2) il y avait des périodes d’attente entre les programmes offerts aux participants intéressés; (3) certains des prestataires les plus

in certain programs; (4) only 30 000 program places were made available in spite of the fact that 85 000 single young adults were on social assistance at the time. As my colleague points out, this last factor in particular “brings into question the degree to which the distinction in s. 29(a) was geared towards improving the [long-term] situation of those under 30, as opposed to simply saving money” (para. 283). Thus, at the minimal impairment stage of the *Oakes* test, there is additional cause for doubting whether the legislated distinction at issue can be properly characterized as being directed at furthering the long-term liberty and dignity of the claimants.

nécessiteux — les analphabètes et les personnes gravement sous-scolarisées — ne pouvaient participer à certains programmes; (4) ces programmes ne comptaient que 30 000 places, alors qu’on dénombrait à l’époque pertinente 85 000 personnes seules de moins de 30 ans recevant de l’aide sociale. Comme le souligne mon collègue, ce dernier facteur en particulier « incite à se demander dans quelle mesure la distinction prévue à l’al. 29a) visait vraiment à améliorer la situation des personnes de moins de 30 ans, et non pas simplement à réaliser des économies » (par. 283). Par conséquent, à l’étape de l’atteinte minimale de l’analyse prévue par le critère énoncé dans l’arrêt *Oakes*, il existe des raisons supplémentaires de se demander s’il est justifié d’affirmer que la distinction litigieuse établie par le texte de loi tendait à favoriser la liberté et la dignité à long terme des demandeurs.

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This is sufficient, in my view, to establish that the government has not in this case discharged the always heavy burden of justifying a *prima facie* violation of s. 7 under s. 1. I note in passing that it will be a rare case indeed in which the government can successfully claim that the deleterious effects of denying welfare recipients their most basic requirements are proportional to the salutary effects of doing so in contemplation of long-term benefits, for reasons that are largely encompassed by my discussion of rational connection. This is not that rare case. For this reason among others, I find that the violation of the claimants’ right to life, liberty and security of the person is not saved by s. 1.

À mon avis, cela suffit pour établir que, en l’espèce, le gouvernement ne s’est pas acquitté de la tâche, par ailleurs toujours lourde, de justifier une violation à première vue de l’art. 7 au regard de l’article premier. En passant, je tiens à signaler que, pour des raisons que j’ai en grande partie exposées dans mon analyse de la question du lien rationnel, il arrivera d’ailleurs rarement que le gouvernement pourra plaider avec succès que les effets préjudiciables du fait de refuser aux bénéficiaires d’aide sociale leurs besoins les plus élémentaires sont proportionnés aux effets bénéfiques à long terme d’une telle mesure. Nous ne sommes pas en présence d’un de ces rares cas. Notamment pour cette raison, je conclus que la violation du droit des demandeurs à la vie, à la liberté et à la sécurité de leur personne n’est pas justifiée au sens de l’article premier.

#### VI. Section 15(1) of the Charter

#### VI. Le paragraphe 15(1) de la Charte

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Having found a violation of s. 7 of the *Charter*, it is not strictly necessary for me to determine whether the impugned provisions also violate s. 15(1). I am, however, in general agreement with my colleague Bastarache J.’s analysis and conclusions on that issue. As he does, I would find that the impugned provision of the regulations under the *Social Aid Act* infringes s. 15 of the *Charter* and that the infringement is not saved by s. 1. The infringement

Ayant conclu à la violation de l’art. 7 de la *Charte*, je n’ai pas à me demander si les dispositions attaquées contreviennent également au par. 15(1). Je suis toutefois généralement en accord avec l’analyse et les conclusions de mon collègue le juge Bastarache sur la question. Tout comme lui, j’estime que la disposition contestée du règlement d’application de la *Loi sur l’aide sociale* viole l’art. 15 de la *Charte* et que cette violation n’est pas justifiée

cannot be saved by s. 1 for substantially the same reasons discussed above in relation to the s. 7 violation.

#### VII. Section 45 of the Quebec Charter

I also agree with my colleague Bastarache J. that s. 45 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, establishes a positive right to a minimal standard of living but that this right cannot be enforced under ss. 52 or 49 in the circumstances of this case. Indeed, s. 45 falls outside the expressly defined ambit of s. 52; it is consequently of no assistance to the appellant. Moreover, since there is no question of wrongful conduct or negligence on the part of the legislature, s. 49 cannot be resorted to either. The right that is provided for in s. 45, while not enforceable here, stands nevertheless as a strong political and moral benchmark in Quebec society and a reminder of the most fundamental requirements of that province's social compact. In that sense, its symbolic and political force cannot be underestimated.

#### VIII. Damages

Finally, I am in substantial agreement with the analysis of my colleague Bastarache J. with regard to remedy. Were the impugned provision of the Regulation still in force, I would have declared it unconstitutional pursuant to s. 52 of the *Constitution Act, 1982* as it violates the fundamental right to security of the person guaranteed under s. 7 of the *Charter*. I would have also ordered that the declaration of invalidity be suspended for a sufficient period of time to give the government an adequate opportunity to correct the legislation. However, the impugned social assistance regime having been repealed, this point is now moot.

The appellant also seeks monetary compensation for herself and for the members of her class. For the reasons invoked by Bastarache J., I too find this case ill-suited for the concomitant application of s. 52 of the *Constitution Act, 1982* and s. 24 of the *Charter*.

au regard de l'article premier, et ce essentiellement pour les raisons exposées précédemment à l'égard de la violation de l'art. 7.

#### VII. L'article 45 de la Charte québécoise

À l'instar de mon collègue le juge Bastarache, j'estime que l'art. 45 de la *Charte des droits et libertés du Québec*, L.R.Q., ch. C-12, établit un droit positif à un niveau de vie minimal, mais que le respect de ce droit ne peut être imposé en vertu des art. 52 ou 49 dans les circonstances du présent pourvoi. De fait, comme l'art. 45 se trouve hors du champ d'application par ailleurs expressément défini de l'art. 52, il n'est en conséquence d'aucune utilité à l'appelante. Qui plus est, puisqu'il n'est aucunement question de conduite fautive ou de négligence de la part du législateur, l'art. 49 ne peut pas lui non plus être invoqué. Quoique le respect du droit prévu à l'art. 45 ne puisse être imposé en l'espèce, ce droit constitue néanmoins un bon point de référence politique et moral dans la société québécoise, ainsi qu'un rappel des exigences les plus fondamentales du contrat social entre la province et ses citoyens. En ce sens, on ne saurait sous-estimer sa valeur symbolique et politique.

#### VIII. Dommages-intérêts

Enfin, je souscris pour l'essentiel à l'analyse de mon collègue le juge Bastarache sur la question de la réparation. Si la disposition réglementaire contestée était encore en vigueur, je l'aurais déclarée inconstitutionnelle en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*, au motif qu'elle porte atteinte au droit fondamental de chacun à la sécurité de sa personne garanti par l'art. 7 de la *Charte*. J'aurais également ordonné la suspension de cette déclaration d'invalidité pendant un délai suffisant pour permettre au gouvernement de modifier le texte de loi. Cependant, vu l'abrogation du régime d'aide sociale contesté, la question est maintenant devenue théorique.

L'appelante demande également une indemnité pécuniaire pour elle-même et pour les membres du groupe dont elle fait partie. Pour les motifs exposés par le juge Bastarache, j'estime moi aussi que le présent pourvoi se prête mal à l'application

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I wish to note however that the financial impact of an hypothetical award on the province of Quebec would probably be less of a burden than surmised by my colleague. Indeed, the various remedial programs that failed to address the appellant's needs in this case were *Charter* proof until April 1989, protected as they were by a notwithstanding clause in their enabling statute (S.Q. 1984, c. 5, s. 4). This means that the programs' role in the *Charter* violation in this case could only be assessed within a 4-month window, representing the time between the expiry of the notwithstanding clause and the repeal of the impugned legislation.

concomitante de l'art. 52 de la *Loi constitutionnelle de 1982* et de l'art. 24 de la *Charte*. Toutefois, je tiens à souligner que les répercussions financières d'une hypothétique condamnation de la province de Québec à des dommages-intérêts seraient probablement moins importantes que le présume mon collègue. En effet, les divers programmes correctifs qui n'ont pas su répondre aux besoins de l'appelante en l'espèce étaient soustraits à l'application de la *Charte* jusqu'en avril 1989, étant protégés par une disposition d'exemption dans la loi autorisant leur création (L.Q. 1984, ch. 5, art. 4). Cela signifie que l'évaluation du rôle des programmes dans la violation de la *Charte* ne pourrait porter que sur une période de quatre mois, c'est-à-dire le temps écoulé entre l'expiration de la disposition d'exemption et l'abrogation de la mesure législative contestée.

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Even though this affects the extent of the violation, it has no impact in my view on the usefulness of the whole of the evidence presented in this case as to the existence of the right and the nature of the infringement. The fact that *An Act to amend the Social Aid Act*, S.Q. 1984, c. 5, and the programs it enacted were shielded from the *Charter* until April 1989 is a matter that goes to the scope or extent of the breach. It does not change the fact that a breach occurred.

Bien que ce fait ait une incidence sur l'étendue de la violation, il n'a selon moi aucun effet sur l'utilité de l'ensemble des éléments de preuve présentés en l'espèce relativement à l'existence du droit invoqué et à la nature de la violation. Le fait que la *Loi modifiant la Loi sur l'aide sociale*, L.Q. 1984, ch. 5, et les programmes établis sous son régime aient été soustraits à l'application de la *Charte* jusqu'en avril 1989 concerne l'ampleur ou l'étendue de la violation, mais ne change par ailleurs rien au fait qu'il s'est produit une violation.

#### IX. Conclusion

#### IX. Conclusion

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For these reasons, I would allow the appeal and I would answer the stated constitutional questions as follows:

Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de répondre ainsi aux questions constitutionnelles qui ont été formulées :

1. Did s. 29(a) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?

1. Le paragraphe 29a) du *Règlement sur l'aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, adopté en vertu de la *Loi sur l'aide sociale*, L.R.Q., ch. A-16, violait-il le par. 15(1) de la *Charte canadienne des droits et libertés* pour le motif qu'il établissait une distinction discriminatoire fondée sur l'âge relativement aux personnes seules, aptes au travail, âgées de 18 à 30 ans?

Yes.

Oui.

2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

2. Dans l'affirmative, cette violation est-elle justifiée dans le cadre d'une société libre et démocratique, en vertu de l'article premier de la *Charte canadienne des droits et libertés*?

No.

Non.

3. Did s. 29(a) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?

Yes, the section infringed s. 7 by denying those to whom it applied of their right to security of the person.

4. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

English version of the reasons delivered by

LEBEL J. (dissenting) —

#### I. Introduction

I have read with interest the opinion of my colleague Justice Bastarache. I am in overall agreement with his reasons concerning the application of s. 15 of the *Canadian Charter of Rights and Freedoms* (“*Canadian Charter*”) and I concur in the disposition he proposes. However, while I acknowledge that the appellant was unable to establish a violation of s. 7 of the *Canadian Charter*, I am unable, with respect, to agree with the interpretation and application he suggests. Finally, in the discussion of s. 45 of the *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 (“*Quebec Charter*”), I believe that certain unique aspects of the *Quebec Charter*, and the nature of the economic rights that it protects, merit a few additional comments.

#### II. Section 15 of the *Canadian Charter*

It is not disputed in this case that s. 29(a) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, establishes a formal distinction between the appellant (and members of her group) and other social aid recipients based on a personal characteristic, namely age. The appeal essentially relates

3. Le paragraphe 29a) du *Règlement sur l’aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, adopté en vertu de la *Loi sur l’aide sociale*, L.R.Q., ch. A-16, violait-il l’art. 7 de la *Charte canadienne des droits et libertés* pour le motif qu’il portait atteinte au droit à la sécurité des personnes qu’il visait, et ce d’une façon incompatible avec les principes de justice fondamentale?

Oui, la disposition en question violait l’art. 7 en refusant aux personnes qu’elle visait le droit à la sécurité de leur personne.

4. Dans l’affirmative, cette violation est-elle justifiée dans le cadre d’une société libre et démocratique, en vertu de l’article premier de la *Charte canadienne des droits et libertés*?

Non.

Les motifs suivants ont été rendus par

LE JUGE LEBEL (dissident) —

#### I. Introduction

J’ai lu avec intérêt l’opinion de mon collègue le juge Bastarache. Je souscris de façon générale à ses motifs sur l’application de l’art. 15 de la *Charte canadienne des droits et libertés* (« *Charte canadienne* ») et je suis d’accord avec le dispositif qu’il propose. Par ailleurs, bien que je reconnaisse que l’appelante n’a pu établir une violation de l’art. 7 de la *Charte canadienne*, avec égards, je ne peux cependant me rallier à l’interprétation et à l’application qu’il en suggère. Enfin, à l’occasion de la discussion de l’art. 45 de la *Charte des droits et libertés de la personne* du Québec, L.R.Q., ch. C-12 (« *Charte québécoise* »), je crois utile d’ajouter quelques commentaires sur le particularisme de certains aspects de la *Charte québécoise* et d’examiner la nature des droits économiques qu’elle protège.

#### II. L’article 15 de la *Charte canadienne*

Il n’est pas contesté dans la présente affaire que l’al. 29a) du *Règlement sur l’aide sociale*, R.R.Q. 1981, ch. A-16, r. 1, établit une distinction formelle entre l’appelante (et les membres de son groupe) et les autres bénéficiaires d’aide sociale sur la base d’une caractéristique personnelle, soit l’âge. Le

to the third element in the analysis under s. 15 of the *Canadian Charter*, which involves determining whether the distinction in issue is discriminatory. For the reasons given by my colleague Bastarache J., and for the following reasons, I am of the opinion that s. 29(a), when taken in isolation or considered in light of all employability programs, discriminates against recipients under 30 years of age.

403 Differential treatment becomes discriminatory when it violates the human dignity and freedom of the individual. This will be the case where the differential treatment reflects a stereotypical application of presumed personal or group characteristics, or where it perpetuates or promotes the view that the individual concerned is less capable or less worthy of respect and recognition as a human being or as a member of Canadian society.

404 It should first be noted that in this case, the distinction was based on a ground expressly enumerated in s. 15(1) of the *Canadian Charter*. In such circumstances, it is much easier to conclude that the distinction violates the innate dignity of the individual, as Iacobucci J. held in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. However, when compared to the other enumerated or analogous grounds, age is unique in that a distinction based on age may, in some cases, reflect the needs and abilities of individuals. In *Law*, for example, the Supreme Court upheld a distinction based on age in the Canada Pension Plan (CPP) on the ground that the distinction was not discriminatory. The CPP provided that a person must have reached the age of 35 in order to receive surviving spouse benefits. This Court reached that conclusion because the distinction based on age is justified by the actual (not stereotypical) capacity of individuals under the age of 35 to support themselves in the long term.

405 In this case, the distinction based on age, unlike the distinction at issue in *Law*, does not reflect either the needs or the abilities of social aid recipients

pourvoi porte essentiellement sur le troisième volet de l'analyse fondée sur l'art. 15 de la *Charte canadienne* qui consiste à rechercher si la distinction en cause est discriminatoire. Pour les raisons exposées par mon collègue le juge Bastarache et les motifs qui suivent, je suis d'avis que l'al. 29a), pris isolément ou considéré à la lumière de l'ensemble des programmes d'employabilité, est discriminatoire à l'endroit des bénéficiaires de moins de 30 ans.

Une différence de traitement devient discriminatoire lorsqu'elle porte atteinte à la dignité et à la liberté humaine de l'individu. Il en est ainsi lorsque la différence de traitement traduit une application stéréotypée de présumées caractéristiques personnelles ou de groupe ou que, par ailleurs, elle perpétue ou favorise l'opinion que l'individu concerné est moins capable, ou moins digne d'être reconnu ou valorisé en tant qu'être humain ou que membre de la société canadienne.

Tout d'abord, il convient de souligner qu'en l'espèce, la distinction se fonde sur un motif explicitement énuméré au par. 15(1) de la *Charte canadienne*. Dans de telles circonstances, il est beaucoup plus facile de conclure que la distinction porte atteinte à la dignité essentielle de l'individu, comme l'affirme d'ailleurs le juge Iacobucci dans l'arrêt *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497. Toutefois, comparativement aux autres motifs énumérés ou analogues, l'âge est particulier en ce sens qu'une distinction fondée sur l'âge peut dans certains cas correspondre aux besoins et aux capacités des individus. Dans l'affaire *Law*, par exemple, la Cour suprême a validé une distinction fondée sur l'âge prévue au Régime de pensions du Canada (RPC) au motif qu'elle n'était pas discriminatoire. Le RPC fixait un âge minimum de 35 ans pour toucher des prestations de conjoint survivant. La Cour estimait que la distinction fondée sur l'âge était justifiée par la capacité réelle (et non stéréotypée) des individus de moins de 35 ans de mieux subvenir à leurs besoins à long terme.

En l'espèce, contrairement à la distinction en cause dans l'affaire *Law*, la distinction fondée sur l'âge ne correspond ni aux besoins ni aux capacités

under 30 years of age. The ordinary needs of young people are not so different from the needs of their elders as to justify such a pronounced discrepancy between the two groups' benefits. As well, young people are no more able to find or keep a job during an economic slowdown than are their elders. In fact, young people are the first to feel the impact of an economic crisis on the labour market. Because they have little experience or seniority, they are at the top of the list for termination and lay-off (see the report by Louis Ascah, *La discrimination contre les moins de trente ans à l'aide sociale du Québec: un regard économique* (1988)). Also, because the distinction made by the social aid scheme was justified by the fact that young people are able to survive a period of economic crisis better, I, like Bastarache J., am of the opinion that this distinction perpetuated a stereotypical view of young people's situation on the labour market.

My colleague McLachlin C.J. says that the Quebec government was under no illusions as to the ability of young people to keep a job in a period of economic crisis. In her view, the Quebec government knew perfectly well that they would be the first to suffer the negative effects of the difficulties in the economy. This was in fact the reason why the government created the employability programs, which were designed to make up for lack of training or experience. Those programs assisted young people to re-enter the labour market, while counteracting the negative effects on vocational development of prolonged periods out of the productive workforce.

I am prepared to concede that the Quebec government knew that young people are particularly vulnerable during an economic slowdown. As well, I readily acknowledge that the government sincerely believed that it was helping young people by making the payment of full benefits conditional on participation in an employability program. Nonetheless, the distinction made by the social aid scheme did not reflect the needs of young social assistance recipients under the age of 30. By trying to combat the pull of social assistance, for the "good" of the young

des bénéficiaires d'aide sociale de moins de 30 ans. Les besoins ordinaires des jeunes ne se différencient pas de ceux de leurs aînés au point de justifier un écart si prononcé entre leurs prestations. De même, la capacité des jeunes à se trouver ou à conserver un emploi en période de ralentissement économique n'est pas supérieure à celle de leurs aînés. Au contraire, les jeunes sont les premiers à subir les contrecoups d'une crise économique sur le marché de l'emploi. En raison de leur peu d'expérience ou d'ancienneté, ils se retrouvent en tête des listes de licenciements et de mises à pied (voir le rapport d'expertise de Louis Ascah, *La discrimination contre les moins de trente ans à l'aide sociale du Québec : un regard économique* (1988)). Aussi, dans la mesure où la distinction établie par le régime d'aide sociale était justifiée par la capacité des jeunes à mieux survivre une période de crise économique, je suis d'avis, à l'instar du juge Bastarache, que cette distinction perpétuait une vision stéréotypée de la situation des jeunes sur le marché du travail.

Ma collègue, le juge en chef McLachlin, affirme que le gouvernement québécois n'entretenait pas d'illusions quant à l'aptitude des jeunes à conserver un emploi en période de crise économique. Selon elle, le gouvernement québécois savait pertinemment qu'ils étaient les premiers à subir les chocs provoqués par les difficultés de l'économie. C'est d'ailleurs pour cette raison que le gouvernement a mis sur pied les programmes d'employabilité. Destinés à combler le manque de formation ou d'expérience, ces programmes visaient à aider les jeunes à se réinsérer dans le marché du travail tout en contrant les effets pervers d'une inactivité prolongée sur le développement professionnel.

Je suis prêt à concéder que le gouvernement québécois connaissait la vulnérabilité particulière des jeunes en période de ralentissement économique. Je reconnais d'emblée, par ailleurs, que le gouvernement croyait sincèrement aider les jeunes en conditionnant le versement d'une pleine prestation à la participation à un programme d'employabilité. Néanmoins, la distinction établie par le régime d'aide sociale ne correspondait pas aux besoins des jeunes assistés sociaux de moins de 30 ans. En cherchant à contrer l'effet d'attraction de l'aide sociale

people themselves who depended on it, the distinction perpetuated the stereotypical view that a majority of young social assistance recipients choose to freeload off society permanently and have no desire to get out of that comfortable situation. There is no basis for that vision of young social assistance recipients as “parasites”. It has been disproved by numerous experts. For instance, in a 1986 study prepared for the Quebec government’s Commission consultative sur le travail (*Les jeunes et le marché du travail* (1986)), Professor Gilles Guérin wrote, *inter alia* (at p. 65):

[TRANSLATION] An estimated proportion of 91% of young people (counting only those capable of working) perceive their situation on social aid as temporary and have a fierce desire to work, to have a “real” job, to collect a “real” wage, and to acquire socio-economic autonomy. An IQOP study shows that young people value being productive workers, that it is preferable in their eyes to hold a job, even one that does not interest them, than to be unemployed. The myth of the young social assistance recipient who is capable of working and is happy with social assistance is therefore completely false; work is what is most highly valued by the people around them, their friends and family and their neighbours, and by the young people themselves. [Emphasis added.]

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As well, in *Le plein emploi: pourquoi?* (1983), L. Poulin Simon and D. Bellemare found that where income was equal, a majority of people in Quebec preferred work to unemployment. While the authors made no absolute statements, they came to substantially the same conclusions with respect to those statistics (at p. 66):

[TRANSLATION] These results add to the doubt there might be as to the strictly utilitarian economic hypothesis that predicts that where income is equal, workers generally prefer not working to working. In our opinion, that hypothesis derives from a medieval view of economic reality, where work was a degrading activity with no intrinsic value; the serfs worked while the lords were content to amuse themselves. In an advanced industrial economy, the reality of work would seem to be quite a different matter.

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Young social assistance recipients in the 1980s certainly did not latch onto social assistance out of laziness; they were stuck receiving welfare because there were no jobs available. Economists who

pour le « bien » même des jeunes qui en dépendaient, la distinction perpétuait une vision stéréotypée selon laquelle la plupart des jeunes assistés sociaux choisissent de vivre de façon permanente aux crochets de la société sans désir aucun de quitter cette situation fort confortable. Or, cette conception du jeune assisté social comme « individu-parasite » est sans fondement. Elle est démentie par plusieurs experts. Ainsi, dans une étude préparée en 1986 pour la Commission consultative sur le travail du gouvernement du Québec (*Les jeunes et le marché du travail* (1986)), le professeur Gilles Guérin écrivait entre autres (à la p. 65) :

Dans une proportion estimée à 91% (des aptes au travail uniquement), [l]es jeunes perçoivent leur situation à l’aide sociale comme temporaire et ils désirent farouchement travailler, avoir un « vrai » emploi, toucher un « vrai » salaire et acquérir leur autonomie socio-économique. D’après une enquête IQOP, les jeunes valorisent tellement le fait d’être travailleur actif, qu’à leurs yeux il est préférable d’occuper un emploi, même sans intérêt, plutôt que d’être en chômage. Le mythe du jeune assisté social apte au travail qui se complait à l’aide sociale est donc complètement faux; le travail est ce qui est le plus valorisé par leur entourage, leurs amis, leur famille, leurs voisins et par eux-mêmes. [Je souligne.]

De même, dans leur ouvrage, *Le plein emploi: pourquoi?* (1983), les auteures L. Poulin Simon et D. Bellemare constatent qu’à revenu égal, une majorité de Québécois préfèrent le travail au chômage. Sans être aussi catégoriques, elles formulent sensiblement les mêmes conclusions sur ces statistiques (à la p. 66) :

Ces résultats renforcent les doutes qu’on peut entretenir à l’égard du postulat économique strictement utilitariste qui prédit qu’à revenu égal, les travailleurs préféreront généralement l’inactivité au travail. Ce postulat découle, à notre avis, d’une vision médiévale de la réalité économique où le travail était une activité avilissante et sans valeur intrinsèque; les serfs travaillaient tandis que les seigneurs se complaisaient dans des activités de loisir. Dans une économie industrielle avancée, la réalité du travail apparaît tout à fait différente.

Loin de se cramponner à l’aide sociale par paresse, les jeunes assistés sociaux des années 80 sont demeurés tributaires de l’aide sociale faute d’emplois disponibles. Les économistes qui ont

studied the labour market during that period unambiguously recognize the gradual but universal shrinkage in the number of jobs in the economy since 1966 (and especially since 1974) as the primary factor in the meteoric rise in the unemployment rate among young people. For instance, in his report “Le chômage des jeunes au Québec: aggravation et concentration (1966-1982)” (1984), 39 *Relations Industrielles* 419, the economist Pierre Fortin attributed three quarters of the rise in the average unemployment rate among all young people, from 6 percent to 23 percent, since 1966 to the general deterioration of the economy, together with young people’s much greater vulnerability to any slowdown in overall employment prospects. In his view, the extreme sensitivity of the youth unemployment rate to general conditions in the economy confirms that a very large majority of young people want to work and are capable of doing productive work when there are jobs for them. Accordingly, the real solution to the youth unemployment rate, he says, lies in a full employment policy for all workers, and not a simple employment incentive mechanism incorporated as part of social assistance programs.

Obviously, it is too easy to pass harsh judgment on the actions of a government after the fact. I certainly do not intend to dispute the appropriateness of offering incentives to work that may legitimately be the subject of a political debate. However, even if the Quebec government could validly encourage young people to work, the approach adopted discriminates between social aid recipients under 30 years of age and those who are 30 years of age and over, for no valid reason, and perpetuates the prejudiced notion that the former tend to be happy being dependent on the state, even though they are better able to make a go of things than their elders during periods of economic slowdown. With due respect for the opinion of the Chief Justice, I do not believe that the only way for the Quebec government to secure participation in those programs was to make the payment of full benefits conditional on participation in an employability program. There is nothing in the evidence that establishes that the people who did participate in the programs would not have participated without a financial incentive, nor is there anything from which that can be assumed. In my view, the

étudié le marché du travail à cette époque reconnaissent unanimement la raréfaction progressive, mais généralisée, des emplois dans l’économie depuis 1966 (et surtout depuis 1974) comme facteur premier de l’aggravation foudroyante du taux de chômage des jeunes. Ainsi, dans son rapport d’expertise « Le chômage des jeunes au Québec : aggravation et concentration (1966-1982) » (1984), 39 *Relations Industrielles* 419, l’économiste Pierre Fortin attribue les trois quarts de l’augmentation de 6 à 23 p. 100 du taux de chômage moyen de l’ensemble des jeunes depuis 1966 à la détérioration générale de l’économie, alliée à la vulnérabilité beaucoup plus forte des jeunes à tout relâchement des perspectives globales de l’emploi. Selon lui, cette vive sensibilité du taux de chômage des jeunes aux conditions générales de l’économie confirme que la très grande majorité des jeunes veulent travailler et sont capables de travail productif lorsque des emplois sont disponibles. En conséquence, la véritable solution au taux de chômage des jeunes serait une politique de plein emploi pour tous les travailleurs et non un simple mécanisme d’incitation au travail, dans le cadre de programmes d’aide sociale.

Évidemment, il serait trop facile après coup de porter des jugements sévères sur les mesures prises par un gouvernement. Je n’entends certes pas contester la pertinence d’incitations au travail dont la nature peut faire légitimement l’objet d’un débat politique. Toutefois, même si le gouvernement québécois pouvait valablement chercher à inciter les jeunes au travail, la solution retenue discriminait sans motif valable entre les bénéficiaires d’aide sociale de moins de 30 ans et ceux de 30 ans et plus, tout en perpétuant le préjugé que les premiers tendent à se complaire dans un état de dépendance envers l’État, bien qu’ils se tirent mieux d’affaire que leurs aînés en période de ralentissement économique. Avec égards pour l’opinion du juge en chef McLachlin, je ne crois pas que le seul moyen pour le gouvernement québécois d’assurer la participation aux programmes était de rendre conditionnel le versement d’une pleine prestation à la participation à un programme d’employabilité. Rien dans la preuve ne démontre que les personnes qui ont participé aux programmes n’y auraient pas participé sans incitatif financier. Rien davantage ne permet de le présumer.

Quebec government could have achieved its objective of developing employability just as well without abandoning recipients under the age of 30 to these paltry benefits.

411 In addition to the underlying stereotypes, the social aid scheme has too many other defects that would be sufficient on their own to support a finding that s. 15 of the *Canadian Charter* was violated. My colleague Bastarache J. alluded to, *inter alia*, the restrictions placed on participation in employability programs. I will not repeat his comments, but I would like to add that the programs lasted for a maximum of 12 months. At the end of that time, recipients did not qualify for full benefits. They had to participate in an employability program again (and even several times) in order to avoid the harsh reality of reduced benefits. As well, if they were still unable to find a job, young social assistance recipients, even those who had participated in all the programs offered, would again receive the “small scale”. In my view, once a recipient had participated in a program and made every effort to find a job, the scheme should have provided for payment of benefits equivalent to the benefits paid to recipients 30 years of age and over.

412 In addition to these inconsistencies in the system, the evidence shows that implementation of the programs was delayed by administrative constraints, and some recipients therefore had to wait several months before they were able to take part in an employability program. Louise Bourassa, director of workforce and income security programs, in fact acknowledged in her testimony that the Department had received complaints that some recipients were on waiting lists. It appears that between the time someone registered for a program and the time the program started, reduced benefits continued to be paid.

413 All of these defects in the scheme, together with the preconceived ideas that underpinned it, necessarily lead to the conclusion that s. 29(a) of the *Regulation respecting social aid* infringed the equality right of recipients under 30 years of age.

À mon avis, le gouvernement québécois aurait tout aussi bien pu atteindre son objectif de développer l'employabilité sans condamner à une prestation dérisoire les bénéficiaires de moins de 30 ans.

Par ailleurs, au-delà des stéréotypes qui le sous-tendent, le régime d'aide sociale comporte trop de déficiences qui constituent à elles seules une violation de l'art. 15 de la *Charte canadienne*. Mon collègue le juge Bastarache fait allusion, notamment, aux restrictions qui affectaient la participation aux programmes d'employabilité. Il est inutile de répéter ses commentaires. Je désire cependant ajouter que les programmes étaient d'une durée maximale de 12 mois. Au terme de ces 12 mois, les bénéficiaires ne se qualifiaient pas pour une pleine prestation. Ils devaient participer à nouveau (et même plusieurs fois) à un programme d'employabilité pour échapper à la réduction de leurs prestations. Enfin, s'il ne trouvait pas d'emploi, le jeune assisté social, qui aurait pourtant participé à tous les programmes offerts, recevait à nouveau le « petit barème ». À mon avis, dès lors que le bénéficiaire avait participé à un programme et qu'il avait déployé tous les efforts pour se trouver un emploi, le régime aurait dû le rendre admissible au paiement d'une prestation équivalente à celle versée aux bénéficiaires de 30 ans et plus.

Outre ces incohérences du système, la preuve démontre que des contraintes administratives ont ralenti la mise en œuvre des programmes. En conséquence, plusieurs bénéficiaires ont dû attendre plusieurs mois avant de pouvoir prendre part à un programme d'employabilité. Madame Louise Bourassa, directrice des programmes de main-d'œuvre et de sécurité du revenu, a d'ailleurs reconnu dans son témoignage que le ministère avait reçu des plaintes que certains prestataires se trouvaient sur des listes d'attente. Or, il appert que, entre l'inscription à un programme et le début de ce dernier, les prestations demeuraient réduites.

Toutes ces déficiences du régime, couplées aux idées préconçues le sous-tendant, doivent mener à la conclusion que l'al. 29a) du *Règlement sur l'aide sociale* contrevient au droit à l'égalité des bénéficiaires âgés de moins de 30 ans. Pour les motifs

For the reasons given by Bastarache J., s. 29(a) is not saved by s. 1 of the *Canadian Charter*.

### III. Section 7 of the *Canadian Charter*

Having regard to the foregoing conclusion, I see no point in any further consideration of whether s. 29(a) of the *Regulation respecting social aid* violated s. 7 of the *Canadian Charter*. While I agree with Bastarache J.'s conclusion that the appellant failed to establish a violation of s. 7, I would note that I agree with the part of the reasons of the Chief Justice in which she writes that it is not appropriate, at this point, to rule out the possibility that s. 7 might be invoked in circumstances unrelated to the justice system. In the case of s. 7, the process of jurisprudential development is not complete. With respect, I am afraid that an interpretation such as is suggested by Bastarache J. unduly circumscribes the scope of the section, in a manner contrary to the cautious, but open, approach taken in the decisions of this Court on the question. It having been established that s. 7 does not apply, we must now review the arguments made by the appellant concerning the interpretation and application of s. 45 of the *Quebec Charter*.

### IV. Section 45 of the *Quebec Charter*

The appellant submits that s. 45 of the *Quebec Charter* recognizes the right to an acceptable standard of living, as a substantive right. She cites the dissenting opinion of Robert J.A. in the Court of Appeal ([1999] R.J.Q. 1033), in which he found s. 45 to have independent legal effect, based on a difference between the wording of that section and of the other provisions that the *Quebec Charter* contains under the heading of social and economic rights. The respondent submits that s. 45 is no more than a mere policy statement, implementation of which may be ascertained from the relevant legislation. In the words of Baudouin J.A. in the Court of Appeal, the respondent argues that s. 45 does not authorize the courts to review the sufficiency of social measures that the legislature has chosen to adopt, in its political discretion. For the following reasons, I am of the opinion that while s. 45 is not without any binding content, it does not operate to place a duty on the

exposés par le juge Bastarache, l'al. 29a) n'est pas sauvegardé par l'article premier de la *Charte canadienne*.

### III. L'article 7 de la *Charte canadienne*

Vu la conclusion précédente, je crois inutile d'étudier si l'al. 29a) du *Règlement sur l'aide sociale* contrevient à l'art. 7 de la *Charte canadienne*. Bien que je partage la conclusion du juge Bastarache que l'appelante n'a pas réussi à établir une violation de l'art. 7, je souligne toutefois que je suis d'accord avec cette partie des motifs du juge en chef McLachlin, selon laquelle il ne convient pas, à ce moment-ci, de fermer la porte à une éventuelle possibilité que l'art. 7 puisse être invoqué dans des circonstances n'ayant aucun lien avec le système de justice. L'évolution de l'art. 7 n'est pas terminée. Avec respect, je crains qu'une interprétation comme celle que suggère le juge Bastarache ne circonscrive indûment l'aire d'application de cette disposition, contrairement à l'orientation de la jurisprudence certes prudente, mais ouverte, de notre Cour sur cette question. L'application de l'art. 7 étant écartée, il reste à revoir les arguments avancés par l'appelante au sujet de l'interprétation et de la mise en œuvre de l'art. 45 de la *Charte québécoise*.

### IV. L'article 45 de la *Charte québécoise*

L'appelante soutient que l'art. 45 de la *Charte québécoise* consacre le droit à un niveau de vie décent à titre de droit substantif. Elle invoque l'opinion dissidente du juge Robert en Cour d'appel ([1999] R.J.Q. 1033) qui reconnaît une portée juridique autonome à l'art. 45, sur la base d'une différence entre son libellé et celui des autres dispositions que la *Charte québécoise* inclut sous la rubrique des droits sociaux et économiques. L'intimé, quant à lui, soutient que l'art. 45 n'est guère plus qu'un simple énoncé de politique dont la mise en vigueur se vérifie dans la législation pertinente. Reprenant les termes du juge Baudouin en Cour d'appel, il allègue que l'art. 45 n'autorise pas les tribunaux à contrôler la suffisance des mesures sociales que le législateur choisit d'adopter dans sa discrétion politique. Pour les raisons qui suivent, je suis d'avis que l'art. 45, sans pour autant être dépourvu de tout contenu obligationnel, n'a pas pour effet d'obliger le législateur

Quebec legislature to guarantee persons in need an acceptable standard of living. That interpretation is supported by the wording and legislative history of s. 45, its position in the *Quebec Charter* and by the interaction between that section and the other provisions of the *Quebec Charter*.

A. *The Wording of Section 45 and its Placement in the Quebec Charter*

416 As Robert J.A. correctly observed, the *Quebec Charter* operates as a fundamental statute in the law of Quebec, and its unique nature is apparent in a variety of ways. First, it may be distinguished from other provincial human rights statutes in that its content goes well beyond the framework of mere prohibitions on discrimination. In addition to the very special importance that it assigns to the right to equality, the *Quebec Charter* protects a large number of other rights, including fundamental rights and freedoms and legal, political, social and economic rights. As well, while the *Canadian Charter* contains a justification clause that may apply to the violation of protected rights, the rights and freedoms guaranteed by the *Quebec Charter* are guaranteed without restriction, other than the restrictions inherent in the rights and freedoms themselves (with the exception, however, of the fundamental rights and freedoms in Chapter I, which may be justifiably limited under s. 9.1). In terms of remedies, the *Quebec Charter* differs from the *Canadian Charter* in that it offers various methods for compensating individuals whose rights are violated in private relationships. A final distinction worth noting is that the *Quebec Charter* is practically the only fundamental legislation in Canada, or even North America, that expressly protects social and economic rights.

417 Pierre Bosset writes that including economic and social rights in a document that solemnly affirms the existence of fundamental rights and freedoms must have some consequence. In his view, the recognition of those rights [TRANSLATION] “makes it necessary to consider the question of the protection of economic and social rights from a qualitatively different perspective, one that is appropriate to a constitutional instrument, and not as a mere

québécois à assurer un niveau de vie décent aux personnes dans le besoin. Cette interprétation est confirmée tant par le libellé de l’art. 45 que par son histoire législative, sa place dans la *Charte québécoise* et son interaction avec les autres dispositions de la *Charte québécoise*.

A. *Le texte et la place de l’art. 45 dans la Charte québécoise*

Comme le fait remarquer à juste titre le juge Robert, dans le droit de la province de Québec, la *Charte québécoise* joue le rôle de loi fondamentale, dont la spécificité se manifeste à plusieurs niveaux. Elle se distingue d’abord des autres lois provinciales sur les droits de la personne, son contenu dépassant largement le simple cadre des prohibitions de la discrimination. Outre l’importance toute particulière qu’elle accorde au droit à l’égalité, la *Charte québécoise* protège un grand nombre d’autres droits dont les libertés et droits fondamentaux ainsi que des droits judiciaires, politiques, sociaux et économiques. De plus, alors que la *Charte canadienne* contient une clause de justification applicable en cas d’atteinte aux droits protégés, les droits et libertés garantis par la *Charte québécoise* le sont sans restriction autre que celles qui leur sont inhérentes (à l’exception, cependant, des droits et libertés fondamentales du chapitre premier qui peuvent faire l’objet d’une justification sous l’art. 9.1). Au plan des recours, la *Charte québécoise* se distingue de la *Charte canadienne* en offrant divers modes de réparation aux justiciables lésés dans le cadre de rapports privés. Enfin, autre distinction digne de mention, la *Charte québécoise* est pratiquement la seule loi fondamentale au Canada, voire en Amérique du Nord, à protéger expressément des droits sociaux et économiques.

Selon l’auteur Pierre Bosset, l’inclusion des droits économiques et sociaux dans un document qui affirme solennellement l’existence de libertés et droits fondamentaux ne peut rester sans conséquence. Selon lui, cette reconnaissance « force à envisager la question de la protection des droits économiques et sociaux dans une perspective qualitativement différente, propre à un texte quasi constitutionnel, et non comme une simple branche

branch of administrative law” (P. Bosset, “Les droits économiques et sociaux: parents pauvres de la Charte québécoise?” (1996), 75 *Can. Bar Rev.* 583, at p. 585). However, although the incorporation of social and economic rights into the *Quebec Charter* gives them a new dimension, it still does not make them legally binding. Robert J.A. is also of that opinion. In the case of s. 45 of the *Quebec Charter*, though, he creates an exception. He finds it to be binding, relying on a difference between the wording of s. 45 and the wording of the other provisions in the same chapter. In my view, that exception does not stand up to careful scrutiny of the chapter in question, the provisions of which are as follows:

#### CHAPTER IV

##### ECONOMIC AND SOCIAL RIGHTS

**39.** Every child has a right to the protection, security and attention that his parents or the persons acting in their stead are capable of providing.

**40.** Every person has a right, to the extent and according to the standards provided for by law, to free public education.

**41.** Parents or the persons acting in their stead have a right to require that, in the public educational establishments, their children receive a religious or moral education in conformity with their convictions, within the framework of the curricula provided for by law.

**42.** Parents or the persons acting in their stead have a right to choose private educational establishments for their children, provided such establishments comply with the standards prescribed or approved by virtue of the law.

**43.** Persons belonging to ethnic minorities have a right to maintain and develop their own cultural interests with the other members of their group.

**44.** Every person has a right to information to the extent provided by law.

**45.** Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.

**46.** Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being.

du droit administratif » (P. Bosset, « Les droits économiques et sociaux : parents pauvres de la Charte québécoise? » (1996), 75 *R. du B. can.* 583, p. 585). Toutefois, bien que l’insertion des droits sociaux et économiques dans la *Charte québécoise* leur confère une nouvelle dimension, elle ne leur a pas attribué pour autant un caractère juridiquement contraignant. Le juge Robert partage cette opinion. Cependant, il fait une exception dans le cas de l’art. 45 de la *Charte québécoise*. Il lui reconnaît un caractère contraignant, en s’appuyant sur une différence entre le libellé de l’art. 45 et celui des autres dispositions du même chapitre. À mon avis, une telle exception ne résiste pas à un examen attentif de ce chapitre dont voici les dispositions :

#### CHAPITRE IV

##### DROITS ÉCONOMIQUES ET SOCIAUX

**39.** Tout enfant a droit à la protection, à la sécurité et à l’attention que ses parents ou les personnes qui en tiennent lieu peuvent lui donner.

**40.** Toute personne a droit, dans la mesure et suivant les normes prévues par la loi, à l’instruction publique gratuite.

**41.** Les parents ou les personnes qui en tiennent lieu ont le droit d’exiger que, dans les établissements d’enseignement publics, leurs enfants reçoivent un enseignement religieux ou moral conforme à leurs convictions, dans le cadre des programmes prévus par la loi.

**42.** Les parents ou les personnes qui en tiennent lieu ont le droit de choisir pour leurs enfants des établissements d’enseignement privés, pourvu que ces établissements se conforment aux normes prescrites ou approuvées en vertu de la loi.

**43.** Les personnes appartenant à des minorités ethniques ont le droit de maintenir et de faire progresser leur propre vie culturelle avec les autres membres de leur groupe.

**44.** Toute personne a droit à l’information, dans la mesure prévue par la loi.

**45.** Toute personne dans le besoin a droit, pour elle et sa famille, à des mesures d’assistance financière et à des mesures sociales, prévues par la loi, susceptibles de lui assurer un niveau de vie décent.

**46.** Toute personne qui travaille a droit, conformément à la loi, à des conditions de travail justes et raisonnables et qui respectent sa santé, sa sécurité et son intégrité physique.

47. Husband and wife have, in the marriage, the same rights, obligations and responsibilities.

Together they provide the moral guidance and material support of the family and the education of their common offspring.

48. Every aged person and every handicapped person has a right to protection against any form of exploitation.

Such a person also has a right to the protection and security that must be provided to him by his family or the persons acting in their stead. [Emphasis added.]

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Chapter IV is remarkable for the presence of both intrinsic and extrinsic limitations on the rights created in it. First, six of the ten sections in the chapter contain a reservation (worded differently from one section to another) indicating that the exercise of the rights they protect depends on the enactment of legislation. For instance, to cite a few examples, the right to free public education is guaranteed “to the extent and according to the standards provided for by law”, the right of parents to have their children receive religious instruction in conformity with their convictions is guaranteed “within the framework of the curricula provided for by law” and the right to information is guaranteed “to the extent provided by law”. As well, all of the rights in the chapter are excluded from the preponderance that s. 52 assigns to the other rights and freedoms guaranteed by the *Quebec Charter*. Accordingly, any interference with any of those rights may not result in a declaration under s. 52 that the legislation in question is of no force and effect. Nonetheless, it is possible, under s. 49, to obtain cessation of any interference with such a right, and compensation for the moral or material prejudice resulting therefrom.

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In the opinion of Robert J.A., the differences in wording among the sections in Chapter IV are not of merely aesthetic significance. He is of the view that the expression “provided for by law” used in s. 45 to qualify the financial assistance and social measures that the legislature must adopt in order to ensure an acceptable standard of living does not mean the same thing as the other expressions used in the other sections in Chapter IV. While those other expressions, in his view, indicate that the rights are granted only to the extent provided for by law, the

47. Les époux ont, dans le mariage, les mêmes droits, obligations et responsabilités.

Ils assurent ensemble la direction morale et matérielle de la famille et l'éducation de leurs enfants communs.

48. Toute personne âgée ou toute personne handicapée a droit d'être protégée contre toute forme d'exploitation.

Telle personne a aussi droit à la protection et à la sécurité que doivent lui apporter sa famille ou les personnes qui en tiennent lieu. [Je souligne.]

Le chapitre IV se distingue par la présence de limitations à la fois internes et externes aux droits qui y sont reconnus. D'une part, six des dix articles de ce chapitre contiennent une réserve (formulée en termes différents d'une disposition à l'autre) indiquant que la mise en œuvre des droits qu'ils protègent dépend de l'adoption de mesures législatives. Ainsi, pour citer quelques exemples, le droit à l'instruction publique gratuite est garanti « dans la mesure et suivant les normes prévues par la loi », le droit des parents à ce que leurs enfants reçoivent un enseignement religieux conforme à leurs convictions est garanti « dans le cadre des programmes prévus par la loi » et le droit à l'information est garanti « dans la mesure prévue par la loi ». D'autre part, les droits regroupés dans ce chapitre ne sont pas inclus parmi les droits et libertés que l'art. 52 de la *Charte québécoise* déclare avoir préséance sur les autres lois. Il s'ensuit qu'une atteinte à l'un ou l'autre de ces droits ne peut pas donner lieu à une déclaration d'inopérabilité en vertu de l'art. 52. Il demeure néanmoins possible d'obtenir la cessation de cette atteinte et la réparation du préjudice moral ou matériel qui en résulte en vertu de l'art. 49.

Selon le juge Robert, les différences textuelles entre les articles du chapitre IV n'ont pas seulement une valeur esthétique. Il est d'avis que l'expression « prévues par la loi » que l'on retrouve à l'art. 45 pour qualifier les mesures d'assistance financière et sociales que le législateur doit adopter pour assurer un niveau de vie décent n'a pas la même signification que les autres expressions employées dans les autres articles du chapitre IV. Alors que ces dernières indiquent selon lui que les droits ne sont reconnus que dans la mesure prévue par la loi,

expression “provided for by law” refers, rather, to the methods by which the legislature has committed itself to providing the measures to ensure an acceptable standard of living. That interpretation, he says, is consistent with Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, to which s. 45 bears an undeniable resemblance:

*Article 11.* 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The apparent similarity between s. 45 and Article 11(1) of the Covenant does not necessarily mean that the Quebec legislature intended to entrench the right to an acceptable standard of living in the *Quebec Charter*. In fact, the wording of s. 45 itself seems to negate that possibility. Section 45 does not guarantee the right to an acceptable standard of living, as Article 11(1) does; rather, it guarantees the right to social measures. In my view, that distinction supports the assertion that s. 45 protects a right of access to social measures for anyone in need. The fact that anyone in need is entitled not to measures to ensure him or her an acceptable standard of living, but to measures susceptible of ensuring him or her that standard of living, is also revealing. It seems to suggest that the legislature did not intend to give the courts the power to review the adequacy of the measures adopted, or to usurp the role of the legislature in that regard.

As well, the expression “provided for by law” must be considered in light of the other provisions of Chapter IV that have a direct impact on the financial resources of the state. Those provisions all contain a reservation (worded in different ways from one section to another). Those reservations confirm that the rights are protected only to the extent provided for by law. It would be most surprising if the Quebec legislature had committed itself unconditionally to ensuring an acceptable standard of living for anyone in need at the same time as limiting the exercise of

l’expression « prévues par la loi » renvoie plutôt à la modalité selon laquelle le législateur s’est engagé à prendre des mesures destinées à assurer un niveau de vie décent. Cette interprétation s’accorde d’après lui avec le par. 11(1) du *Pacte international relatif aux droits économiques, sociaux et culturels*, 993 R.T.N.U. 3, avec lequel l’art. 45 a une parenté indéniable :

*Article 11.* 1. Les États parties au présent Pacte reconnaissent le droit de toute personne à un niveau de vie suffisant pour elle-même et sa famille, y compris une nourriture, un vêtement et un logement suffisants, ainsi qu’à une amélioration constante de ses conditions d’existence. Les États parties prendront des mesures appropriées pour assurer la réalisation de ce droit et ils reconnaissent à cet effet l’importance essentielle d’une coopération internationale librement consentie.

La parenté évidente entre l’art. 45 et le par. 11(1) du Pacte ne signifie pas nécessairement que le législateur québécois a voulu consacrer le droit à un niveau de vie décent dans la *Charte québécoise*. En fait, le texte même de l’art. 45 semble nier cette possibilité. En effet, cette disposition ne garantit pas le droit à un niveau de vie décent, comme le fait le par. 11(1), mais bien le droit à des mesures sociales. Cette distinction appuie à mon avis la proposition que l’art. 45 protège un droit d’accès à des mesures sociales à toute personne dans le besoin. Le fait que toute personne dans le besoin n’ait pas droit à des mesures lui assurant un niveau de vie décent mais plutôt à des mesures susceptibles de lui assurer ce niveau de vie est aussi révélateur. Il semble suggérer que le législateur n’a pas voulu conférer aux tribunaux le pouvoir de contrôler la suffisance des mesures adoptées ni de s’ériger en législateurs à cet égard.

D’autre part, l’expression « prévues par la loi » doit être considérée à la lumière des autres dispositions du chapitre IV qui ont un impact direct sur les ressources financières de l’État. Ces dernières contiennent toutes une réserve (formulée en des termes différents d’une disposition à l’autre). Cette réserve confirme que les droits ne sont protégés que dans la mesure prévue par la loi. Il serait fort étonnant que le législateur québécois se soit engagé inconditionnellement à assurer un niveau de vie décent à toute personne dans le besoin alors qu’il a limité

all of the other rights that call for it to make a direct financial investment to what is prescribed by law (M.-J. Longtin and D. Jacoby, “La Charte vue sous l’angle du législateur”, in *La nouvelle Charte sur les droits et les libertés de la personne* (1977), 4, at p. 24).

422 The final point is that the interpretation adopted by Robert J.A. does not seem to be supported by the opinions expressed during the parliamentary debates that led to the enactment of the *Quebec Charter*. The Quebec Minister of Justice referred to social and economic rights in the broader framework of a charter that was intended to be a synthesis of certain democratic values accepted in Quebec, Canada and the West, and described the rationale for those provisions as follows (*Journal des débats*, vol. 15, No. 79, November 12, 1974, at p. 2744):

[TRANSLATION] These rights are of special importance. Some may say that in certain cases they are expressions of good intentions, but I think that the fact that they are recognized in a bill like this one will give them an important place in the context of the democratic values to which I have referred, that is, that a number of these social and economic rights in a way summarize certain things, certain principles, certain values that we hold dear in Quebec. Despite the fact that some of them are subject to the effect of other government legislation, which I certainly do not deny, they nonetheless represent part of our democratic heritage. That is why we have included them in this Charter.

423 It therefore seems obvious that the Quebec legislature did not intend to give the social and economic rights guaranteed by the *Quebec Charter* independent legal effect. As well, there is nothing in the debates to suggest the intention of creating an exception with respect to s. 45.

#### B. Case Law Concerning Section 45

424 The Quebec courts have generally taken the position that s. 45, and all of the rights in Chapter IV of the *Quebec Charter*, were positive rights, the exercise of which depended on the enactment of legislation. In *Lévesque v. Québec (Procureur général)*, [1988] R.J.Q. 223, the Court of Appeal held (at p. 226):

aux prescriptions de la loi la réalisation de tous les autres droits exigeant de lui un investissement financier direct : M.-J. Longtin et D. Jacoby, « La Charte vue sous l’angle du législateur », dans *La nouvelle Charte sur les droits et les libertés de la personne* (1977), 4, p. 24.

Enfin, l’interprétation retenue par le juge Robert ne semble pas trouver de soutien dans les opinions exprimées au cours des débats parlementaires qui ont précédé l’adoption de la *Charte québécoise*. Situait les droits sociaux et économiques dans le cadre plus large d’une charte destinée à faire une synthèse de certaines valeurs démocratiques acquises au Québec, au Canada et en Occident, le ministre de la Justice du Québec décrivait en ces termes la raison d’être de ces dispositions (*Journal des débats*, vol. 15, n° 79, 12 novembre 1974, p. 2744) :

Ces droits ont une portée importante. Certains diront peut-être que, dans des cas, il s’agit d’expressions de bonne volonté, mais je pense que le fait qu’ils soient reconnus dans un projet de loi comme celui-là va leur assurer un caractère important dans ce contexte des valeurs démocratiques dont je parlais tout à l’heure, c’est-à-dire qu’un certain nombre de ces droits socio-économiques résument d’une certaine façon certaines choses, certains principes, certaines valeurs auxquels nous sommes attachés au Québec. Malgré que, pour certains d’entre eux, ils sont soumis à l’effet d’autres lois gouvernementales, ce que je suis loin de nier, ils représentent quand même des acquisitions de notre patrimoine démocratique. C’est la raison pour laquelle nous les avons inscrits à cette charte.

Il semble donc évident que le législateur québécois n’a pas voulu reconnaître une portée juridique autonome aux droits sociaux et économiques garantis par la *Charte québécoise*. Par ailleurs, rien dans les débats ne suggère que l’on ait voulu créer une exception en ce qui concerne l’art. 45.

#### B. La jurisprudence portant sur l’art. 45

Les tribunaux québécois ont généralement adopté la position que l’art. 45 de même que tous les droits se trouvant au chapitre IV de la *Charte québécoise* étaient des droits-créances dont la mise en œuvre dépendait de l’adoption de mesures législatives. Ainsi, dans l’affaire *Lévesque c. Québec (Procureur général)*, [1988] R.J.Q. 223, la Cour d’appel a statué à la p. 226 que :

[TRANSLATION] In 1975, in Chapter IV, Social and Economic Rights, the Charter granted all individuals the right to social measures, but because that provision does not prevail over the other laws of Quebec, the right to financial assistance must be determined under the appropriate legislation and regulations, in this case, the Act.

As well, in *Lecours v. Québec (Ministère de la Main d'œuvre et de la Sécurité du revenu)*, J.E. 90-638, the Superior Court held that s. 45 of the *Quebec Charter* did not grant a universal right to social assistance; that right must be provided by law.

There is, however, one decision of the Quebec Court of Appeal that is an exception. That judgment, in *Johnson v. Commission des affaires sociales*, [1984] C.A. 61, relied on s. 45 of the *Quebec Charter* in holding that a statutory provision declaring a person who is unemployed because of a labour dispute to be ineligible for social assistance could not be applied to a striker. Johnson and his wife had found themselves without income the day after a strike vote was held. Because he was not a union member, Johnson could not receive strike pay. He then tried to obtain unemployment insurance benefits, but was unsuccessful. As a last resort, he applied for social aid, which he was denied on the ground that s. 8 of the *Social Aid Act*, R.S.Q., c. A-16, excluded persons who had lost their job because of a labour dispute from benefits. He then challenged the validity of s. 8 on the ground that it was contrary to ss. 10 and 45 of the *Quebec Charter*.

Bisson J.A., writing for the Court of Appeal, held that s. 8 of the Act was not based on one of the grounds of discrimination listed in s. 10 of the *Quebec Charter* because being unemployed as a result of a labour dispute was not included in the concept of social condition. That did not conclude his analysis, and he went on to declare that s. 8 was of no force and effect as against the appellant on the ground that it was contrary to a number of the principles laid down in the *Quebec Charter* and in the *Social Aid Act* (at p. 70).

Quant à la charte, en 1975, à l'intérieur du chapitre IV, Droits économiques et sociaux, elle a consacré le droit des citoyens aux mesures sociales mais, comme cette disposition n'a aucune préséance sur les autres lois du Québec, le droit à l'assistance financière doit être déterminé suivant les textes législatifs et réglementaires pertinents, en l'espèce la loi.

De même, dans l'affaire *Lecours c. Québec (Ministère de la Main d'œuvre et de la Sécurité du revenu)*, J.E. 90-638, la Cour supérieure a décidé que l'art. 45 de la *Charte québécoise* n'accordait pas un droit universel à l'aide sociale; ce droit doit être prévu par la loi.

Un arrêt de la Cour d'appel du Québec fait cependant exception. Prononcé dans l'affaire *Johnson c. Commission des affaires sociales*, [1984] C.A. 61, ce jugement s'est fondé sur l'art. 45 de la *Charte québécoise* pour rendre inopposable à un gréviste dans le besoin une disposition législative déclarant inadmissible à l'aide sociale une personne se trouvant sans emploi en raison d'un conflit de travail. En effet, Johnson et son épouse s'étaient retrouvés sans revenu au lendemain d'un vote de grève. N'étant pas membre en règle du syndicat, Johnson n'avait pu toucher les prestations de grève. Il avait alors tenté d'obtenir des prestations d'assurance-chômage mais sans succès. En dernier recours, il avait déposé une demande d'aide sociale qui lui avait été refusée au motif que l'art. 8 de la *Loi sur l'aide sociale*, L.R.Q., ch. A-16, excluait du bénéfice de la loi les personnes ayant perdu leur emploi en raison d'un conflit de travail. Il a alors entrepris de contester la validité de l'art. 8 au motif qu'il contreviait aux art. 10 et 45 de la *Charte québécoise*.

Au nom de la Cour d'appel, le juge Bisson a statué que l'art. 8 de la Loi n'était pas fondé sur un motif de discrimination énuméré à l'art. 10 de la *Charte québécoise* puisque le fait d'être sans emploi en raison d'un conflit de travail n'était pas visé par le concept de condition sociale. Cette conclusion ne mettant pas fin à son analyse, il a poursuivi en déclarant que l'art. 8 était sans effet et inopposable aux appelants au motif qu'il contreviait à plusieurs principes énoncés dans la *Charte québécoise* et dans la *Loi sur l'aide sociale* (à la p. 70) :

[TRANSLATION] Having found that s. 8 was valid legislation, I am nevertheless compelled to acknowledge that, as happens in the case of some legislation, a provision that is perfectly legal may, inadvertently, produce effects that the legislature did not anticipate.

That is the case with s. 8 as it relates to the appellants. The effect of that statutory provision, which was intended to prevent strikes being funded by social aid, is that because of the special situation of the appellants, s. 45 of the Charter must be applied.

428 It is difficult to view *Johnson* as an express recognition of the binding effect of s. 45. For one thing, it is obvious that the Court of Appeal was influenced by the exceptional circumstances in the case before it: a worker who had been on probation had been unable to participate in the strike vote and was not entitled to union benefits. The court was dealing with legislation that was perfectly valid but that produced effects the legislature had not anticipated. As Pierre Bosset, *supra*, points out, that case is in fact an atypical case, in which the basis for the judgment is extremely uncertain (at p. 593):

[TRANSLATION] When restricted to the applicant's particular case, the declaration that the law was of no force and effect is perhaps not very dissimilar to a judgment in equity. However, we may also regard it as an implied application of the rule of interpretation stated in s. 53 of the *Charter*, which provides that if any doubt arises in the interpretation of a provision of the Act, it shall be resolved in keeping with the intent of the *Charter*.

429 Accordingly, other than in exceptional circumstances, it does not seem that s. 45 is capable of having independent legal effect. Robert J.A. thought that this interpretation should be rejected on the ground that it reduced s. 45 to a mere obligation that [TRANSLATION] "theoretically . . . could be no more than symbolic and purely optional" (p. 1100). His opinion, however, was not based on a proper assessment of the nature of the obligational content of s. 45. The right of access to measures of financial assistance and social measures without discrimination would not be guaranteed by the *Quebec Charter* were it not for s. 45, the reason for this being that s. 10 of the *Quebec Charter* does not create an independent right to equality. In the first decision on this point, *Commission des droits de la personne*

Ayant conclu que l'article 8 était une législation valide, je suis forcé, par ailleurs, d'admettre que, comme la chose arrive dans certaines législations, un texte parfaitement légal peut, par accident, produire des effets que le législateur n'avait pas prévus.

Tel est le cas de l'article 8 par rapport aux appelants. Cette disposition législative, destinée à éviter que l'aide sociale finance les grèves, fait en sorte qu'en raison de la situation particulière des appelants il faut appliquer l'article 45 de la charte.

Il est difficile de considérer l'affaire *Johnson* comme une reconnaissance explicite de la force contraignante de l'art. 45. D'abord, il est évident que la Cour d'appel a été influencée par les circonstances exceptionnelles de l'espèce : le travailleur, en période de probation, n'avait pu prendre part au vote de grève et n'avait pas droit aux prestations du syndicat. Elle se trouvait devant un texte de loi parfaitement valide mais qui produisait des effets non prévus par le législateur. Comme le souligne l'auteur Pierre Bosset, *loc. cit.*, cette affaire présente plutôt un cas atypique, où le fondement du jugement demeure fort incertain (à la p. 593) :

Limitée au cas particulier du requérant, la déclaration d'inopposabilité n'est peut-être pas loin de ressembler, ici, à un jugement d'équité. On est libre, cependant, d'y voir aussi une application implicite de la règle d'interprétation énoncée par l'art. 53 de la *Charte*, selon laquelle lorsqu'un doute surgit dans l'interprétation d'une disposition de la loi, il doit être tranché dans le sens indiqué par la *Charte*.

Ainsi, en dehors de circonstances exceptionnelles, il ne semble pas que l'art. 45 puisse jouir d'une juridicité autonome. Le juge Robert a estimé qu'une telle interprétation devait être rejetée au motif qu'elle réduisait l'art. 45 à une simple obligation qui « théoriquement (. . .) pourrait demeurer symbolique et purement facultative » (p. 1100). Son opinion, toutefois, n'apprécie pas correctement la nature du contenu obligationnel de l'art. 45. En effet, le droit d'accès sans discrimination à des mesures d'assistance financière et sociale ne serait pas garanti par la *Charte québécoise* en l'absence de l'art. 45. La raison tient au fait que l'art. 10 de la *Charte québécoise* ne crée pas de droit autonome à l'égalité. Dans une première décision sur ce sujet, *Commission des droits de la personne du Québec*

*du Québec v. Commission scolaire de St-Jean-sur-Richelieu*, [1991] R.J.Q. 3003, aff'd [1994] R.J.Q. 1227 (C.A.), the Human Rights Tribunal explained the complex interaction between the right to equality and economic and social rights, in that case the right to free public education, as follows (at p. 3037):

[TRANSLATION] [W]hile the Charter allows for the exercise of the right to free public education to be affected by various statutory restrictions, and even for it to be subject to certain exceptions (such as charging tuition fees at the college and university level, for example), it prohibits limitations that have an effect on the exercise of that right that is discriminatory on one of the grounds enumerated in s. 10.

The symbiosis between s. 10 and the other rights and freedoms is a direct result of the wording of s. 10, which creates not an independent right to equality but a method of particularizing the various rights and freedoms recognized (*Desroches v. Commission des droits de la personne du Québec*, [1997] R.J.Q. 1540 (C.A.), at p. 1547). Section 10 sets out the right to equality, but only in the recognition and exercise of the rights and freedoms guaranteed. Accordingly, a person may not base an action for a remedy on the s. 10 right to equality as an independent right. However, a person may join s. 10 with another right or freedom guaranteed by the *Quebec Charter* in order to obtain compensation for a discriminatory distinction in the determination of the terms and conditions on which that right or freedom may be exercised (P. Carignan, "L'égalité dans le droit: une méthode d'approche appliquée à l'article 10 de la Charte des droits et libertés de la personne" in *De la Charte québécoise des droits et libertés: origine, nature et défis* (1989), 101, at pp. 136-37).

While it is true that the existence of that right of access is itself subject to the enactment of legislation, there is opinion that suggests that a minimum duty to legislate could be inferred from the inclusion of economic and social rights in the *Quebec Charter*. That idea is argued by Pierre Bosset, *supra*, at p. 602, who sees it as an alternative to the refusal by the Quebec courts to recognize the rights set out in Chapter IV of the *Quebec Charter* as having binding effect:

*c. Commission scolaire de St-Jean-sur-Richelieu*, [1991] R.J.Q. 3003, conf. par [1994] R.J.Q. 1227 (C.A.), le Tribunal des droits de la personne a expliqué ainsi l'interaction complexe existant entre le droit à l'égalité et les droits économiques et sociaux, en l'occurrence le droit à l'instruction publique gratuite (à la p. 3037) :

[S]i la charte permet que l'exercice du droit à l'instruction publique gratuite soit affecté de différentes restrictions législatives, voire qu'il souffre certaines exceptions (telles que l'imposition de frais de scolarité aux niveaux collégial et universitaire, par exemple), elle interdit cependant les limitations qui, dans l'aménagement de ce droit, produisent un effet discriminatoire au regard de l'un des motifs énumérés à l'article 10.

Cette symbiose entre l'art. 10 et les autres droits et libertés découle directement de la formulation de l'art. 10 qui ne crée pas un droit autonome à l'égalité mais une modalité de particularisation des divers droits et libertés reconnus (*Desroches c. Commission des droits de la personne du Québec*, [1997] R.J.Q. 1540 (C.A.), p. 1547). En effet, l'art. 10 proclame le droit à l'égalité mais uniquement dans la reconnaissance et l'exercice des droits et libertés garantis. Aussi, une personne ne peut fonder un recours sur le droit à l'égalité prévu à l'art. 10 en tant que droit indépendant. Elle peut toutefois jumeler l'art. 10 avec un autre droit ou une autre liberté garanti par la *Charte québécoise* afin d'obtenir réparation pour une distinction discriminatoire dans la détermination des modalités de ce droit ou de cette liberté (P. Carignan, « L'égalité dans le droit : une méthode d'approche appliquée à l'article 10 de la Charte des droits et libertés de la personne » dans *De la Charte québécoise des droits et libertés : origine, nature et défis* (1989), 101, p. 136-137).

Il est vrai cependant que même l'existence de ce droit d'accès est assujéti à l'adoption de mesures législatives. Toutefois, certaines opinions suggèrent qu'une obligation minimale de légiférer pourrait être déduite de l'insertion des droits économiques et sociaux dans la *Charte québécoise*. Cette idée est défendue par l'auteur Pierre Bosset, *loc. cit.*, p. 602, qui y voit une alternative au refus des tribunaux québécois de reconnaître la force contraignante des droits du chapitre IV de la *Charte québécoise* :

[TRANSLATION] Unless we are to think that the legislature spoke for no purpose when it included economic and social rights in the *Charter*, we must take seriously the hypothesis of minimum obligational content, of a “hard core” of rights that may be asserted against the state, despite the fact that the provisions in question do not, properly speaking, prevail over legislation. The idea of a hard core, which is more in keeping with the spirit of the *Charter* and the way that we normally think about rights and obligations than is the idea of a “purely optional” obligation, involves, at a minimum, the creation of a legal framework that favours the attainment of social and economic rights. Accordingly, failure to legislate — particularly where the way in which the right is worded expressly refers to the law — would be inconsistent with the obligations imposed by the *Charter*. Legislating solely as a matter of form, in legislation devoid of substance, would be no less problematic an idea.

432 However, that interpretation would not give the courts the power to review the adequacy of the measures adopted. Nonetheless, the task it would assign them might be incompatible with their function, which is to determine what types of measures are likely to allow for the exercise of rights.

433 In conclusion, the wording of s. 45 and its placement in the *Quebec Charter* confirm that it does not confer an independent right to an acceptable standard of living for anyone in need. That interpretation is the one most consistent with the intention of the Quebec legislature. Although it might be desirable, entrenching economic and social rights in a charter of rights is not essential to recognition of those rights in positive law. Social law had in fact developed in Quebec well before the enactment of the *Quebec Charter*.

#### V. Conclusion

434 For these reasons, the appeal should be allowed, in accordance with the disposition proposed by my colleague Bastarache J.

*Appeal dismissed, L'HEUREUX-DUBÉ, BASTARACHE, ARBOUR and LEBEL JJ. dissenting.*

*Solicitors for the appellant: Ouellet, Nadon, Barabé, Cyr, de Merchant, Bernstein, Cousineau, Heap & Palardy, Montreal.*

À moins de considérer que le législateur parlait pour ne rien dire en consacrant les droits économiques et sociaux dans la *Charte*, il faut prendre au sérieux l'hypothèse d'un contenu obligationnel minimum, d'un « noyau dur » de droits opposables à l'État en dépit du fait que les dispositions concernées ne jouissent pas, à proprement parler, de la prépondérance par rapport à la législation. Plus respectueuse de l'esprit de la *Charte* et de la conception que l'on se fait habituellement des droits et des obligations que la thèse d'une obligation « purement facultative », l'idée d'un noyau dur implique, minimalement, la mise en place d'un cadre juridique favorable à la réalisation des droits économiques et sociaux. Ainsi, un défaut de légiférer — notamment lorsque la formulation du droit renvoie explicitement à la loi — serait incompatible avec les obligations qui découlent de la *Charte*. Légiférer uniquement pour la forme, par un acte législatif vide de substance, ne serait pas moins problématique.

Cette interprétation n'autoriserait cependant pas les tribunaux à contrôler la suffisance des mesures adoptées. Elle leur conférerait néanmoins une tâche peut-être incompatible avec leur fonction, c'est-à-dire celle de déterminer les types de mesures qui sont susceptibles de mettre les droits en œuvre.

En conclusion, la rédaction et la situation de l'art. 45 dans la *Charte québécoise* confirment qu'il ne confère pas de droit autonome à un niveau de vie décent à toute personne dans le besoin. Cette interprétation est la plus conforme à l'intention du législateur québécois. Bien que souhaitable, leur consécration dans une charte des droits n'est cependant pas indispensable à la reconnaissance des droits économiques et sociaux dans le droit positif. Le droit social s'est d'ailleurs développé au Québec bien avant l'adoption de la *Charte québécoise*.

#### V. Conclusion

Pour ces motifs, le pourvoi doit être accueilli, conformément au dispositif suggéré par mon collègue, le juge Bastarache.

*Pourvoi rejeté, les juges L'HEUREUX-DUBÉ, BASTARACHE, ARBOUR et LEBEL sont dissidents.*

*Procureurs de l'appelante : Ouellet, Nadon, Barabé, Cyr, de Merchant, Bernstein, Cousineau, Heap & Palardy, Montréal.*

*Solicitor for the respondent: The Department of Justice, Sainte-Foy.*

*Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.*

*Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.*

*Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.*

*Solicitor for the intervener the Attorney General for Alberta: Alberta Justice, Edmonton.*

*Solicitor for the intervener Rights and Democracy (also known as International Centre for Human Rights and Democratic Development): David Matas, Winnipeg.*

*Solicitor for the intervener Commission des droits de la personne et des droits de la jeunesse: Commission des droits de la personne et des droits de la jeunesse, Montreal.*

*Solicitors for the intervener the National Association of Women and the Law (NAWL): Gwen Brodsky, Vancouver; Rachel Cox, Saint-Lazare, Quebec.*

*Solicitor for the intervener the Charter Committee on Poverty Issues (CCPI): Nova Scotia Legal Aid, Halifax.*

*Solicitors for the intervener the Canadian Association of Statutory Human Rights Agencies (CASHRA): McCarthy Tétrault, Montreal.*

*Procureur de l'intimé : Le ministère de la Justice, Sainte-Foy.*

*Procureur de l'intervenant le procureur général de l'Ontario : Le ministère du Procureur général, Toronto.*

*Procureur de l'intervenant le procureur général du Nouveau-Brunswick : Le procureur général du Nouveau-Brunswick, Fredericton.*

*Procureur de l'intervenant le procureur général de la Colombie-Britannique : Le ministère du Procureur général, Victoria.*

*Procureur de l'intervenant le procureur général de l'Alberta : Alberta Justice, Edmonton.*

*Procureur de l'intervenant Droits et Démocratie (aussi appelé le Centre international des droits de la personne et du développement démocratique) : David Matas, Winnipeg.*

*Procureur de l'intervenante la Commission des droits de la personne et des droits de la jeunesse : Commission des droits de la personne et des droits de la jeunesse, Montréal.*

*Procureurs de l'intervenante l'Association nationale de la femme et du droit (ANFD) : Gwen Brodsky, Vancouver; Rachel Cox, Saint-Lazare (Québec).*

*Procureur de l'intervenant le Comité de la Charte et des questions de pauvreté (CCQP) : Nova Scotia Legal Aid, Halifax.*

*Procureurs de l'intervenante l'Association canadienne des commissions et conseil des droits de la personne (ACCCDP) : McCarthy Tétrault, Montréal.*

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2008 ONCA 538  
Ontario Court of Appeal

Flora v. Ontario Health Insurance Plan

2008 CarswellOnt 3879, 2008 ONCA 538, [2008] O.J. No. 2627, 168 A.C.W.S. (3d) 227, 175  
C.R.R. (2d) 19, 238 O.A.C. 319, 295 D.L.R. (4th) 309, 76 Admin. L.R. (4th) 132, 91 O.R. (3d) 412

**ADOLFO A. FLORA (Appellant) and GENERAL MANAGER,  
ONTARIO HEALTH INSURANCE PLAN (Respondent)**

R. Sharpe, E.A. Cronk, E.E. Gillese JJ.A.

Heard: January 21, 2008

Judgment: July 4, 2008

Docket: CA C47182

Proceedings: affirming *Flora v. Ontario Health Insurance Plan* (2007), 2007 CarswellOnt 103, (sub nom. *Flora v. Ontario (Health Insurance Plan, General Manager)*) 278 D.L.R. (4th) 45, 219 O.A.C. 142, 83 O.R. (3d) 721, 56 Admin. L.R. (4th) 206 (Ont. Div. Ct.)

Counsel: Mark J. Freiman, John A. Dent for Appellant  
Janet E. Minor, Matthew Horner for Respondent

Subject: Public

APPEAL by insured from judgment reported at *Flora v. Ontario Health Insurance Plan* (2007), 2007 CarswellOnt 103, (sub nom. *Flora v. Ontario (Health Insurance Plan, General Manager)*) 278 D.L.R. (4th) 45, 219 O.A.C. 142, 83 O.R. (3d) 721, 56 Admin. L.R. (4th) 206 (Ont. Div. Ct.) dismissing insured's appeal from decision of Health Services Appeal and Review Board.

***E.A. Cronk J.A.:***

**I. Introduction**

1 The appellant, Adolfo A. Flora, was diagnosed with liver cancer in 1999. After consulting several Ontario doctors, he was told that he was not a suitable candidate for a liver transplant and was given approximately six to eight months to live.

2 Mr. Flora explored his overseas treatment options. Eventually, at a cost of about \$450,000, he underwent chemoembolization to contain the growth and decrease the size of his existing tumours and a living-related liver transplantation (LRLT), a procedure involving the transfer of part of a living donor's liver to the patient, at a hospital in London, England. Fortunately, these procedures saved Mr. Flora's life.

3 Mr. Flora applied to the Ontario Health Insurance Plan (OHIP) for reimbursement of his medical expenses. When his reimbursement request was rejected by the respondent, the General Manager of OHIP, Mr. Flora sought a review of OHIP's decision before the Health Services Appeal and Review Board. The majority of the Board upheld OHIP's denial of reimbursement on the basis that the treatment received by Mr. Flora in England was not an "insured service" within the meaning of the *Health Insurance Act*, R.S.O. 1990, c. H.6 (the Act) and s. 28.4(2) of R.R.O. 1990, Reg. 552 (the Regulation). Mr. Flora's subsequent appeal to the Divisional Court was dismissed.

4 Mr. Flora now appeals to this court. He argues that the Divisional Court erred: (i) by applying the reasonableness standard of review to the Board's decision; (ii) by concluding that the Board's decision was reasonable; and (iii) in the alternative, by failing to declare that s. 28.4(2) of the Regulation violates his rights to life and security of the person under s. 7 of the *Charter of Rights and Freedoms*.

5 For the reasons that follow, I would dismiss the appeal.

## II. Relevant Legislative Provisions

6 The following legislative provisions are pertinent:

### A. The Act

11.2(1) The following services are insured services for the purposes of the Act:

1. Prescribed services of hospitals and health facilities rendered under such conditions and limitations as may be prescribed.
2. Prescribed medically necessary services rendered by physicians under such conditions and limitations as may be prescribed.
3. Prescribed health care services rendered by prescribed practitioners under such conditions and limitations as may be prescribed.

12.(1) Every insured person is entitled to payment to himself or herself or on his or her behalf for, or to be otherwise provided with, insured services in the amounts and subject to such conditions and co-payments, if any, as are prescribed.

### B. The Regulation

28.4(2) Services that are part of a treatment and that are rendered outside Canada at a hospital or health facility are prescribed as insured services if,

- (a) the treatment is generally accepted in Ontario as appropriate for a person in the same medical circumstances as the insured person; and
- (b) either,
  - (i) that kind of treatment that is not performed in Ontario by an identical or equivalent procedure, or
  - (ii) that kind of treatment is performed in Ontario but it is necessary that the insured person travel out of Canada to avoid a delay that would result in death or medically significant irreversible tissue damage.

### C. The Canada Health Act, R.S.C. 1985, c. C-6 (the CHA)

3. It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.

### D. The Charter

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

### III. Facts

#### *(1) Diagnosis and Transplant Eligibility*

7 In the early 1970s, Mr. Flora contracted Hepatitis C from tainted blood in a blood transfusion carried out during surgery to remove a benign tumour from his esophagus. Eventually, this led to cirrhosis of the liver and, despite regular monitoring, a diagnosis of liver cancer (hepatocellular carcinoma or "HCC") in 1999. Mr. Flora was then 50 years old. His cancer was advanced and multifocal — he had several tumours or lesions. His prognosis was dire — he was told by Ontario doctors that he had about six to eight months to live.

8 When Mr. Flora's liver cancer was detected, only cadaveric liver transplants were performed in Ontario. LRLTs were relatively new and adult-to-adult LRLT programs were in their infancy both in Canada and Europe. As a result, an adult-to-adult LRLT had not yet been undertaken in this province, although paediatric LRLTs had been performed.

9 At that time, adult patient eligibility for cadaveric liver transplants was determined by physicians in Ontario based on medically-established guidelines developed in the mid-1990s, known as the "Milan Criteria". Under these criteria as employed in Ontario, doctors would only undertake a liver transplant if: (i) the patient had one tumour equal to or less than five centimetres in diameter; (ii) alternatively, in the case of multiple tumours, no more than three tumours existed, each equal to or less than three centimetres in diameter; and (iii) there was no evidence of vascular invasion or spread of the cancer outside the liver. These restrictions recognized Ontario's chronic shortages of transplant organs relative to need, and the goal of ensuring that transplant candidates with high survival prospects were approved for transplants in priority to patients with lower chances of good survival outcomes.

10 Imaging studies conducted on Mr. Flora in Ontario in December 1999 and in England in February 2000 revealed that he had multiple tumours, some of which were quite large and in excess of the Milan Criteria as applied in Ontario.

11 Faced with his alarming diagnosis and prognosis, Mr. Flora examined the possibility of a liver transplant with Dr. Florence Wong, a specialist in gastroenterology and hepatology at the Toronto General Hospital (the TGH). Dr. Wong, in turn, explored Mr. Flora's treatment options with several other Ontario specialists, including the Medical Director of the Liver Transplant Unit at the TGH. This unit assessed Mr. Flora and concluded that he was ineligible for a cadaveric liver transplant under the Milan Criteria.

12 As a result, with Dr. Wong's assistance, Mr. Flora consulted a number of experts overseas, including Dr. M.P. Manns, Director of the Department of Gastroenterology and Hepatology at the Hanover Medical School in Germany. Based on an assessment of Mr. Flora conducted in early February 2000, Dr. Manns reported that Mr. Flora's cancer was "amenable neither to resection [surgical removal] nor to liver transplantation due to its multifocal nature".

13 Later the same month, Mr. Flora also met with Dr. Roger Williams, a hepatologist and Head of the Liver Unit at the Cromwell Hospital in London, England (the Cromwell), and Dr. Shamsudin Mohamed Rela, a transplant surgeon, of the same hospital (Mr. Flora's U.K. doctors). The Cromwell operates on private funding.

14 The Cromwell's LRLT program had been initiated only some months earlier, in the fall of 1999, to assist overseas patients who had no priority in cadaver donor organ allocation under England's national health care system. In its program, the Cromwell used cadaveric transplant eligibility criteria to determine patient-eligibility for a LRLT. However, these criteria were broader than Ontario's Milan Criteria: the Cromwell offered liver transplantation if the prospective patient had three tumours or less, with a maximum diameter of 5 centimetres. As well, the Cromwell's approach to these criteria was flexible. For example, lesions of only a few millimetres in size were accorded little, if any, significance in transplant assessments at the Cromwell.

15 Mr. Flora underwent chemoembolization at the Cromwell and was found to be eligible for a liver transplant under that hospital's cadaveric transplant selection criteria. Because of the extensive wait lists in England for

cadaveric organs, particularly for non-residents, Mr. Flora was approved as a candidate for a LRLT. He was regarded at the Cromwell as an "acceptable", but not the "best", candidate for this procedure. Mr. Flora's brother agreed to serve as the living donor.

16 Before undertaking the LRLT procedure, Mr. Flora returned to Canada and consulted Dr. William Wall, the Director of the Multi-Organ Transplant Program at the London Health Sciences Centre in London, Ontario (the LHSC), the only other hospital in Ontario that performed liver transplants apart from the TGH. The LHSC was then in the process of selecting its first candidate for an adult-to-adult LRLT. The first adult-to-adult LRLT in Ontario was performed at the LHSC on April 4, 2000, 35 days after Mr. Flora was assessed by that hospital's transplant team.

17 Because no LRLT-specific patient candidacy criteria existed, Mr. Flora's eligibility for a LRLT at the LHSC was evaluated under the Milan Criteria. The LHSC transplant team determined that Mr. Flora was not an acceptable candidate for either a cadaveric transplantation or a LRLT due to the apparent number and size of his lesions.

18 At both the Cromwell and the LHSC, the animating rationale for restricting eligibility for LRLTs was an ethical one: given the serious and significant physical and other risks to the donor of donating a portion of his or her liver, only those patients with high survival prospects would be selected for the procedure. The health and safety of the living donor was a dominant concern.

### ***(2) OHIP Application***

19 On February 22, 2000, Dr. Wong completed an application to OHIP for payment of Mr. Flora's medical expenses in England by signing a form called a "Prior Approval Application for Full Payment of Insured Out-of-Country Health Services" (the OHIP Application). In respect of the question, "Is the treatment generally accepted in Ontario as appropriate for a person in these medical circumstances?", Dr. Wong checked "yes" in a box on the form. In response to the question, "Is this treatment performed in Ontario by an identical or equivalent procedure?", Dr. Wong indicated in a handwritten note: "The treatment can be performed in Ontario, but Mr. Flora is deemed an unsuitable candidate."

20 On February 24, 2000, Mr. Flora's OHIP Application was denied. Nevertheless, he elected to proceed with a LRLT at the Cromwell. The surgery was performed on March 26, 2000. Happily, it appears to have been completely successful.

### ***(3) Expert Evidence***

21 The Board received documentary evidence from several Ontario doctors who were involved in Mr. Flora's care, including Dr. Wall. As well, Dr. Wall testified before the Board. He indicated that, at the LHSC, liver transplantation would not be recommended for a patient who had more than three tumours due to the high risk of cancer recurrence. Dr. Wall also said that if Mr. Flora's condition had met the Milan Criteria, he would have been put on the wait lists in Ontario for a cadaveric liver. Because Mr. Flora's cancer was malignant, he would have had priority on the wait lists and, if listed in early January 2000, likely would have received a cadaveric organ in about 50 days. He would also have been considered for a LRLT at the LHSC.

22 It was also Dr. Wall's opinion that:

From a medical point of view, the decision regarding [Mr. Flora's] ineligibility was straightforward and not difficult. The cancers were too numerous (the various imaging tests suggested 5 cancers, I thought there might have been as many as six) and taken together, they were too large on the imaging tests.

23 The Board was also provided with expert evidence from Mr. Flora's U.K. doctors, by telephone. They testified that Mr. Flora fell within the accepted criteria at the Cromwell for the performance of a LRLT and expressed the opinions that, with a LRLT, Mr. Flora had an estimated five-year survival rate of 70-75% (Dr. Williams) or 60-80% (Dr. Rela).

24 There was no dispute among the experts that, without a liver transplant, Mr. Flora would have died.

#### (4) Decisions Below

25 The issue before the Board was whether the treatment received by Mr. Flora at the Cromwell was an "insured service" under s. 28.4(2) of the Regulation and, therefore, under the Act. The parties agreed that the treatment in question consisted of both Mr. Flora's chemoembolization procedure and his LRLT.

26 Pursuant to s. 12(1) of the Act, an insured person is entitled to receive payment from OHIP for "insured services" in such amounts and subject to such conditions and co-payments, if any, as are prescribed. Section 28.4(2) of the Regulation establishes a two-part test for the determination of whether an out-of-country medical treatment constitutes an "insured service". Under the first branch of the test, the treatment in question must be "generally accepted in Ontario as appropriate for a person in the same medical circumstances as the [reimbursement claimant]" (s. 28.4(2)(a)). The second branch of the test requires that the treatment be one that is not performed in Ontario by an identical or equivalent procedure or, if performed in Ontario, that it is necessary for the claimant to travel out of Canada to avoid a delay "that would result in death or medically significant irreversible tissue damage" (s. 28.4(2)(b)).

27 The majority of the Board<sup>1</sup> held that while the second branch of the test — s. 28.4(2)(b) — was satisfied in Mr. Flora's case, the first branch — s. 28.4(2)(a) — was not because his medical treatment in England was not "generally accepted in Ontario as appropriate for a person in [his] medical circumstances". Accordingly, Mr. Flora had not satisfied the test under s. 28.4(2) of the Regulation for an "insured service" and no reimbursement of his medical expenses at the Cromwell was available under s. 12(1) of the Act. The Board, therefore, upheld the denial of Mr. Flora's OHIP Application.

28 One member of the Board dissented. She preferred the evidence of Mr. Flora's U.K. doctors over that of Dr. Wall regarding Mr. Flora's suitability for a LRLT and concluded that both branches of the s. 28.4(2) test for an "insured service" were satisfied. Consequently, she would have reversed OHIP's denial of reimbursement.

29 Mr. Flora appealed to the Divisional Court. He advanced three principal arguments: (i) the standard of review applicable to the Board's decision was correctness; (ii) the Board erred in law in its interpretation and application of s. 28.4(2)(a) of the Regulation; and (iii) in the alternative, s. 28.4(2) of the Regulation violated s. 7 of the *Charter*.

30 The Divisional Court unanimously rejected these arguments. It held that the standard of reasonableness, rather than correctness, applied to a review of the Board's decision and that the Board's decision was reasonable. It also rejected Mr. Flora's *Charter* s. 7 challenge.

#### IV. Issues

31 There are three issues:

- (1) Did the Divisional Court err by applying the reasonableness standard of review to the Board's decision?
- (2) Did the Divisional Court err by holding that the Board's decision was reasonable?
- (3) Did the Divisional Court err by failing to hold that s. 28.4(2) of the Regulation offends s. 7 of the *Charter*?

#### V. Analysis

##### (1) Standard of Review

32 Mr. Flora argues that the issue before the Board was "a pure question of law" concerning the meaning of the phrase "generally accepted in Ontario as appropriate" under s. 28.4(2)(a) of the Regulation. He submits that because the Board has no specialized expertise relative to the courts to determine such a legal question, no deference is owed to the Board and the correctness standard of review applies.

33 I disagree. In my opinion, reasonableness is the appropriate standard of review in this case. I say this for the following reasons.

34 At the time of the appeal to the Divisional Court, an evaluation of the four factors comprising the pragmatic and functional approach to judicial review was required to determine the proper level of deference owed to the Board's decision. See for example, *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.); and *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (S.C.C.). The Divisional Court undertook this analysis and concluded that, overall, the application of the requisite factors in this case favoured the deferential standard of reasonableness.

35 Since the Divisional Court's decision, the Supreme Court of Canada rendered its decision in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.). *Dunsmuir* now governs the standard of review analysis applicable to administrative decisions. Under *Dunsmuir*, the reasonableness *simpliciter* and patent unreasonableness standards of review have been collapsed into a single standard of reasonableness. However, I do not understand *Dunsmuir* to have entirely jettisoned the factors relevant under the pragmatic and functional analysis. To the contrary, *Dunsmuir* confirms that the factors considered by the Divisional Court continue to be relevant to the determination of the appropriate standard of review applicable to the decision of an administrative tribunal.

36 The majority of the Supreme Court in *Dunsmuir* explained the standard of review analysis in these terms (at para. 62):

In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

As the majority in *Dunsmuir* indicated at para. 64, the "factors" referenced in this passage include those that applied under the pragmatic and functional approach.

37 In my view, the Divisional Court properly applied these factors in this case. The Divisional Court accepted that two factors support the application of the least deferential standard of review — correctness. First, the legislature did not enact a privative clause to insulate the Board's decision from judicial review. Instead, s. 24(1) of the Act affords a broad right of appeal to the Divisional Court. I agree with the Divisional Court that this factor suggests that less deference is to be afforded to the Board on judicial review. *Dunsmuir* at para. 52.

38 The Board's task was to determine whether the medical treatment received by Mr. Flora in England constituted an "insured service" within the meaning of the Act and s. 28.4(2) of the Regulation. This determination did not require the Board to engage in an evaluation of broad policy-laden choices that involved "the balancing of multiple sets of interests of competing constituencies": see *Monsanto* at para. 15. The Divisional Court concluded that this factor also suggests less deference to the Board's decision. Again, I agree.

39 That said, *Dunsmuir* reiterates that deference is owed by reviewing courts where — as here — the challenged tribunal decision involves a question in which the legal and factual issues are interwoven and cannot be readily separated. The question at issue before the Board was fact-driven and case specific. As the Divisional Court observed, the express language of s. 28.4(2)(a) links the funding test to Mr. Flora's medical circumstances. *Dunsmuir* recognizes that the requirement for this type of fact-driven inquiry is a strong indicator for the application of the reasonableness standard of review (at paras. 51 and 53).

40 The relative expertise of the Board also militates in favour of the reasonableness standard. The Divisional Court properly emphasized that the Board was required "to consider the specifics of Mr. Flora's case, clinical considerations, and professional and ethical standards" and that this analysis involved "an understanding of medicine, an area where the courts cannot claim to have greater expertise than the Board members ..."

41 Moreover, in reaching its decision, the Board was engaged in interpreting the Act and s. 28.4(2) of the Regulation, in respect of which it must be taken as having considerable familiarity. The review of OHIP reimbursement decisions concerning out-of-country medical services is a common undertaking of the Board. The Supreme Court of Canada has repeatedly held, and *Dunsmuir* confirms, that even in respect of a pure question of law, the decision of an expert tribunal regarding the interpretation and application of its 'home' statute, or of statutes closely connected to its function, with which the tribunal will have particular familiarity, may attract deference (at paras. 54-56).

42 The interpretation and application of s. 28.4(2) was a matter well within the domain of the Board's experience. To use the language of the majority in *Dunsmuir*, the Board's inquiry did not involve an issue of general law "that is both of central importance to the legal system as a whole and outside [its] specialized area of expertise" so as to attract the correctness standard of review. *Dunsmuir* at para. 60. Nor does Mr. Flora's *Charter* s. 7 challenge convert the nature of the question at issue before the Board into one of broad legal complexity and significance. Section 6(3) of the *Ministry of Health Appeal and Review Boards Act, 1998*, S.O. 1998, c. 18, Sch. H, precludes the Board from undertaking *Charter*-based inquiries. Mr. Flora's *Charter* s. 7 challenge, therefore, was first addressed by the Divisional Court.

43 Thus, the Board's expertise in medical matters and in respect of a legislative scheme with which it is frequently engaged, strongly supports the application of the reasonableness standard.

44 Finally, and importantly, existing jurisprudence suggests that the reasonableness standard applies to a review of the Board's decision. Ontario courts have previously held that a Board decision under the Regulation regarding payment of out-of-country medical expenses is reviewable on the reasonableness standard. See for example, *Ruggiero Estate v. Ontario Health Insurance Plan* (2005), 78 O.R. (3d) 28 (Ont. Div. Ct.) at paras. 9-13.

45 I conclude that the reasonableness standard of review applies to the Board's decision. I therefore pass to the next issue, whether the Board's decision meets that standard.

## **(2) Reasonableness of the Board's Decision**

46 Mr. Flora argues that the Board made a series of errors in its s. 28.4(2)(a) analysis that render the Board's decision both unreasonable and incorrect. He submits that the Board erred: (i) by relying on the evidence of cadaveric transplant eligibility criteria; (ii) by relying on Dr. Wall's evidence concerning the appropriateness of a LRLT for Mr. Flora in the face of contradictory evidence from experienced international medical experts; (iii) by conflating the availability of LRLTs in Ontario with the issue whether Mr. Flora's LRLT was medically appropriate; and (iv) by adopting an interpretation of "appropriate" under s. 28.4(2)(a) that is contrary to the purpose of the Act and the CHA. Mr. Flora further contends that the Divisional Court fatally erred by incorporating many of these Board errors into its own reasoning, leading to the flawed conclusion that the Board's decision was reasonable. I will consider these submissions in turn.

### *Meaning of Reasonableness*

47 I begin with consideration of the meaning of 'reasonableness'. In *Dunsmuir*, the majority of the Supreme Court of Canada explained this standard in the judicial review context in these terms (at para. 47):

[C]ertain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. ... In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

It is against this standard that the Board's decision must be measured.

*Evidence Relied on by the Board*

48 I do not accept Mr. Flora's submission that the Board erred by relying on the expert evidence of cadaveric transplant eligibility criteria in determining whether a LRLT was generally accepted in Ontario as appropriate for a person in Mr. Flora's medical circumstances.

49 Both Mr. Flora's U.K. doctors and Dr. Wall testified that the transplant eligibility criteria at their hospitals are the same for cadaveric transplants and LRLTs. The transplant team at the LHSC used Ontario's Milan Criteria, which were originally designed to evaluate patient eligibility for cadaveric liver transplants, to assess Mr. Flora's eligibility for a cadaveric transplant and a LRLT. Mr. Flora's U.K. doctors employed the Cromwell's cadaveric transplant eligibility criteria to evaluate Mr. Flora's eligibility for both types of transplant. In both jurisdictions, therefore, cadaveric transplant eligibility criteria were considered appropriate for LRLT candidacy assessments and were utilized in Mr. Flora's case.

50 The real difference between the approach of the specialists in the two jurisdictions lies in the *content* of the selection criteria employed in their respective hospitals for *both* types of liver transplants. The criteria utilized at the Cromwell were broader and more "relaxed" than Ontario's Milan Criteria, allowing for a higher risk of tumour recurrence. The application of the two sets of cadaveric transplant eligibility criteria resulted in different LRLT eligibility determinations.

51 Dr. Williams confirmed that Mr. Flora was assessed at the Cromwell for both a cadaveric transplant and a LRLT utilizing that institution's cadaveric transplant selection criteria. He said that the use of these criteria for the evaluation of LRLT eligibility is recognized by international experts, although some experts also urge the adoption of less stringent criteria to determine LRLT eligibility. Dr. Williams, however, expressly refrained from offering any opinion on the latter proposal.

52 Moreover, according to Dr. Williams, Mr. Flora received a LRLT at the Cromwell because the delay on the cadaveric liver transplant wait lists in England would have been too long (six to eighteen months) and, as a non-resident, Mr. Flora would not have received a cadaveric organ in time. In contrast, it was Dr. Wall's uncontested evidence that if Mr. Flora had satisfied the Milan Criteria he would have received a cadaveric transplant in Ontario in about 50 days and he would have been considered for a LRLT at the LHSC.

53 Mr. Flora attacks those of the Divisional Court's findings that suggest that the evidence of several Ontario doctors supported the appropriateness of the use of the Milan Criteria to assess a patient's suitability for a LRLT. He argues that Dr. Wall was the only Ontario doctor who provided this evidence and, as a result, there was no evidence before the Board of a medical "consensus" in Ontario on this issue.

54 In my view, this complaint is of no import. The critical question is whether the Board understood the nature of the expert evidence regarding the criteria used in Ontario and England to assess the appropriateness of a LRLT for Mr. Flora.

55 The Board's reasons reflect no misapprehension of the evidence on this issue. It was Dr. Wall's uncontradicted evidence before the Board that Ontario's Milan Criteria "are generally accepted criteria in all of the liver transplant programs in Canada". Mr. Flora's eligibility for a LRLT was assessed both in England and Ontario utilizing cadaveric transplant eligibility criteria. The Board's reasons reveal that it had a firm grasp of the available expert evidence about the disparate transplant eligibility criteria used in Ontario and England and the differing treatment decisions arrived at for Mr. Flora on the application of those criteria in both jurisdictions.

56 Mr. Flora also argues that the Board erred, and its decision was rendered unreasonable, by "its incorporation of the shortage of cadaveric organs into its interpretation of whether a LRLT was generally accepted in Ontario as appropriate treatment for persons in Mr. Flora's medical circumstances". I cannot accede to this argument.

57 The Board noted the necessity of allocating scarce resources in various parts of its reasons. These comments refer to the supply of cadaveric organs, a factor irrelevant to patient selection for a LRLT. However, read in their entirety, the Board's reasons demonstrate that it understood that the issue of cadaveric organ supply was relevant to the purposes behind the original development of the Milan Criteria, that selection criteria specific to LRLT patient candidacy had not been developed in Europe or Canada, and that the 'supply issue' pertinent to LRLTs concerned the availability of living organ donors rather than the availability of cadaveric organs.

58 In the end, the Board properly focused on the critical evidence in this case, namely: (i) the unanimous expert evidence that cadaveric liver transplant eligibility criteria were used both in Ontario and England to determine Mr. Flora's eligibility for a LRLT; (ii) the expert evidence from a leading Ontario liver transplant specialist — Dr. Wall — that Mr. Flora did not satisfy the medical criteria for a LRLT in this jurisdiction; and (iii) the unanimous opinion evidence of Mr. Flora's Ontario specialists that he was also ineligible for a cadaveric liver transplant.

59 In all these circumstances, the Board's reliance on the evidence of cadaveric transplant eligibility criteria was clearly reasonable.

60 I also do not accept Mr. Flora's contention that the Board erred by relying on Dr. Wall's evidence regarding Mr. Flora's candidacy for a LRLT in Ontario. The Board stated at p. 17 of its reasons: "[I]t is the opinion of Ontario physicians [to] which the Board must give the greatest weight in this appeal."

61 This Ontario-centric focus to the Board's inquiry was mandated by the language of s. 28.4(2)(a) itself. Under that provision, the treatment in respect of which OHIP reimbursement is sought must be generally accepted as appropriate "in Ontario" for a person in the same medical circumstances as the reimbursement claimant. Section 28.4(2)(b) contains language to the same effect. As the Divisional Court stressed, the focus of s. 28.4(2)(a) is "on accepted treatment standards in Ontario". I agree with the Divisional Court that the intention of the legislature with respect to s. 28.4(2) is clear:

[I]t is intended to limit reimbursement to those procedures and treatments that would have been considered appropriate for an equivalent individual in equivalent circumstances in Ontario ... It is obvious that the legislature intended to emphasize the local nature of the provision. [Emphasis in original.]

62 The Board recognized that s. 28.4(2)(a) of the Regulation is concerned with the medical practices and standards applicable in Ontario. The Board put it this way (at p. 17): "The issue before the Board, however, is whether the treatment is generally accepted *in Ontario* as appropriate for a person in the same medical circumstances." [Emphasis in original.]

63 The evidence of Mr. Flora's U.K. doctors was principally concerned with the applicable transplant eligibility criteria in the United Kingdom and Europe. Mr. Flora's U.K. doctors, although eminent in their fields, did not profess any expertise in Ontario's medical practices and standards, or in the application of Ontario's liver transplant eligibility criteria.

64 In contrast, the record reveals that Dr. Wall, also an eminently qualified liver transplant specialist, was well-versed in Ontario's liver transplant medical standards and practices. The record indicates that at the time of Mr. Flora's assessment, Dr. Wall was the most experienced liver transplant surgeon in Canada.

65 At the time of Mr. Flora's liver cancer diagnosis, the TGH and the LHSC were the only two Ontario hospitals performing liver transplants of any kind. It was Dr. Wall's evidence that although no Canadian transplant facility had done an adult-to-adult LRLT by February 2000, the LHSC had the expertise and ability to do one and had embarked on its own adult-to-adult LRLT program. Dr. Wall testified that Mr. Flora was found to be ineligible for *any* liver transplant because his cancer was too extensive and was outside the criteria recognized in Ontario for liver transplant selection.

66 By deciding to accord greater weight to Dr. Wall's evidence than to that of Mr. Flora's U.K. doctors, the Board simply determined that Dr. Wall was better positioned than Mr. Flora's U.K. doctors to provide opinion evidence of generally accepted medical practices and standards in Ontario. This conclusion was open to the Board on the evidence.

67 Mr. Flora relies on the contents of the OHIP Application as completed by Dr. Wong, which I have earlier described, to argue that there was conflicting evidence before the Board from Mr. Flora's Ontario specialists on the core issue of whether a LRLT treatment was "generally accepted in Ontario as appropriate" for a person in his medical circumstances. I disagree.

68 Dr. Wong did not testify before the Board. Nor did Mr. Flora seek to have any written materials from Dr. Wong admitted by the Board to explain her entries on the OHIP Application. Perhaps more importantly, Dr. Wong is not a liver transplant specialist. She did not personally evaluate the appropriateness of a liver transplant — cadaveric or otherwise — for Mr. Flora. She referred Mr. Flora to Dr. Les Lilly at the TGH for that purpose and the TGH Liver Transplant Unit evaluated Mr. Flora's suitability for a cadaveric liver transplant. Dr. Wall, at the LHSC, assessed Mr. Flora's eligibility for both a cadaveric transplant and a LRLT. The fact that Dr. Wong checked a box on the OHIP Application indicating that a LRLT for Mr. Flora was "generally accepted in Ontario as appropriate" must be viewed in that context.

69 It is also significant that Mr. Flora's OHIP Application pre-dated his assessment at the LHSC. In the OHIP Application, Dr. Wong was addressing a "possible" LRLT at the Cromwell. There was no evidence before the Board or the Divisional Court that Dr. Wong disagreed with the LRLT eligibility decision made by the LHSC transplant team in respect of Mr. Flora or that she challenged the transplant selection criteria utilized for that purpose.

70 Moreover, the Board was alert to the statements made by Dr. Wong on the OHIP Application. After recognizing the statements made by her on which Mr. Flora relied, the Board noted that Dr. Wong had also indicated on the OHIP Application that, "Physicians in Ontario will not give Mr. Flora chemoembolization or [a LRLT]" (at p. 10). The Board then indicated:

[T]he Board understands the form to indicate that while in Dr. Wong's opinion liver transplantation is generally accepted as appropriate for a person suffering from [Mr. Flora's] condition, [Mr. Flora's] condition did not satisfy guidelines established within the province.

In the absence of contrary evidence from Dr. Wong before the Board, I cannot conclude that this interpretation of her statements on the OHIP Application was unreasonable.

71 Accordingly, I see no error in the Board's reliance on the evidence impugned by Mr. Flora.

*Interpretation of Section 28.4(2)(a)*

72 Mr. Flora advances two arguments in support of his contention that the Board and the Divisional Court erred by misinterpreting s. 28.4(2)(a) of the Regulation. He submits first, that the Board "conflated" the issue of the availability of the LRLT procedure in Ontario with the issue of its appropriateness for Mr. Flora. Next, he maintains that the Divisional Court erred by accepting an interpretation of s. 28.4(2)(a) that is inconsistent with the purpose and objectives of the Act and the CHA. I would reject these arguments.

**(a) The "conflation" argument**

73 Mr. Flora's claim that the Board erred by conflating the availability of a LRLT in Ontario with its appropriateness for Mr. Flora is predicated on the proposition that the "appropriateness" of a medical treatment is to be measured solely by its medical efficacy. In other words, if the proposed treatment would potentially benefit the patient, in the absence of any contraindications for the treatment it must be regarded as medically necessary and appropriate under s. 28.4(2)(a) of the Regulation.

74 There are at least four difficulties with this proposition. First, as the Divisional Court held, it ignores the reality of medical care and the process of decision-making by physicians in Ontario. A variety of considerations inform the medical decision whether to offer a liver transplant to a specific patient. These include issues regarding donor organ supplies, patient survival prospects and, in the case of LRLTs, ethical considerations concerning risk factors for prospective organ donors.

75 In particular, there was evidence before the Divisional Court from Dr. Peter Singer, an Ontario professor of medicine, a bio-ethicist and the Director of the University of Toronto Joint Centre for Bioethics, that the appropriateness of a proposed medical treatment for a particular patient is "not purely a medical concept". To the contrary, "[A] physician's determination about whether treatment is appropriate includes not only medical facts like the projected chance of success but also ethical considerations." Thus, with LRLTs, "[T]he potential risk to the donor, in relation to the benefit to the recipient, play[s] a significant role in the decision whether to offer a transplant." In their evidence before the Board, Mr. Flora's U.K. doctors and Dr. Wall also confirmed that ethical considerations form an essential part of medical decision-making concerning patient selection for a LRLT.

76 Thus, the thesis that the appropriateness of a LRLT turns solely on its medical efficacy brushes aside the centrality of ethical considerations in transplant decision-making.

77 Second, the medical efficacy approach to the interpretation of "appropriateness" is inconsistent with the plain language of s. 28.4(2)(a). If the interpretation of "appropriateness" advanced by Mr. Flora were to govern, any potentially life-saving out-of-country medical treatment would qualify for public funding under the Act, regardless of a patient's particular medical circumstances, simply because it would be of potential benefit to the patient. This would ignore the requirement under s. 28.4(2)(a) that the "appropriateness" of a treatment be determined with reference to a person "in the same medical circumstances" as the reimbursement claimant.

78 Section 28.4(2) of the Regulation embodies a clear conceptual distinction between the "appropriateness" and the "availability" of a medical treatment. Section 28.4(2)(a) is concerned with the former, while s. 28.4(2)(b) focuses on the latter. On the plain language of s. 28.4(2), the legislature has indicated that a treatment may be generally accepted in Ontario as appropriate (s. 28.4(2)(a)), although it is not performed in Ontario (s. 28.4(2)(b)). In accordance with well-established principles of statutory interpretation, meaning must be accorded to each branch of the s. 28.4(2) funding test. There is nothing in s. 28.4(2)(a) to suggest that the "appropriateness" of a medical treatment is to be determined exclusively on the basis of its potential medical efficacy.

79 Third, the interpretation of "appropriateness" posited by Mr. Flora is also inconsistent with the legislative purpose of s. 28.4(2). I agree with the Divisional Court that the purpose of s. 28.4(2) is to allow Ontario residents "to receive funding for the same level of health care services abroad that they are entitled to receive in Ontario". If the medical efficacy interpretation of "appropriateness" was accepted, it would mean that Ontario residents would be entitled to bypass the requirements of s. 28.4(2)(a) and receive publicly-funded medical treatments that are offered solely on the basis of foreign medical assessments concerning the potential benefit of the treatments at issue. This, too, would 'read-out' the requirement in s. 28.4(2)(a) that the appropriateness of a medical treatment be determined with reference to general medical practices and standards "in Ontario" and the claimant's own medical circumstances.

80 Finally, the interpretation urged by Mr. Flora reflects an overly broad approach to publicly-funded health care that has been rejected by the courts. See for example, *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 (S.C.C.), at 672-73; and *Cameron v. Nova Scotia (Attorney General)* (1999), 177 D.L.R. (4th) 611 (N.S. C.A.) at paras. 235-39. Neither the Act nor the Regulation promise that insured Ontarians will receive public funding for all medically beneficial treatments.

**(b) The purpose and objectives of the legislation**

81 Mr. Flora submits that both the Divisional Court and the Board misinterpreted the phrase "accepted as appropriate" under s. 28.4(2)(a) of the Regulation by failing to accept the views of internationally renowned experts — Mr. Flora's U.K. doctors — concerning the appropriateness of a LRLT for Mr. Flora. The core of his complaint was succinctly set out at para. 51 of his factum:

To deny an Ontarian coverage for a life-saving operation advocated by internationally renowned specialists is inconsistent with the principle of access to health care according to need not according to means. The need in such a case is irrefutable. Also irrefutable is that for most Ontarians, denial of coverage means denial of access to medical treatment.

82 I would reject this complaint. I am persuaded that the interpretive approach to s. 28.4(2)(a) urged by Mr. Flora is inconsistent with the overall purpose of the Act and the express language of s. 28.4(2)(a).

83 The Divisional Court described the purpose of the CHA and the Act this way: "[T]he overall purpose of the [CHA] and the [Act] is to provide access to health care on the basis of medical need, not ability to pay." Later in its reasons, the Divisional Court elaborated on the legislative scheme embodied in the Act, indicating that it was designed "to provide insurance coverage against the cost of insured services on a non-profit basis on uniform terms and conditions available to all residents of Ontario". Under this scheme, "Health professionals determine which medical services are appropriate in the treatment of their patients." I do not understand Mr. Flora to challenge these statements.

84 Mr. Flora also accepts the Divisional Court's characterization of the purpose of s. 28.4(2) of the Regulation:

[Section 28.4(2)] ensures that funding of out-of-country medical treatments is provided fairly and equally in a manner that upholds Ontario's medical and ethical standards, while protecting vulnerable Ontario patients in a responsible, cost-effective manner.

.....

Limiting the funding of out-of-country medical treatments to those that are "generally accepted in Ontario" ensures that public funds are not spent on treatments that are inconsistent with the ethics and values of the Ontario medical profession and the Ontario public. This safeguards the integrity of the health care system.

85 Several features of this legislative regime must be emphasized. The funding provided by the Act does not extend to all medical treatments or procedures. Only those medical services that the legislature has determined should be included as "insured services" qualify under the Act for reimbursement by OHIP.

86 The legislative regime is a funding scheme. The Act specifies only those health services that will be financed — in whole or in part — from public funds. The Regulation, in turn, sets out those services that are covered under the funding scheme. It remains the task of health care professionals to determine the nature of the medical services to be provided to a particular patient.

87 In this context, s. 28.4(2)(a) of the Regulation entitles residents of Ontario to public funding for the same medical services received outside Ontario as those received within the province that are eligible for reimbursement from OHIP.

88 However, s. 28.4(2)(a) contains an important limitation on access to public funds for medical services. Funding is provided only where the medical treatment is "generally accepted in Ontario as appropriate for a person in the same medical circumstances [as the reimbursement claimant]". As I have attempted to underscore earlier in these reasons, the incorporation of an "in Ontario" standard into s. 28.4(2)(a) ensures that funding is provided only to the extent that the treatment in question is regarded as appropriate, having regard to the patient's medical circumstances and the medical standards, practices and ethics recognized in this province. I agree with the Divisional Court that:

This limitation seeks to balance the overall objective of access to health care on the basis of medical need with the goal of ensuring that funding for out-of-country treatments is only provided to the extent that Ontarians would be entitled to receive funding within Ontario, if the treatment were available here.

89 The Board also recognized this regulatory purpose when it stressed in its reasons that the funding test under s. 28.4(2)(a) is "whether the treatment is generally accepted *in Ontario* as appropriate". [Emphasis in original.]

90 There is simply nothing in the Act or s. 28.4(2) of the Regulation to suggest that the funding criteria established by s. 28.4(2) are different in kind, or are to be applied any differently, where the appropriateness of the treatment in question is supported by international rather than local medical opinion, or where the nature of the treatment is potentially life-saving. To import such notions into the interpretation of s. 28.4(2) would defeat the equality of access to funded health care envisaged by the Act and the Regulation.

91 Thus, the interpretative approach urged by Mr. Flora ignores the Ontario-specific standard reflected in s. 28.4(2), as well as the documentary and oral evidence before the Board from Mr. Flora's own Ontario doctors regarding his eligibility for both types of liver transplants.

### *Conclusion Regarding Reasonableness*

92 I end my analysis of the reasonableness of the Board's decision where I began. Under the formulation of the reasonableness standard articulated in *Dunsmuir*, deference is owed to the Board's decision if it falls within a range of acceptable outcomes that are defensible on the facts and the law and if the justification for the decision is sound, transparent and intelligible. I have no hesitation in concluding that the Board's decision satisfies these requirements. I turn next to Mr. Flora's *Charter* s. 7 claim.

### **(3) Charter Section 7 Claim**

93 Before this court, Mr. Flora renews his claim that s. 28.4(2) of the Regulation offends s. 7 of the *Charter*. He argues that: (i) the denial of his OHIP Application deprived him of access to a life-saving medical treatment, thereby violating his s. 7 rights to life and security of the person; (ii) the state also deprived him of his s. 7 rights by amending, in 1992, a predecessor version of the Regulation that would have provided funding for his LRLT on the basis of medical necessity; (iii) in any event, s. 7 imposes a positive obligation on the state to provide life-saving medical treatments, thus obviating the need for a finding of state action amounting to deprivation; and (iv) finally, s. 28.4(2) does not comport with the principles of fundamental justice. For the reasons that follow, I conclude that Mr. Flora's *Charter* s. 7 claim fails.

94 In *R. v. Beare* (1987), [1988] 2 S.C.R. 387 (S.C.C.), at 401, the Supreme Court of Canada described the requirements for the invocation of s. 7 of the *Charter* in these terms:

To trigger its operation there must first be a finding that there has been a deprivation of the right to 'life, liberty and security of the person' and secondly, that that deprivation is contrary to the principles of fundamental justice.

See also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (S.C.C.) at para. 47; *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, [2000] 2 S.C.R. 519 (S.C.C.) at para. 70; and *Chaoulli c. Québec (Procureur général)*, [2005] 1 S.C.R. 791 (S.C.C.), per McLachlin C.J. and Major J. (Bastarache J. concurring) at para. 109.

95 The Divisional Court concluded that Mr. Flora had failed to demonstrate that the Regulation constituted a deprivation by the state of his rights to life or security of the person and that this deficiency was fatal to his *Charter* s. 7 claim. I agree.

96 In *Chaoulli*, *supra* the Supreme Court was concerned with a Quebec health care-related statute that limited access to private health services by removing the ability to contract for private health insurance in respect of those services covered

by provincial public insurance. Chief Justice McLachlin and Major J. held at para. 104: "The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."

97 Chief Justice McLachlin and Major J. also held that the potential denial of timely health care for a condition that is clinically significant to a patient's current or future health engages security of the person under s. 7 of the *Charter* (at paras. 111 and 112). Moreover, "[W]here lack of timely health care can result in death, s. 7 protection of life itself is engaged" (at para. 123). See also the reasons of Binnie and LeBel JJ. at para. 200 and Deschamps J. at paras. 38-40.

98 In *Chaoulli*, the pivotal consideration was the fact that the impugned prohibition on private health insurance "conspired" with excessive costs in Quebec's public health care system to force Quebecers onto the wait lists that pervaded the public system. It was this connection between the statutory prohibition on private health insurance and the delays in the public system that anchored the *Chaoulli* holding that the wait lists constituted a deprivation of rights protected under s. 7. In other words, the statutory prohibition in issue was directly linked to the harm suffered by Quebecers who were compelled by the prohibition to rely on the public health care system and to endure the consequences of significant wait lists.

99 A similar link between state action and delays in accessing health care grounds the Supreme Court of Canada's decision in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.). In that case, the Supreme Court concluded that the s. 7 right to security of the person for women was jeopardized by the mandatory therapeutic abortion committee system established by the *Criminal Code*, which forced women who sought abortions to suffer significant delays in treatment with attendant physical risk and psychological suffering. *Morgentaler* at p. 59 per Dickson C.J. and at pp. 105-6 per Beetz J., Estey J. concurring.

100 To similar effect is the Supreme Court's decision in *Rodriguez v. British Columbia (Attorney General)* (1993), 107 D.L.R. (4th) 342 (S.C.C.), which holds that governmental interference with a citizen's bodily integrity — such as a criminal law prohibition on assisted suicide — constitutes a deprivation of security of the person under s. 7.

101 These cases are clearly distinguishable from the case at bar. In contrast to the legislative provisions at issue in *Chaoulli*, *Morgentaler* and *Rodriguez*, s. 28.4(2) of the Regulation does not prohibit or impede anyone from seeking medical treatment. Section 28.4(2) neither prescribes nor limits the types of medical services available to Ontarians. Nor does it represent governmental interference with an existing right or other coercive state action. Quite the opposite. Section 28.4(2) provides a defined benefit for out-of-country medical treatment that is not otherwise available to Ontarians — the right to obtain public funding for certain specific out-of-country medical treatments. By not providing funding for *all* out-of-country medical treatments, it does not deprive an individual of the rights protected by s. 7 of the *Charter*.

102 This conclusion is supported by the recent decision of this court in *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 (Ont. C.A.). In that case, the claimants asserted a violation of s. 7 in the context of the Ontario government's failure to fund intensive behavioural intervention for autistic children over a certain age. Central to the court's rejection of the s. 7 claim in *Wynberg* was its conclusion that the impugned legislation did not create a mandatory requirement that school-age children attend public school; nor did it otherwise compel such attendance. As a result, the claimants were free to pursue intensive behavioural therapy in the private sector and their s. 7 rights were not violated. Similar defects apply here in respect of Mr. Flora's s. 7 claim.

#### *Effect of Regulatory Amendment*

103 I would also reject Mr. Flora's claim that the legislature's decision to amend the former version of the Regulation, so as to alter the test for OHIP funding for out-of-country medical services, constitutes a deprivation of rights within the meaning of s. 7.

104 It seems to me that the decision of this court in *Ferrell v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 97 (Ont. C.A.) is a full answer to this claim. In *Ferrel*, Morden A.C.J.O., writing for the court, confirmed that a *Charter* violation cannot be grounded on a mere change in the law. He said (at p. 110): "If there is no constitutional obligation to enact [the legislation at issue] in the first place, I think that it is implicit, as far as the requirements of the constitution are concerned, that the legislature is free to return the state of the statute book to what it was before [the impugned legislation]." Subsequently, in *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2002), 56 O.R. (3d) 505 (Ont. C.A.) at para. 94, this court reiterated this principle, stating: "[I]n the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values." See also *Baier v. Alberta*, [2007] 2 S.C.R. 673 (S.C.C.) at paras. 35-36. I therefore turn next to Mr. Flora's assertion that s. 7 imposes a positive obligation on the state to provide, and therefore to fund, life-saving medical treatments.

### *Claim of Positive State Obligation*

105 The Supreme Court of Canada has expressly left open the question of whether a *positive* right to a minimum level of health care exists under s. 7. In *Gosselin c. Québec (Procureur général)*, [2002] 4 S.C.R. 429 (S.C.C.) at paras. 81-83, the court indicated that s. 7 may one day be interpreted to include positive obligations in special circumstances where, at a minimum, the evidentiary record discloses actual hardship.

106 But, to date, the protection afforded by s. 7 of the *Charter* has not been extended to cases — like this one — involving solely economic rights. As this court stated in *Wynberg, supra* at para. 220, s. 7 of the *Charter* has been interpreted "only as restricting the state's ability to *deprive* individuals of life, liberty or security of the person". [Emphasis in original.] See also *Melanson v. New Brunswick (Attorney General)* (2007), 280 D.L.R. (4th) 69 (N.B. C.A.).

107 Nor does *Chaoulli* support Mr. Flora's contention that s. 7 imposes positive obligations on the state. Consider again the unequivocal statement by McLachlin C.J. and Major J. at para. 104 of *Chaoulli*: "The *Charter* does not confer a freestanding constitutional right to health care." Moreover, as this court observed in *Wynberg* at para. 222, in *Chaoulli* the claimants did not seek an order requiring the government to fund their private health care or to spend more money on health care: "[O]n the contrary, they sought the right to spend their own money to obtain insurance to pay for private health care services." On the facts here, there was no law restricting Mr. Flora's ability to spend his own money to obtain a LRLT at a private hospital in England. Indeed, that is precisely what he chose to do.

108 In my view, on the current state of s. 7 constitutional jurisprudence, where — as here — the government elects to provide a financial benefit that is not otherwise required by law, legislative limitations on the scope of the financial benefit provided do not violate s. 7. On the law at present, the reach of s. 7 does not extend to the imposition of a positive constitutional obligation on the Ontario government to fund out-of-country medical treatments even where the treatment in question proves to be life-saving in nature.

109 In summary, I agree with the Divisional Court that Mr. Flora failed to establish a deprivation of his rights to life or security of the person under s. 7 of the *Charter*. Moreover, the existing jurisprudence does not permit me to interpret s. 7 as imposing a constitutional obligation on the respondent to fund out-of-country medical treatments beyond those that satisfy the test set out in s. 28.4(2) of the Regulation. In view of these conclusions, it is unnecessary to address Mr. Flora's remaining arguments regarding the conformity of s. 28.4(2) of the Regulation with the principles of fundamental justice.

## **VI. Disposition**

110 Like the Board and the Divisional Court, I am sympathetic to the difficult circumstances and choices that confronted Mr. Flora when his liver cancer was detected. But as compelling as his situation undoubtedly was, the heart of this appeal concerns the reasonableness of the Board's decision that public funds were not available under the Act to finance Mr. Flora's medical treatment in England. For the reasons given, I see no basis on which to interfere with the Board's decision to affirm the denial of OHIP funding in this case.

111 I would dismiss the appeal.

112 The issues raised on this appeal were novel, at least to some extent. Certainly they had implications for the public funding of health care services in Ontario beyond the interests of the involved litigants. These factors tend to support a decision to award no costs of the appeal. However, the parties requested an opportunity to make costs submissions, depending on the disposition of this appeal. Accordingly, if they are unable to agree on costs, and costs are sought by the respondent, the respondent may deliver his brief written costs submissions to the Registrar of this court within fourteen days from the date of these reasons. Mr. Flora shall deliver his brief responding costs submissions to the Registrar within fourteen days thereafter.

***E.E. Gillese J.A.:***

I agree.

***R. Sharpe J.A.:***

I agree.

*Appeal dismissed.*

#### Footnotes

1 Throughout the balance of these reasons, I refer to the majority's decision as the decision of the Board.

27

2014 ONCA 852  
Ontario Court of Appeal

Tanudjaja v. Canada (Attorney General)

2014 CarswellOnt 16752, 2014 ONCA 852, 123 O.R. (3d) 161, 247 A.C.W.S.  
(3d) 558, 323 C.R.R. (2d) 71, 326 O.A.C. 257, 379 D.L.R. (4th) 467

**Jennifer Tanudjaja, Janice Arsenault, Ansat Mahmood, Brian DuBourdieu,  
Centre for Equality Rights in Accommodation, Appellants and The Attorney  
General of Canada and the Attorney General of Ontario, Respondents**

K. Feldman, G.R. Strathy, G. Pardu J.J.A.

Heard: May 26-27; May 29, 2014

Judgment: December 1, 2014

Docket: CA C57714

Proceedings: affirming *Tanudjaja v. Canada (Attorney General)* (2013), [2013] O.J. No. 4078, 116 O.R. (3d) 574, 2013 ONSC 5410, 2013 CarswellOnt 12551, 293 C.R.R. (2d) 272, Lederer J. (Ont. S.C.J.)

Counsel: Tracy Heffernan, Fay Faraday, Peter Rosenthal, for Appellants  
Janet E. Minor, Shannon Chace, for Respondent, Attorney General of Ontario  
Michael H. Morris, Gail Sinclair, for Respondent, Attorney General of Canada  
Anthony D. Griffin, for Intervener, Ontario Human Rights Commission  
Avvy Go, Mary Eberts, for Intervener, Colour of Poverty/Colour of Change Network  
Cheryl Milne, for Intervener, David Asper Centre for Constitutional Rights  
Marie Chen, Jackie Esmonde, for Intervener, coalition of the Income Security and Advocacy Centre, the ODSP Action Coalition and the Steering Committee on Social Assistance  
Vasuda Sinha, Rahool Agarwal, Lauren Posloski, for Intervener, Women's Legal Education and Action Fund  
Molly Reynolds, Ryan Lax, for Intervener, coalition of Amnesty International Canada and the International Network for Economic, Social and Cultural Rights  
Laurie Letheren, Renée Lang, for Intervener, coalition of ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario  
Martha Jackman, Benjamin Ries, for Intervener, coalition of the Charter Committee on Poverty, Pivot Legal Society and Justice for Girls

Subject: Civil Practice and Procedure; Constitutional; Human Rights

APPEAL by applicants from judgment reported at *Tanudjaja v. Canada (Attorney General)* (2013), 2013 ONSC 5410, 2013 CarswellOnt 12551, 116 O.R. (3d) 574, 293 C.R.R. (2d) 272, [2013] O.J. No. 4078 (Ont. S.C.J.), dismissing application for, *inter alia*, declaration that respondents Crown in Right of Canada and Crown in Right of province had violated applicants' rights to life, liberty and security of the person and to equality before law in respect of general policies around homelessness.

**G. Pardu J.A.:**

1 The appellants ask this Court to overturn a decision of a motion judge dismissing their application for relief pursuant to the *Charter of Rights and Freedoms*. The motion judge concluded it was plain and obvious the application did not disclose a viable cause of action and the application had no reasonable prospect of success. The motion judge also found the appellant's claim was not justiciable.

## The Applicants

2 The application was brought by four individuals and an organization devoted to human rights and equality rights in housing.

3 The individual applicants suffer from homelessness and inadequate housing.

4 Brian DuBourdieu was diagnosed with cancer. As a result of his illness he was unable to work, unable to pay his rent and lost his apartment. He has been living on the streets and in shelters and has been on the waiting list for subsidized housing for four years.

5 Jennifer Tanudjaja is a young single mother in receipt of social assistance living in precarious housing with her two sons. Despite extensive efforts, Ms. Tanudjaja has been unable to secure housing within the social assistance shelter allowance. Her rent is almost double the shelter allowance allotted and is more than her total social assistance benefit. She has been on the waiting list for subsidized housing for over two years.

6 Ansar Mahmood was severely disabled in an industrial accident. Two of his children are also disabled, including one son who uses a wheelchair. Mr. Mahmood lives with his wife and four children in a two-bedroom apartment that is neither accessible nor safe for persons with disabilities. The family survives on a fixed income and has been on the waiting list for subsidized accessible housing for four years.

7 Janice Arsenault and her two young sons became homeless after her spouse died suddenly. For several years she lived in shelters and on the streets. She was forced to place her children in her parents' care. Now housed, she currently spends 64% of her small monthly income on rent, placing her in danger of becoming homeless again.

8 The Centre for Equality Rights in Accommodation (CERA) is an Ontario-based non-profit organization which provides direct services to low income tenants and the homeless on human rights and housing issues. CERA is membership-based. Many of CERA's members have experienced inadequate housing and homelessness.

## The Application

9 The appellants allege that actions and inaction on the part of Canada and Ontario have resulted in homelessness and inadequate housing. They argue that the governments have taken an approach that violates their s. 7 and s. 15 rights under the *Charter*. The core of their application is captured in para. 14 of the Amended Notice of Application, which provides:

Canada and Ontario have instituted changes to legislation, policies, programs and services which have resulted in homelessness and inadequate housing. Canada and Ontario have either taken no measures, and/or have taken inadequate measures, to address the impact of these changes on groups most vulnerable to, and at risk of, becoming homeless. Canada and Ontario have failed to undertake appropriate strategic coordination to ensure that government programs effectively protect those who are homeless or most at risk of homelessness. As a result, they have created and sustained conditions which lead to, support and sustain homelessness and inadequate housing.

10 The appellants expressly disavow any challenge to any particular legislation, nor do they allege that the particular application of any legislation or policy to any individual has violated his or her constitutional rights. They do not point to a particular law which they say "in purpose or effect perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1)"<sup>1</sup>. They do not identify any particular law which violates the s. 7 right to life, liberty and security of the person. Rather, they submit that the social conditions created by the overall approach of the federal and provincial governments violate their rights to adequate housing.

11 They submit that Canada has eroded access to affordable housing by:

- (a) cancelling funding for the construction of new social housing;
- (b) withdrawing from administration of affordable rental housing;
- (c) phasing out funding for affordable housing projects under cost-sharing agreements with the provinces; and
- (d) failing to institute a rent supplement program comparable to those in other countries.

12 They submit that Ontario has also diminished access to affordable housing by:

- (a) terminating the provincial program for constructing new social housing;
- (b) eliminating protection against converting affordable rental housing to non-rental uses and eliminating rent regulation;
- (c) downloading the cost and administration of existing social housing to municipalities;
- (d) failing to implement a rent supplement program comparable to those in other countries;
- (e) downloading responsibility for funding development of new social housing to municipalities which lack the tax base to support such construction; and
- (f) heightening insecurity of tenancy by creating administrative procedures that facilitate evictions.

13 The appellants also argue that Canada and Ontario have diminished income support programs, and that this has increased the risk of homelessness and inadequate housing. In 1996, federal transfer payments were no longer tied to a minimum standard for social assistance. Amendments to the *Employment Insurance Act* S.C. 1996, c. 23, resulted in fewer people being entitled to benefits and Ontario has reduced welfare rates.

14 Finally, the appellants submit that deinstitutionalization of persons afflicted with disabilities without adequate community support has resulted in widespread homelessness amongst those persons.

15 The appellants claim wide-ranging remedies in their application:

- a) A declaration that decisions, programs, actions and failures to act by the government of Canada ("Canada") and the government of Ontario ("Ontario") have created conditions that lead to, support and sustain conditions of homelessness and inadequate housing. Canada and Ontario have failed to effectively address the problems of homelessness and inadequate housing.
- b) A declaration that Canada and Ontario have obligations pursuant to sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("the Charter") to implement effective national and provincial strategies to reduce and eventually eliminate homelessness and inadequate housing.
- c) A declaration that the failure of Canada and Ontario to have implemented effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing violates the applicants' and others' rights to life, liberty and security of the person contrary to s.7 of the *Charter*. These violations are not in accordance with the principles of fundamental justice and are not demonstrably justifiable under section 1 of the *Charter*.
- d) A declaration that the failure of Canada and Ontario to have implemented effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing violates the applicants' and others' right to equality contrary to s. 15(1) of the *Charter*. These violations are not demonstrably justifiable under section 1 of the *Charter*.

e) An order that Canada and Ontario must implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing, and that such strategies:

i. must be developed and implemented in consultation with affected groups; and

ii. must include timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms;

f) An order that [the Superior Court of Justice] shall remain seized of supervisory jurisdiction to address concerns regarding implementation of the order in (e).

### The motion judge's decision

16 The motion judge struck the appellants' application, without leave to amend, on the basis that it was plain and obvious that the application could not succeed. He found that the application disclosed no reasonable cause of action and was not justiciable.

17 With respect to s. 7 of the *Charter*, the motion judge concluded that there was no positive *Charter* obligation which required Canada and Ontario to provide for "affordable, adequate, accessible housing" and that in any event, the appellants had not identified any breach of the principles of fundamental justice. With respect to s. 15 of the *Charter*, he found that "the actions and decisions complained of do not deny the homeless a benefit Canada and Ontario provide to others or impose a burden not levied on others, meaning there can be no breach of s. 15 of the *Charter*." In any event he concluded that homelessness and inadequate housing were not analogous grounds under s. 15 of the *Charter*. The free standing claim that homelessness might disproportionately affect persons such as "women, single mothers, persons with mental and physical disabilities, aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance" did not engage s. 15 of the *Charter*, in the absence of discriminatory laws, or discriminatory application of those laws. Finally he concluded that in any event, the issues raised by the application were not justiciable, that the implementation of the relief sought would "cross institutional boundaries and enter into the area reserved for the Legislature."

### The Interveners

18 The following eight organizations, or groups of organizations, were granted leave to intervene in this appeal under Rule 13.02 of the *Rules of Civil Procedure*: (1) a coalition of the *Charter* Committee on Poverty, Pivot Legal Society and Justice for Girls (the *Charter* Committee Coalition); (2) a coalition of Amnesty International Canada and the International Network for Economic, Social and Cultural Rights (the Amnesty Coalition); (3) the David Asper Centre for Constitutional Rights (the Asper Centre); (4) a coalition of ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario (the ARCH Coalition); (5) a coalition of the Income Security Advocacy Centre, the ODSP Action Coalition and the Steering Committee on Social Assistance (the Income Security Coalition); (6) the Colour of Poverty/Colour of Change Network (COPC); (7) the Ontario Human Rights Commission (OHRC); and (8) the Women's Legal Education Action Fund Inc. (LEAF). Each filed a factum and made brief oral submissions, generally in support of the appellants.

### Analysis

19 I would uphold the motion judge's conclusion that this application is not justiciable. In essence, the application asserts that Canada and Ontario have given insufficient priority to issues of homelessness and inadequate housing.

20 As indicated in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.), at 90-91, "[a]n inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring to other decision making institutions of the polity."

21 Having analysed the jurisprudence relating to justiciability in Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Carswell, 2012), the author identified several relevant factors, at p. 162:

Political questions, therefore, must demonstrably be unsuitable for adjudication. These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process. Justiciable questions and political questions lie at opposing ends of a jurisdiction spectrum.

.....

[T]he political nature of a matter raises two related dilemmas for courts. The first is the dilemma of institutional capacity. Courts are designed to make pronouncements of law. Arguably, they accomplish this goal more effectively and efficiently than any other institution could. Where the heart of a dispute is political rather than legal, however, courts may have no particular advantage over other institutions in their expertise, and may well be less effective and efficient than other branches of government in resolving such controversies, as the judiciary is neither representative of the political spectrum, nor democratically accountable.

22 A challenge to a particular law or particular application of such a law is an archetypal feature of *Charter* challenges under s. 7 and s. 15. As observed in *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.), at p. 545:

In considering its appropriate role the Court must determine whether the question is purely political in nature, and should therefore be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.

23 The Supreme Court discussed the difference between a political issue and a legal issue in *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, [2011] 3 S.C.R. 134 (S.C.C.), and *Chaoulli c. Québec (Procureur général)*, 2005 SCC 35, [2005] 1 S.C.R. 791 (S.C.C.). In both cases, the Attorneys General argued that the subject matter of the *Charter* challenge was immune from scrutiny, and the Supreme Court disagreed. Both cases are distinguishable.

24 In *PHS Community Services Society v. Canada (Attorney General)*, the Court observed, at para. 105:

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

[Emphasis added]

25 In *Chaoulli c. Québec (Procureur général)*, 2005 SCC 35, [2005] 1 S.C.R. 791 (S.C.C.), the applicant challenged a Quebec law that prohibited private health insurance for services that were available in the public sector. At para. 107, McLachlin C.J. and Major J. said:

While the decision about the type of health care system Quebec should adopt falls to the legislature of the province, the resulting legislation, like *all laws*, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*.

[Emphasis added]

26 Binnie and LeBel JJ. (dissenting on the merits in *Chaoulli*) also rejected the argument of the Attorneys General of Canada and Quebec that the claims advanced by the appellant were inherently political and therefore not

properly justiciable by the courts. They pointed, at para. 183, to s. 52 of the *Constitution Act, 1982*, which "affirms the constitutional power and *obligation* of courts to declare laws of no force or effect to the extent of their inconsistency with the Constitution" (emphasis in original).

27 In this case, unlike in *PHS Community Services Society* (where a specific state action was challenged) and *Chaoulli* (where a specific law was challenged) there is no sufficient legal component to engage the decision-making capacity of the courts.

28 In *Chaoulli*, the Supreme Court found that the legislative prohibition against private insurance contained in the *Hospital Insurance Act*, R.S.Q. c. A-29, engaged the appellants' rights to security of the person and was arbitrary in that no link was established to tie the need for the prohibition to the goal of maintaining quality public health care. That kind of analysis, a comparison between the legislative means and purpose, is impossible in this case.

29 This is not to say that constitutional violations caused by a network of government programs can never be addressed, particularly when the issue may otherwise be evasive of review.

30 There are several aspects of this application, however, that make it unsuitable for *Charter* scrutiny. Here the appellants assert that s. 7 confers a general freestanding right to adequate housing. This is a doubtful proposition in light of *Chaoulli*, where McLachlin C.J. and Major J. made the following unequivocal statement, at para. 104:

The *Charter* does not confer a freestanding right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*.

31 Further, as this Court noted in *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 (Ont. C.A.), leave to appeal denied, (2007), [2006] S.C.C.A. No. 441 (S.C.C.), at para. 225:

[I]n *Gosselin*, *supra*, the Supreme Court of Canada rejected an argument that s. 7 of the *Charter* requires the provision of a minimum level of social assistance adequate to meet basic needs.

32 Moreover, the diffuse and broad nature of the claims here does not permit an analysis under s. 1 of the *Charter*. As indicated in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), in the event of a violation of a right guaranteed by the *Charter*, the legislation will nonetheless be sustained if the objective of the legislation is pressing and substantial, the rights violation is rationally connected to the purpose of the legislation, the violation minimally impairs the guaranteed right, and the impact of the infringement of the right does not outweigh the value of the legislative object. Here, in the absence of any impugned law there is no basis to make that comparison.

33 Finally, there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a "court-like" function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy.

34 Were the court to confine its remedy to a bare declaration that a government was required to develop a housing policy, that would be so devoid of content as to be effectively meaningless. To embark, as asked, on judicial supervision of the adequacy of housing policy developed by Canada and Ontario takes the court well beyond the limits of its institutional capacity. All agree that housing policy is enormously complex. It is influenced by matters as diverse as zoning bylaws, interest rates, procedures governing landlord and tenant matters, income tax treatment of rental housing, not to mention the involvement of the private sector and the state of the economy generally. Nor can housing policy be treated monolithically. The needs of aboriginal communities, northern regions, and urban centres are all different, across the country.

35 I add that complexity alone, sensitivity of political issues, the potential for significant ramifications flowing from a court decision and a preference that legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability: see, for example, *Chaoulli*, at para. 107. Again, the issue is one of institutional competence. The question is whether there is a sufficient legal component to anchor the analysis.

36 The application here is demonstrably unsuitable for adjudication, and the motion judge was correct to dismiss it on the basis that it was not justiciable.

37 Given that this application was properly dismissed on the ground that it did not raise justiciable issues, it is not necessary to explore the limits, in a justiciable context, of the extent to which positive obligations may be imposed on government to remedy violations of the *Charter*, a door left slightly ajar in *Gosselin c. Québec (Procureur général)*, 2002 SCC 84, [2002] 4 S.C.R. 429 (S.C.C.). Nor is it necessary to determine whether homelessness can be an analogous ground of discrimination under s. 15 of the *Charter* in some contexts.

38 The appellants also argue that the motion judge ought to have refused to hear the respondents' motions to dismiss because the governments did not move to dismiss the application until two years after the application was issued on May 26, 2010, and after the appellants had compiled a voluminous record which was served on the respondents on November 22, 2012. Six months later the respondents advised the appellants that they had reviewed the record, sought instructions, and consulted each other and would respond with motions to strike. The motion judge found that it was not reasonable to require that the motion to strike be brought before the record was served, and that only then would the respondents have an appreciation of the case to meet. Given the size of the record and the significance of the issues raised, the motion judge did not consider that six months was so long as to justify refusal to hear the motions to strike. I see no reason to interfere with this discretionary decision.

39 I would add that although to issue of leave to amend was raised during argument, the appellants did not propose any specific amendment and I cannot conceive of any amendment that would cure the absence of a justiciable issue. None of the parties or interveners thought it necessary to refer to any part of the evidentiary record, and I would not speculate that there is anything in that record which might alter these conclusions. The appeal is therefore dismissed, without costs by agreement of the parties.

**G.R. Strathy J.A.:**

I agree

**K. Feldman J.A. (dissenting):**

### Overview

40 I have had the benefit of reading the reasons of Pardu J.A., but I do not agree with her conclusion that the appeal should be dismissed.

41 The appellants seek constitutional remedies under ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* against the governments of Ontario and Canada for the myriad of problems related to homelessness and inadequate housing in this province and this country. The application does not attack any specific piece or pieces of legislation. Rather, the appellants seek remedies for what they say is the unconstitutional effect of the governments' withdrawal of programs and failure to legislate.

42 The application for constitutional relief was struck out at the pleadings stage before the court had the opportunity to consider the 16-volume evidentiary record filed by the appellants.

43 In my view, it was an error of law to strike this application at the pleadings stage. The application raises significant issues of public importance. The appellants' approach to *Charter* claims is admittedly novel. But given the jurisprudential journey of the *Charter's* development to date, it is neither plain nor obvious that the appellants' claims are doomed to fail.

44 I would allow the appeal, and allow the application to proceed.

## Analysis

### (1) *The Rule in Hunt v. T & N plc*

45 The respondents moved to strike the appellants' application under rule 14.09 and rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, on the ground that the application disclosed no reasonable cause of action. The leading case on the test for striking a claim as disclosing no reasonable cause of action is the Supreme Court of Canada's decision in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.).

46 Justice Wilson summarized her holding in *Hunt*, at p. 980:

[A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect...should the relevant portions of a plaintiff's statement of claim be struck out....

47 Justice Wilson emphasized that novelty alone is not a reason to strike a claim. Rather, the claim must be "certain to fail" because, as pleaded, it contains a "radical defect". Chief Justice McLachlin recently discussed these principles in *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.). On the issue of the proper approach to novel claims, she stated, at para. 21:

Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson* [1932] A.C. 562. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

48 In this passage, the Chief Justice reminds us that some very significant innovations in the law have developed from motions to strike or similar preliminary motions, including the general duty of care owed to one's neighbour, which came from the House of Lords' decision on such a motion in *McAlister (Donoghue) v. Stevenson* [[1932] A.C. 562 (U.K. H.L.)].

49 To summarize, a claim should not be struck out at the pleadings stage unless it has no reasonable prospect of success, taking the facts pleaded to be true. The novelty of the claim alone is not a reason to strike the claim. Rather, there must be a radical defect in the claim that will be fatal to its success. The purpose of a motion to strike is to weed out, at an early stage, claims that have no reasonable chance of success, either because the legal issue raised has been conclusively decided against the claim or because the facts, taken at their highest, cannot support the claim. The motion to strike should not be used, however, as a tool to frustrate potential developments in the law.

**(2) *The appellants' Charter claims***

50 In the amended notice of application, the appellants set out the basis for their *Charter* claims, at paras. 34-38:

34. The harm caused by Canada's and Ontario's failure to implement effective strategies to address homelessness and inadequate housing deprives the applicants and others similarly affected of life, liberty and security of the person in violation of section 7 of the *Charter*. This deprivation is not in accordance with the principles of fundamental justice. The deprivation is arbitrary, disproportionate to any government interest, fundamentally unfair to the applicants, and contrary to international human rights norms. Further, Canada's and Ontario's failure to effectively address homelessness and inadequate housing violate s. 15 of the *Charter* by creating and sustaining conditions of inequality.

35. Those who are homeless and inadequately housed are subject to widespread discriminatory prejudice and stereotype and have been historically disadvantaged in Canadian society. Their rights, needs and interests have been frequently ignored or overlooked by governments. People who are homeless and inadequately housed are perhaps the most marginalized, disempowered, precarious and vulnerable group in Canadian society.

36. Canada's and Ontario's failure to adopt effective strategies to address homelessness and inadequate housing, result in the further marginalization, exclusion and deprivation of this group. Canada and Ontario have failed to take into account the circumstances of people who are homeless and have created additional burdens, disadvantage, prejudice and stereotypes, in violation of section 15 of the *Charter*.

37. Furthermore the persons affected by homelessness and the lack of adequate housing are disproportionately members of other groups protected from discrimination under s. 15(1) including: women, single mothers, persons with mental and physical disabilities, Aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance. Canada's and Ontario's failure to implement effective strategies to address homelessness and inadequate housing therefore constitutes adverse effects discrimination against these groups under s. 15(1).

38. There is no pressing and substantial objective served by these violations and the violations are not demonstrably justifiable under s. 1 of the *Charter*.

**(3) *The appellants' s. 7 claim should not be struck***

51 In a lengthy discussion, the motion judge defines the parameters of s. 7 of the *Charter*, as if those parameters were settled law. He concludes that the appellants' claim does not fit within those settled parameters, and as a result, it is plain and obvious that their claim cannot succeed.

52 In my view, there are four problems with the motion judge's approach: 1) he misunderstood the appellants' s. 7 claim and stated it in an overly broad manner; 2) he erred in stating that the s. 7 jurisprudence on whether positive obligations can be imposed on governments to address homelessness is settled; 3) he erred in purporting to define the law in a critical area of Canadian jurisprudence on a motion to strike; and 4) most importantly, he erred in concluding that the issue of whether the appellants had a potential claim under s. 7 could be decided without considering the full evidentiary record.

53 The motion judge first erred in misconstruing the appellants' claim. At para. 34, the motion judge articulated the claim as follows:

The position taken by the applicants asserts that the *Charter* includes a positive obligation, placed on Canada and Ontario, to see that the rights included in the *Charter* are provided for. In such circumstances, the question of whether there is an accompanying breach of fundamental justice would not arise. In this approach, the only issue would be whether the rights to "life, liberty and security of the person" are being breached. If they are, the state would be obliged to act. There is a broad array of cases which say that this is not so.

54 The motion judge understood the appellants to be making two assertions. The first was that the governments have positive obligations under s. 7. The second was that in order to succeed, the appellants need not prove a breach of a principle of fundamental justice. The appellants did make the first assertion, based on the Supreme Court of Canada's decision in *Gosselin c. Québec (Procureur général)*, 2002 SCC 84, [2002] 4 S.C.R. 429 (S.C.C.), and based on the record they sought to put before a trial court. However, they did not make the second assertion, as can be seen clearly from para. 34 of the amended notice of application, quoted above.<sup>2</sup>

55 Following a lengthy discussion of some case law which both preceded and followed *Gosselin*, the motion judge concluded that the governments have no positive obligation under s. 7 to sustain life, liberty or security of the person and therefore there can be no deprivation under the first step of the s. 7 analysis. He then discussed the appellants' assertion that the majority judgment in *Gosselin* left open the possibility that, in appropriate circumstances in a future case, a court could recognize such an obligation, referring to the following significant passages from the majority decision at paras. 82 and 83:

[82] *One day s. 7 may be interpreted to include positive obligations.* To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": see *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe [v. British Columbia (Human Rights Commission)]*, 2000 SCC 44, [2000] 2 S.C.R. 307...at para. 188 are apposite:

We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.

*The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.*

[83] I conclude that they do not. With due respect for the views of my colleague Arbour J., *I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.* However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.

[Emphasis added.]

56 While recognizing that the majority in *Gosselin* did not foreclose the possibility that, in "special circumstances" in a future case, a court could find that s. 7 imposes positive obligations on government, the motion judge nevertheless concluded the opposite, at para. 59:

The law is established. As it presently stands, there can be no positive obligation on Canada and Ontario to act to put in place programs that are directed to overcoming concerns for the "life, liberty and security of the person". In this context, there is no fundamental right to affordable, adequate and accessible housing provided through s. 7 of the *Charter*.

57 He also stated that the appellants had not pled any "special circumstances", as the majority in *Gosselin* referred to. He then, at para. 67, addressed and distinguished each of the cases that the appellants or the interveners submitted did recognize "positive obligations on the state to act to protect rights [the *Charter*] provides for."

58 For example, the motion judge quoted *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (S.C.C.), in which the Supreme Court stated at para. 64:

It has not yet been necessary to decide in other contexts whether the *Charter* might impose positive obligations on the legislatures or on Parliament such that a failure to legislate could be challenged under the *Charter*. Nonetheless, the possibility has been considered and left open in some cases. For example, in *McKinney [v. University of Guelph]*, [1990] 3 S.C.R. 229, Wilson J. made a comment in *obiter* that "[i]t is not self-evident to me that government could not be found to be in breach of the *Charter* for failing to act" (p. 412). In *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1038, L'Heureux-Dubé J., speaking for the majority and relying on comments made by Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, suggested that in some situations, the *Charter* might impose affirmative duties on the government to take positive action. Finally, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, La Forest J., speaking for the Court, left open the question whether the *Charter* might oblige the state to take positive actions (at para. 73). However, it is neither necessary nor appropriate to consider that broad issue in this case.

59 The motion judge then responded, at para. 71:

*Vriend* and each of the cases referred to [in the quotation from *Vriend* reproduced above] ... pre-date *Gosselin*. Each of them did what it did. They acknowledged that it may be that special or unforeseen circumstances may cause the application of s. 15(1) or, by analogy, s. 7 of the *Charter* to evolve. That possibility does not change the law as it is. What is suggested here has been dealt with before. There is no positive obligation raised by the *Charter* that requires Canada and Ontario to provide for affordable, adequate, accessible housing.

60 The motion judge determined that other Supreme Court and appellate cases, including *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.), *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, [2011] 3 S.C.R. 134 (S.C.C.), and *Victoria (City) v. Adams*, 2009 BCCA 563, 313 D.L.R. (4th) 29 (B.C. C.A.), where the court considered how the *Charter* may include positive obligations to act, nevertheless have no application to this proceeding.

61 Finally, under his discussion of s. 7, the motion judge rejected the submission of the intervener, the David Asper Centre for Constitutional Rights, that the pleaded *Charter* remedies were available in this case, including the possible application of the court's supervisory jurisdiction, as discussed in *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.). He rejected that submission on the basis of his conclusion that the application necessarily requires a complex review of housing policy issues that the court is not equipped to supervise.

62 In my view, the motion judge erred by concluding that it is settled law that the government can have no positive obligation under s. 7 to address homelessness. To the contrary, *Gosselin* specifically leaves the issue of positive obligations under s. 7 open for another day.

63 Further, because a claim can only be struck where the law is clear that the claim cannot succeed, the court should not conduct a lengthy analysis of the case law as it does when making decisions after a trial, a summary judgment hearing, or an appeal, and then draw conclusions that state the law in a new way: see *Spasic Estate v. Imperial Tobacco Ltd.* (2000), 49 O.R. (3d) 699 (Ont. C.A.), leave to appeal refused, (2001), [2000] S.C.C.A. No. 547 (S.C.C.), at paras. 22-23.

64 However, in my view, the motion judge's larger error was to strike the claim without allowing a court to review the evidentiary record assembled by the appellants. In *Gosselin*, the Supreme Court stated that a positive obligation on the

part of government to sustain life, liberty or security of the person may be established in "special circumstances". The motion judge stated that no "special circumstances" were pleaded or alleged.

65 Whether a party characterizes the circumstances as "special" is not determinative. What matters is whether the court considers them sufficiently special. That can be determined only after a consideration of the full record, as well as the response from the governments. For example, in *Gosselin* (see para. 83 quoted above), the court stated that there was not enough evidence to support the proposed interpretation of s. 7.

66 In this case, the appellants assembled a 16-volume record, totalling nearly 10,000 pages, which contains 19 affidavits, 13 of which were from experts. It is premature and not within the intent of *Gosselin* to decide there are no "special circumstances" in such a serious case, at the pleadings stage.

67 One of the concerns raised by the motion judge was that, if *Gosselin* is always read as leaving the door open for the imposition of positive obligations on governments under s. 7 in the future, then no case pleading positive obligations could ever be struck out at the pleadings stage. In my view, that concern is misplaced. There may well be cases where the facts pleaded raise an issue that has been clearly decided in another case, or where the facts as pleaded do not raise a *Charter* issue, although *Charter* relief is requested.

68 But this is not one of those cases. This application is a serious attempt made on behalf of a broad range of disadvantaged individuals and groups. It seeks to have the court address whether government action and inaction that results in homelessness and inadequate housing is subject to *Charter* scrutiny and justifies a *Charter* remedy. I will discuss this issue further at the conclusion of these reasons.

#### **(4) The appellants' s. 15 claim should not be struck**

69 The appellants' s. 15 claim, while perhaps somewhat weaker than their s. 7 claim, should not have been struck at this early stage either. Importantly, the values underlying s. 15 can inform the s. 7 analysis. In their amended notice of application, at para. 37, the appellants observe that those affected by homelessness and inadequate housing are often disproportionately members of other groups protected from discrimination under s. 15, such as women, persons with disabilities, Aboriginal persons, and seniors. In *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.), at para. 115, L'Heureux-Dubé J. (with whom Gonthier and McLachlin JJ. agreed), concurring in the result, stated:

[I]n considering the s. 7 rights at issue, and the principles of fundamental justice that apply in this situation, it is important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.

70 In his discussion of whether the claim under s. 15 should be struck as disclosing no reasonable cause of action, the motion judge again conducted a lengthy and detailed discussion of the merits of the claim, concluding in a number of places, that it is not the impugned government conduct that causes homelessness or the problems faced by the homeless. The motion judge stated at para. 107 that "the 'burden' of being without adequate housing is not caused by these programs. It arises from other wider characteristics of our society and approach to economic issues."

71 This is the very issue that is intended to be addressed by an application judge on a full record, including the responses by the respondent governments. It is only based on such a record that reliable conclusions regarding causation can be drawn. With evidence, it may be that, even if the motion judge's statement is partly true, the governments' conduct is a contributing factor to the burden of being without adequate housing. It is not the role of a motion judge on a motion to strike to make factual findings that are not in the pleadings.

72 The fact that the motion judge found it necessary to make such factual findings in order to determine the motion further demonstrates that the motion to strike is ill-conceived. Such findings are appropriate only where a full record is placed before the court.

73 Finally, in the s. 15 context, the motion judge made a number of significant "observations", the most important of which was that homelessness and being without adequate housing are not analogous grounds of discrimination under s. 15 of the *Charter*. He stated that the lack of adequate housing is not a shared quality, characteristic or trait.

74 A court could very well decide this issue after considering the full evidentiary record and argument. It is an important issue. But it is not open for decision when the application is not allowed to proceed.

#### **(5) Justiciability**

75 The motion judge also added that the issues raised in the application are not justiciable. It is for this reason that my colleague would dismiss the appeal.

76 I would not strike this application at the pleadings stage on the basis that the claims raised are not justiciable.

77 In *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Carswell, 2012), at pp. 242-44, Dean Lorne Sossin addresses the justiciability issue in the context of disputes involving social and economic rights. Citing the Supreme Court of Canada's decision in *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), he states at p. 242:

Canadian Courts have shown marked reluctance to invest rights and guarantees protected under the *Charter* with social and economic content. However, they have shown equal hesitation in foreclosing this possibility. The Supreme Court of Canada, for example, has expressly refrained from stating whether section 7 of the *Charter*, guaranteeing a right to security of the person, protects "economic rights fundamental to human life or survival." [Footnote omitted.]

78 Dean Sossin outlines opposing views on whether, if claims for social and economic rights under the *Charter* were justiciable, courts would be deciding "political" or "policy" matters that should be left to the legislature. In response, he points out that courts may be accused of doing that very thing when they conduct the required analysis under s. 1 of the *Charter*.

79 He then concludes that the justiciability of social and economic rights under the *Charter* is an open question:

It is striking that, despite the rich jurisprudence which has developed under the *Charter*, such uncertainty remains with respect to a question of fundamental importance to the scope of judicial review of government action. For the moment, the justiciability of social and economic rights under the *Charter* remains an open question. [Footnote omitted.]

80 In his chapter "Taking Competence Seriously" in Margot Young et al., eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007), at p. 273, Professor David Wiseman argues that courts are competent to adjudicate "poverty-related standards", and points to a number of cases outside the *Charter* context where courts have been prepared to do just that.<sup>3</sup> He also refers to the dissenting reasons of Arbour J. and L'Heureux-Dubé J. in *Gosselin*, at paras. 141-42 and paras. 330-35, where they acknowledged that, while the court may not be able to determine the level of assistance that government should provide, that does not mean it cannot determine whether there is a constitutional obligation on government to provide some level of assistance.

81 In *Gosselin*, the Supreme Court did not hold that claims for social and economic rights under the *Charter* were non-justiciable. As a result, courts should be extremely cautious before foreclosing any enforcement of these rights. In my view, to strike a serious *Charter* application at the pleadings stage on the basis of justiciability is therefore inappropriate.

82 My colleague points to a number of concerns with the format of this application: in particular, unlike in many other *Charter* cases, the appellants have attacked no particular law. Therefore, there is no direct way to apply the s. 1 analysis from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.).

83 I agree that the broad approach taken in this application is novel and a number of procedural as well as conceptual difficulties could arise when the court addresses whether the *Charter* has been infringed, and if appropriate, determines and applies a reasonable and workable remedy.

84 However, there are two answers to these concerns. First, as Wilson J. observed in *Hunt*, at p. 980, and McLachlin C.J. observed in *Imperial Tobacco*, at para. 21, the novelty of a claim is not a bar to allowing it to proceed. Although the development of *Charter* jurisprudence has to date followed a fairly consistent procedural path, and has involved challenges to particular laws, we are still in the early stages of that development. There is no reason to believe that that procedural approach is fixed in stone. This application asks the court to view *Charter* claims through a different procedural lens. That novelty is not a reason to strike it out.

85 Second, this court had cogent and helpful submissions from the intervener, the David Asper Center for Constitutional Rights, on the ability and authority of the court to grant one or more of the remedies requested in the application. Although the amended notice of application seeks, as one remedy, an order requiring the governments to implement strategies to reduce homelessness and inadequate housing and to consult with affected groups, under court supervision, the court need not make such a wide-ranging order if it finds a breach of the *Charter*. It may limit itself to granting declaratory relief only, as was done in *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, [2010] 1 S.C.R. 44 (S.C.C.). Four such declarations are requested in the amended notice of application.

### Conclusion

86 In my view, it was an error of law to strike this claim at the pleadings stage. The claim does not meet the test under rule 21.01(1)(b): while the claim is novel, both conceptually and substantively, it cannot be said, based on the state of the relevant jurisprudence to date, that the claim has no reasonable prospect of success. In *Gosselin*, the Supreme Court of Canada left open the issue of both the existence and the extent of positive obligations under the *Charter* to give effect to social and economic rights. It is therefore premature to decide at the pleadings stage that the issues are not justiciable.

87 Chief Justice McLachlin described the purpose of motions to strike as follows in *Imperial Tobacco*, at para. 19:

The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

88 This application is simply not the type of "hopeless" claim for which Rule 21 was intended. It has been brought by counsel on behalf of a large, marginalized, vulnerable and disadvantaged group who face profound barriers to access to justice. It raises issues that are basic to their life and well-being. It is supported by a number of credible intervening institutions with considerable expertise in *Charter* jurisprudence and analysis. The appellants put together a significant record to support their application. That record should be put before the court.

89 I would allow the appeal.

*Appeal dismissed.*

### Footnotes

1 *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 (S.C.C.), at para. 35.

- 2 Later on in his reasons, at para. 62, the motion judge recognized that the appellants had pleaded a breach of the principles of fundamental justice.
- 3 For example, in *Marshall v. Canada*, [1999] 3 S.C.R. 456 (S.C.C.), at paras. 58-59, the Supreme Court interpreted a treaty as providing the right to trade for "necessaries" or a "moderate livelihood", which "includes such basics as 'food, clothing and housing, supplemented by a few amenities', but not the accumulation of wealth.... It addresses day-to-day needs" (citation omitted). In *Stouffville Assessment Commissioner v. Mennonite Home Assn.* (1972), [1973] S.C.R. 189 (S.C.C.), the Supreme Court applied a statute that extended a benefit to "an incorporated charitable institution organized for the relief of the poor", and in so doing, considered what constitutes "relief of the poor." See *Assessment Act*, R.S.O. 1990, c. A.31, s. 3(1)(12)(iii). See also *Criminal Code*, R.S.C. 1985, c. C-46, s. 215, which creates the offence of failing to provide the "necessaries of life". In applying this section, courts have to decide what constitutes the "necessaries of life." See Young, at p. 273.

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2008 ONCA 587  
Ontario Court of Appeal

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 CarswellOnt 4811, 2008 ONCA 587, [2008] O.J. No. 3164, 168 A.C.W.S. (3d) 698, 240  
O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 92 O.R. (3d) 513

**IN THE MATTER OF THE COMPANIES' CREDITORS  
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING  
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD  
ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS  
V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE  
& MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND  
6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-  
PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO  
(Applicants / Respondents in Appeal) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II  
CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD  
ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS  
XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA  
INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO  
(Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA  
INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE  
MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC.,  
DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS  
R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED,  
PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE  
INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTEM INC.,  
INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE  
MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC.,  
CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA  
PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008

Judgment: August 18, 2008 \*

Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

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Peter F.C. Howard, Samaneh Hosseini for Bank of America N.A., Citibank N.A., Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity, Deutsche Bank AG, HSBC Bank Canada, HSBC

Bank USA, National Association, Merrill Lynch International, Merrill Lynch Capital Services, Inc., Swiss Re Financial Products Corporation, UBS AG

Kenneth T. Rosenberg, Lily Harmer, Max Starnino for Jura Energy Corporation, Redcorp Ventures Ltd.

Craig J. Hill, Sam P. Rappos for Monitors (ABCP Appeals)

Jeffrey C. Carhart, Joseph Marin for Ad Hoc Committee, Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

Mario J. Forte for Caisse de Dépôt et Placement du Québec

John B. Laskin for National Bank Financial Inc., National Bank of Canada

Thomas McRae, Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

Howard Shapray, Q.C., Stephen Fitterman for Ivanhoe Mines Ltd.

Kevin P. McElcheran, Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia, T.D. Bank

Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada, BNY Trust Company of Canada, as Indenture Trustees

Usman Sheikh for Coventree Capital Inc.

Allan Sternberg, Sam R. Sasso for Brookfield Asset Management and Partners Ltd., Hy Bloom Inc., Cardacian Mortgage Services Inc.

Neil C. Saxe for Dominion Bond Rating Service

James A. Woods, Sebastien Richemont, Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc.,

Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc., Jazz Air LP

Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Subject: Insolvency; Civil Practice and Procedure

APPEAL by opponents of creditor-initiated plan from judgment reported at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]), granting application for approval of plan.

***R.A. Blair J.A.:***

## **A. Introduction**

1 In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

2 By agreement amongst the major Canadian participants, the \$32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

3 Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement*

*Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

### ***Leave to Appeal***

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and — given the expedited time-table — the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), are met. I would grant leave to appeal.

### ***Appeal***

6 For the reasons that follow, however, I would dismiss the appeal.

## **B. Facts**

### ***The Parties***

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP — in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants — slightly over \$1 billion — represent only a small fraction of the more than \$32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

### ***The ABCP Market***

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment — usually 30 to 90 days — typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over \$116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates

to approximately \$32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

### *The Liquidity Crisis*

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes — partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

### *The Montreal Protocol*

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze — the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement — known as the Montréal Protocol — the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the \$32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

### ***The Plan***

#### *a) Plan Overview*

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper — which has been frozen and therefore effectively worthless for many months — into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than \$1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the \$1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

#### *b) The Releases*

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants — in Mr. Crawford's words, "virtually all participants in the Canadian ABCP

market" — from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

- a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
- b) Sponsors — who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information — give up their existing contracts;
- c) The Canadian banks provide below-cost financing for the margin funding facility and,
- d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

### ***The CCAA Proceedings to Date***

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25<sup>th</sup>. The vote was overwhelmingly in support of the Plan — 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan — 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval — a majority of creditors representing two-thirds in value of the claims — required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" — an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing — this time involving the amended Plan (with the fraud carve-out) — was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

### C. Law and Analysis

39 There are two principal questions for determination on this appeal:

- 1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
- 2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

#### *(1) Legal Authority for the Releases*

40 The standard of review on this first issue — whether, as a matter of law, a CCAA plan may contain third-party releases — is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.<sup>1</sup> The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

- a) on a proper interpretation, the CCAA does not permit such releases;
- b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
- c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;
- d) the releases are invalid under Quebec rules of public order; and because
- e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

#### *Interpretation, "Gap Filling" and Inherent Jurisdiction*

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed

restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on *all* creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"<sup>2</sup> and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally — and in the insolvency context particularly — that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes — particularly those like the CCAA that are skeletal in nature — is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context,

in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA — as its title affirms — is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary — as the then Secretary of State noted in introducing the Bill on First Reading — "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), per Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan, supra*, at pp. 306-307:

... [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".<sup>3</sup> Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.* [Emphasis added.]

#### *Application of the Principles of Interpretation*

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions

are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore — as the application judge found — in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.

In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

### The Statutory Wording

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

- a) the skeletal nature of the CCAA;
- b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
- c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

59 Sections 4 and 6 of the CCAA state:

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of

the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

### Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces*, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.) at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).

64 *T&N Ltd., Re, supra*, is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies

applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA — including the concepts of compromise or arrangement.<sup>4</sup>

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.<sup>5</sup> Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.* [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

### The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes<sup>6</sup> and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

### The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

- a) The parties to be released are necessary and essential to the restructuring of the debtor;
- b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it;*
- c) The Plan cannot succeed without the releases;
- d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;* and
- e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then — as was the case in *T&N* — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

[76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.

[77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

#### *The Jurisprudence*

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by

(2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

[It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Canadian Airlines Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Canadian Airlines Corp., Re* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*,<sup>7</sup> of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud, supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines Ltd.*, Tysoe J. made the following comment at para. 24:

[The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to

certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal Airlines Ltd.* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian — at a contractual level — may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank, Canada* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process — in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank, Canada* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little

factual similarity in *NBD Bank, Canada* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank, Canada* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release — as is the situation here. Thus, *NBD Bank, Canada* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

[Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]

See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Stelco Inc., Re* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*"). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

In [*Stelco I*] — the classification case — the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... [*H*]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process. [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants — particularly those represented by Mr. Woods — rely heavily upon the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud, supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 — English translation):

[42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.

.....

[54] The Act offers the respondent a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

.....

[58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act — an awful mess — and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature — they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company — rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself ...* [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg Inc.*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg Inc.* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases — as I have concluded it does — the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg Inc.* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises

and arrangements. Had the majority in *Steinberg Inc.* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

### *The 1997 Amendments*

96 *Steinberg Inc.* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

#### **Exception**

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

#### **Powers of court**

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

#### **Resignation or removal of directors**

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted:<sup>8</sup>

Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes it does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. A similar

amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (C.S. Que.) at paras. 44-46.

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

#### *The Deprivation of Proprietary Rights*

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights — including the right to bring an action — in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4<sup>th</sup> ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2<sup>nd</sup> ed., *supra*, at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4<sup>th</sup> ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

#### *The Division of Powers and Paramountcy*

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action — normally a matter of provincial concern — or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs.

To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

*Conclusion With Respect to Legal Authority*

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

**(2) The Plan is "Fair and Reasonable"**

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties — including leading Canadian financial institutions — that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings — the claims here all being untested allegations of fraud — and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

- a) The parties to be released are necessary and essential to the restructuring of the debtor;
- b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
- c) The Plan cannot succeed without the releases;
- d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
- e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
- f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
- g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than \$32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial

system in Canada. He was required to consider and balance the interests of *all* Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

#### **D. Disposition**

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

*J.I. Laskin J.A.:*

I agree.

*E.A. Cronk J.A.:*

I agree.

#### **Schedule A — Conduits**

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

#### **Schedule B — Applicants**

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

#### **Schedule A — Counsel**

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee

2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.

3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC

Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merrill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG

4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.

5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)

6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

7) Mario J. Forte for Caisse de Dépôt et Placement du Québec

8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada

9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.

11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank

12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

13) Usman Sheikh for Coventree Capital Inc.

14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.

15) Neil C. Saxe for Dominion Bond Rating Service

16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsyes Inc., New Gold Inc. and Jazz Air LP

17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

*Application granted; appeal dismissed.*

#### Footnotes

\* Leave to appeal refused at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

- 2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).
- 3 Citing Gibbs J.A. in *Chef Ready Foods, supra*, at pp.319-320.
- 4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.); see *House of Commons Debates (Hansard), supra*.
- 5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 182.
- 6 A majority in number representing two-thirds in value of the creditors (s. 6)
- 7 *Steinberg Inc.* was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] R.J.Q. 1684 (C.A. Que.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (C.A. Que.)
- 8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

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**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** Canadian Blood Services / Société canadienne du sang v. Freeman | 2010 ONSC 4885, 2010 CarswellOnt 10810, 217 C.R.R. (2d) 153, 204 A.C.W.S. (3d) 210, [2010] O.J. No. 3811 | (Ont. S.C.J., Sep 8, 2010)

1997 CarswellBC 1939  
Supreme Court of Canada

Eldridge v. British Columbia (Attorney General)

1997 CarswellBC 1939, 1997 CarswellBC 1940, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86,  
[1998] 1 W.W.R. 50, 151 D.L.R. (4th) 577, 155 W.A.C. 81, 218 N.R. 161, 38 B.C.L.R. (3d)  
1, 3 B.H.R.C. 137, 46 C.R.R. (2d) 189, 74 A.C.W.S. (3d) 41, 96 B.C.A.C. 81, J.E. 97-1910

**Robin Susan Eldridge, John Henry Warren and Linda Jane Warren,  
Appellants v. The Attorney General of British Columbia and the Medical  
Services Commission, Respondents and The Attorney General of Canada,  
the Attorney General for Ontario, the Attorney General of Manitoba, the  
Attorney General of Newfoundland, the Women's Legal Education and  
Action Fund, the Disabled Women's Network Canada, the charter Committee  
on Poverty Issues, the Canadian Association of the Deaf, the Canadian  
Hearing Society and the Council of Canadians with Disabilities, Interveners**

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

Heard: April 24, 1997  
Judgment: October 9, 1997  
Docket: 24896

Proceedings: reversing (1995), 7 B.C.L.R. (3d) 156 (C.A.); affirming (1992), 75 B.C.L.R. (2d) 68 (S.C.)

Counsel: *Lindsay M. Lyster* and *Andrea L. Zwack*, for the appellants.

*Harvey M. Groberman* and *Lisa J. Mrozinski*, for the respondents.

*Judith Bowers, Q.C.*, and *Simon Fothergill*, for the intervener the Attorney General of Canada.

*Janet E. Minor* and *Richard J.K. Stewart*, for the intervener the Attorney General for Ontario.

*Deborah L. Carlson*, for the intervener the Attorney General of Manitoba.

*B. Gale Welsh, Q.C.*, for the intervener the Attorney General of Newfoundland.

*Jennifer Scott, Katherine Hardie* and *Judy Parrack*, for the interveners the Women's Legal Education and Action Fund and the Disabled Women's Network Canada.

*Martha Jackman* and *Arne Peltz*, for the intervener the Charter Committee on Poverty Issues.

*David Baker* and *Patricia Bregman*, for the interveners the Canadian Association of the Deaf, the Canadian Hearing Society and the Council of Canadians with Disabilities.

Subject: Constitutional; Public; Human Rights

APPEAL from decision of British Columbia Court of Appeal, reported at (1995), 7 B.C.L.R. (3d) 156, 125 D.L.R. (4th) 323, 59 B.C.A.C. 254, 98 W.A.C. 254 (C.A.), affirming decision of British Columbia Supreme Court, reported at (1992), 75 B.C.L.R. (2d) 68 (S.C.), dismissing application for declaration that certain sections of *Hospital Insurance Act* (B.C.) and *Medical and Health Care Services Act* (B.C.) violated s. 15(1) of *Canadian Charter of Rights and Freedoms*.

Pourvoi à l'encontre d'un arrêt de la Cour d'appel de la Colombie-Britannique, publié à (1995), 7 B.C.L.R. (3d) 156, 125 D.L.R. (4th) 323, 59 B.C.A.C. 254, 98 W.A.C. 254 (C.A.), confirmant la décision de la Cour suprême de la Colombie-Britannique, publiée à (1992), 75 B.C.L.R. (2d) 68 (C.S.), rejetant une requête visant à obtenir un jugement déclaratoire à l'effet que certains articles de la *Hospital Insurance Act* (B.C.) et de la *Medical and Health Care Services Act* (B.C.) violaient l'art. 15(1) de la *Charte canadienne des droits et libertés*.

**The judgment of the court was delivered by *La Forest J.*:**

1 This appeal raises the question whether a provincial government's failure to provide funding for sign language interpreters for deaf persons when they receive medical services violates s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The appellants assert that, because of the communication barrier that exists between deaf persons and health care providers, they receive a lesser quality of medical services than hearing persons. The failure to pay for interpreters, they contend, infringes their right to equal benefit of the law without discrimination based on physical disability.

**Factual Background**

2 Medical care in British Columbia is delivered through two primary mechanisms. Hospital services are funded by the government through the *Hospital Insurance Act*, R.S.B.C. 1979, c. 180 [now R.S.B.C. 1996, c. 204], which reimburses hospitals for the medically required services they provide to the public. Funding for medically required services delivered by doctors and other health care practitioners is provided by the province's Medical Services Plan, which is established and regulated by the *Medical and Health Care Services Act*, S.B.C. 1992, c. 76 [now known as the *Medicare Protection Act*, R.S.B.C. 1996, c. 286]. Neither of these programs pays for sign language interpretation for the deaf.

3 Until 1990, the Western Institute for the Deaf and Hard of Hearing, a private, non-profit agency, provided free medical interpreting services for deaf persons in the lower mainland of British Columbia. This program was funded entirely from private sources without any contribution from the provincial government. In September 1990, the Institute discontinued the service because it no longer had sufficient funds to pay for it.

4 Prior to cancelling the program, the Institute made two requests of the Ministry of Health for funding. At the time, it had contracts with a number of government departments to provide sign language interpreters in connection with various services. The Institute requested similar funding for the provision of interpreters in the medical setting, suggesting that sign language interpretation be covered as an insured benefit under the Medical Services Plan. The first request was made in 1989 and was declined out of hand. The second request was made in May 1990 after the Institute had decided that it could no longer fund the service. The cost of the proposed program, which would have extended throughout the province, was estimated to be \$ 150,000 per year. The Ministry turned down the request on the basis that it would strain available resources and create a precedent for the funding of similar services for the non-English speaking immigrant community.

5 Each of the appellants was born deaf. Their preferred means of communication is sign language. They contend that the absence of interpreters impairs their ability to communicate with their doctors and other health care providers, and thus increases the risk of misdiagnosis and ineffective treatment. One of the appellants, Robin Eldridge, suffers from a number of medical conditions, including diabetes. She sees a general physician and a specialist a number of times per year. Neither of these doctors knows sign language. She has also been a patient in hospital on several occasions. The hospitals did not provide her with sign language interpreters. Prior to its termination, she used the Institute's free medical interpreting service. Subsequently, she hired an interpreter when she had surgery in hospital. She testified that she would continue to hire interpreters for important medical situations but could not afford to hire one for every visit to the doctor or hospital. She finds visiting her doctors without an interpreter very stressful and confusing since, in her view, she cannot communicate adequately with them. Her specialist testified that he was satisfied with the level of communication when a sign language interpreter was present. In the absence of an interpreter, he explained, he was

unsure about the accuracy of information conveyed by Ms. Eldridge. Communication with her in these circumstances, he stated, was inhibited and frustrating.

6 The other appellants, John and Linda Warren, see their doctor frequently. Although they had planned to hire an interpreter for the birth of their twin daughters, they were unable to procure one in time as the girls were born prematurely. Linda Warren testified that in the absence of an interpreter, the birth process was difficult to understand and frightening. During the birth, the nurse communicated to her through gestures that the heart rate of one of the babies had gone down. After the babies were born, they were immediately taken from her. Other than writing a note stating that they were "fine", no one explained their condition to her.

7 The Warrens' physician, who does not know sign language, testified that communication by written notes is time consuming, impractical and has the potential to result in harm in some circumstances. Adequate communication, she related, is particularly critical for childbirth. If the doctor can communicate with the patient so that the patient is able to help with the delivery, she explained, complications are less likely to occur and the patient is less apt to have a traumatic birth. In her view, writing notes is not effective in these circumstances; an interpreter is necessary for proper communication. At the time of the trial, the Warrens were expecting another child and wished to have an interpreter present at the birth. They stated that they would not be able to afford one for this purpose or for other visits to their doctor.

8 At trial, the appellants adduced expert testimony explaining that many deaf persons are severely limited in their ability to read and write. The average deaf person, one expert related, has a grade three literacy level. Evidence was also led indicating that miscommunication between deaf persons and their doctors may lead to misdiagnosis. It was also noted that in Alberta and Manitoba the provincial government funds interpreting services for the deaf giving the highest priority to medical interpretation.

9 The respondents presented evidence relating to the budgetary process of the Ministry of Health and the structure of the Medical Services Plan. The government, witnesses explained, does not provide any services directly. Rather, it pays for the provision of medical services by the medical and health care practitioners on a fee-for-service basis. The Plan covers most health services; however there are a number of services that are not included or are funded only in part. These include the services of clinical psychologists, occupational therapists, speech therapists, nutritional counsellors and dentists. Moreover, the province does not pay for such medically related expenses as artificial limbs, hearing aids, or wheelchairs and provides only limited funding for prescription drugs.

10 Hospitals in British Columbia are funded through lump sum "global" payments that they are for the most part free to allocate as they see fit. They are rarely ordered by government to provide specific services. In those instances, they are generally required to fund the service out of their global budgets. The government does provide some funding for specific programs, such as heart transplantation, but this is infrequent.

### Judicial History

11 The appellants filed an application in the Supreme Court of British Columbia seeking, *inter alia*, a declaration that the failure to provide sign language interpreters as an insured benefit under the Medical Services Plan violates s. 15(1) of the *Charter*. Tysoe J. dismissed the application ((1992), 75 B.C.L.R. (2d) 68 (B.C. S.C.)), finding that this failure did not infringe s. 15(1). He determined that sign language interpretation is ancillary to medically required services in much the same way as is transportation to a doctor's office. Any disadvantage suffered by the deaf, he concluded, is not the result of the government's failure to provide such services, but is rather the result of a limitation that exists outside the legislation.

12 In Tysoe J.'s view, the *Charter* does not require governments to implement programs to assist disabled persons. If the government provides a benefit, he stated, s. 15(1) requires that it be distributed equally. There is no obligation, however, to provide the benefit in the first place. He thus concluded that while it is desirable that deaf persons have

interpreters for medical procedures and that the cost be borne by society if they cannot afford to pay, s. 15(1) does not demand this result.

13 On appeal to the British Columbia Court of Appeal (1995), 7 B.C.L.R. (3d) 156 (B.C. C.A.), the majority (Hollinrake and Cumming J.J.A.) held that the lack of interpreting services in hospitals is not discriminatory because the *Hospital Insurance Act* does not provide any "benefit of the law" within the meaning of s. 15(1) of the *Charter*. Writing for the majority, Hollinrake J.A. noted that the extent of the services provided by each hospital is subject to its own decision as to how to spend the global grant received from government. The absence of interpreters, he thus found, results not from the legislation but rather from each hospital's budgetary discretion. Because hospitals are not "government" within the meaning of s. 32 of the *Charter*, he concluded, their failure to provide interpretation does not engage s. 15(1).

14 He next determined that the *Medical and Health Care Services Act* did not violate s. 15(1) of the *Charter* because it did not create a distinction between the deaf and hearing populations. The proper approach to the application of adverse effects analysis to benefit-conferring legislation, he held, was to focus on the impact of the legislation on the disadvantaged group. In considering this impact, he opined, a distinction must be drawn between effects attributable to the legislation and those that exist independently of it. In the absence of legislation, deaf people would be required to pay their doctors in addition to translators in order to receive equivalent medical services to hearing persons. The legislation removes the responsibility of both hearing and deaf persons to pay their physicians. The inequality resulting from the fact that the deaf remain responsible for the payment of translators, in his view, exists independently of the legislation. Thus, he concluded that the legislation provided the benefit of free medical services equally to the hearing and deaf populations.

15 Lambert J.A., in contrast, held that the legislation violated s. 15(1). He noted that many deaf patients, including the appellants, have difficulty communicating by writing. As a result, cases will arise where doctors will be unable to discharge their professional obligations without the aid of an interpreter. Because effective communication is an integral part of medical care, he concluded, sign language interpretation should not be considered a merely ancillary service. In his view, it is no answer to say that before the benefit was enacted, deaf persons were at a disadvantage and that this burden has not been increased by the provision of the benefit. The proper question is whether the law confers a benefit to which the disadvantaged group does not have the same access as others. He thus concluded that the *Medical and Health Care Services Act* discriminated against the appellants where they seek to obtain medical services that require, for the discharge of the practitioner's professional obligations, effective communication between the practitioner and the patient, and where effective communication can only be achieved through the provision of translation services.

16 Lambert J.A. found, however, that this infringement was justified under s. 1 of the *Charter*. He noted the *Medical and Health Care Services Act* does not ensure comprehensive health care coverage. It does not provide for a number of products and services that are required by disabled persons, such as artificial limbs, hearing aids and wheelchairs. In the allocation of scarce financial resources, he stated, governments must make choices about spending priorities. In these circumstances, he held, courts should defer to legislative policy and administrative expertise.

17 Leave to appeal to this Court was granted ([1996] 2 S.C.R. vi) and the following constitutional questions were stated:

1. Does the definition of "benefits" in s. 1 of the *Medical and Health Care Services Act*, S.B.C. 1992, c. 76, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to include medical interpreter services for the deaf?
2. If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?
3. Do ss. 3, 5 and 9 of the *Hospital Insurance Act*, R.S.B.C. 1979, c. 180, and the Regulations enacted pursuant to s. 9 of that Act, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to require that hospitals in the Province of British Columbia provide medical interpreter services for the deaf?

4. If the answer to question 3 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

### Issues

18 There are four principal issues to be considered in this appeal. First, it must be determined whether, and in what manner, the *Charter* applies to the decision not to provide sign language interpreters for the deaf as part of the publicly funded scheme for the provision of medical care. Second, the Court must decide whether this decision constitutes a *prima facie* violation of s. 15(1) of the *Charter*. Having found such a violation, it must be determined whether it is saved by s. 1. After concluding that it is not, an appropriate remedy must be crafted.

### Application of the Charter

19 There are two distinct *Charter* "application" issues in this case. The first is to identify the precise source of the alleged s. 15(1) violations. As I will develop later, in my view it is not the impugned legislation that potentially infringes the *Charter*. Rather, it is the actions of particular entities - hospitals and the Medical Services Commission - exercising discretion conferred by that legislation that does so. The second question is whether the *Charter* applies to those entities. In my view, the *Charter* applies to both in so far as they act pursuant to the powers granted to them by the statutes. I deal with each of these questions in turn.

#### *The Sources of the Alleged Charter Violations*

20 Section 32(1)(b) of the *Charter* reads as follows:

32. (1) This Charter applies

.....

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

There is no question, of course, that the *Charter* applies to provincial legislation; see *Dolphin Delivery Ltd. v. R. W. D. S. U., Local 580*, [1986] 2 S.C.R. 573 (S.C.C.). There are two ways, however, in which it can do so. First, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.

21 The s. 32 jurisprudence of this Court has for the most part focused on the first type of *Charter* violation. There is no doubt, however, that the *Charter* also applies to action taken under statutory authority. The rationale for this rule flows inexorably from the logical structure of s. 32. As Professor Hogg explains in his *Constitutional Law of Canada* (3rd ed. 1992) (loose-leaf), at pp. 34-8.3 - 34-9:

Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

The sentiment of Lord Atkin in speaking of a constitutional prohibition addressed solely at the legislative branch is also apposite: "The Constitution", he wrote, "is not to be mocked by substituting executive for legislative interference with freedom"; see *James v. Cowan*, [1932] A.C. 542 (Australia P.C.), at p. 558.

22 The question in the present case, then, is whether the alleged breach of s. 15(1) arises from the impugned legislation itself or from the actions of entities exercising decision-making authority pursuant to that legislation. The proper framework for determining this question was set out by Lamer J. (as he then was) and approved by a majority of this Court in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.). In that case the Court was faced with determining the constitutionality of orders issued by an adjudicator under the *Canada Labour Code*, R.S.C. 1970, c. L-1, that were alleged to violate an employer's s. 2(b) right to freedom of expression. The Code endowed the adjudicator with a broad discretion to remedy the consequences of an unjust dismissal. There being no question that the *Charter* applied to the adjudicator, the only issue was whether it was the legislation or the order that potentially infringed the *Charter*. In determining this question, Lamer J. (as he then was) stated that legislation conferring a discretion must be interpreted, in so far as possible, consistently with the *Charter*. He explained as follows, at p. 1078:

As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so.

23 Following this schema, it is first necessary to decide whether the legislation impugned in the present appeal can be interpreted in conformity with the *Charter*. In *Slaight*, it was clear that the legislation granted the adjudicator a broad discretion. It was thus easy to conclude that it did not, either expressly or by necessary implication, confer a power to infringe the *Charter*. In the present case the task is more difficult. Indeed, in the court below the argument proceeded on the basis that the legislation was under-inclusive; that it violated s. 15(1) by failing to include medical interpreter services for the deaf in the definition of "benefits", in the case of the *Medical and Health Care Services Act*, and "general hospital services", in the case of the *Hospital Insurance Act*.

24 During the hearing before this Court, however, counsel for the appellants proposed an alternative argument akin to the framework set out in *Slaight*. She suggested that both statutes could be read to conform with s. 15(1). Under this theory, it is not the legislation that is constitutionally suspect, but rather the actions of delegated decision-makers in applying it. In my view, this is the correct approach to the *Charter* application issue in this case. In order to understand how I reach this conclusion, it is necessary to consider the statutory context of this appeal in some depth. With the exception of hospitals, which are the responsibility of the provinces by virtue of s. 92(7) of the *Constitution Act, 1867*, health is not a matter assigned solely to one level of government; see *Schneider v. R.*, [1982] 2 S.C.R. 112 (S.C.C.), at pp. 141-42 (*per* Estey J.). It is generally agreed, however, that the hospital insurance and medicare programs in force in this country come within the exclusive jurisdiction of the provinces under ss. 92(7) (hospitals), 92(13) (property and civil rights) and 92(16) (matters of a merely local or private nature); see Hogg, *supra*, at p. 6-16, and Canadian Bar Association Task Force on Health Care, *What's Law Got to Do with It? Health Care Reform in Canada* (1994), at p. 15.

25 This has not prevented the federal Parliament from playing a leading role in the provision of free, universal medical care throughout the nation. It has done so by employing its inherent spending power to set national standards for provincial medicare programs. The *Canada Health Act*, R.S.C. 1985, c. C-6, requires the federal government to contribute to the funding of provincial health insurance programs provided they conform with certain specified criteria. (The constitutionality of this kind of conditional grant, I note parenthetically, was approved by this Court in *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.), at p. 567.) The purpose of the Act is set out in ss. 3-4 as follows:

3. It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.

4. The purpose of this Act is to establish criteria and conditions in respect of insured health services and extended health care services provided under provincial law that must be met before a full cash contribution may be made.

26 Sections 5 and 7 require the federal government to contribute to provincial insurance schemes where certain conditions are met:

5. Subject to this Act, as part of the Canada Health and Social Transfer, a full cash contribution is payable by Canada to each province for each fiscal year.

7. In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, the health care insurance plan of the province must, throughout the fiscal year, satisfy the criteria described in sections 8 to 12 respecting the following matters:

(a) public administration;

(b) comprehensiveness;

(c) universality;

(d) portability; and

(e) accessibility.

The condition of "comprehensiveness" is of particular importance to this appeal. Its meaning is delineated in s. 9:

9. In order to satisfy the criterion respecting comprehensiveness, the health care insurance plan of a province must insure all *insured health services* provided by hospitals, medical practitioners or dentists, and where the law of the province so permits, similar or additional services rendered by other health care practitioners. [Emphasis added.]

The phrase "insured health services" is defined in s. 2 of the Act to mean, *inter alia*, "hospital services" and "physician services" provided to insured persons. "Hospital services" are further described as including a number of specific services such as accommodation, nursing services and access to diagnostic and treatment facilities, so long as such services are "medically necessary for the purpose of maintaining health, preventing disease or diagnosing or treating an injury, illness or disability." The definition of "physician services" does not list any specific benefits. It states only that they consist of "any medically required services rendered by medical practitioners". The Act does not define the phrases "medically necessary" or "medically required".

27 At the time of trial, the provision of medical treatment by doctors and other health care practitioners in British Columbia was governed by the *Medical and Health Care Services Act*. (It is now known as the *Medicare Protection Act*.) Its structure accords with the criteria set out in the *Canada Health Act*. Sections 6 and 8 of the *Medical and Health Care Services Act* entitle residents of the province to the benefits provided by the Act:

6.(1) A resident who wishes to be enrolled as a beneficiary on his or her own behalf, or on behalf of his or her spouse or children, must apply to the commission in the manner required by the commission.

(2) The commission must, after determining that the applicant, the spouse of the applicant and each of the applicant's children named in the application are residents, enrol as beneficiaries those covered by the application who are residents, effective not more than three months after receipt of the application.

8.(1) A beneficiary is, subject to sections 9 (1), 10, 13 and 14, entitled to have payment made for a *benefit* that he or she has received, in accordance with amounts in a payment schedule, less any applicable patient visit charge. [Emphasis added.]

"Benefit" is defined in s. 1 of the Act as follows:

1. In this Act

.....

"benefits" means

(a) *medically required services* rendered by a medical practitioner who is enrolled under section 12, *unless the services are determined under section 4 by the commission not to be benefits.*

(b) required services prescribed as benefits under section 45 and rendered by a health care practitioner who is enrolled under section 12, or

(c) medically required services performed in accordance with protocols agreed to by the commission, or on order of the referring practitioner, who is a member of a prescribed category of practitioner, in an approved diagnostic facility by, or under the supervision of, a medical practitioner who has been enrolled under section 12, unless the services are determined under section 4 by the commission not to be benefits....  
[Emphasis added.]

28 Notably, the Act does not list the services that are "medically required" such that they qualify as "benefits" under the Act. With the exception of certain specialized services listed as "insured services" under the *Medical Service Act Regulations*, B.C. Reg. 144/68, s. 4.09, as amended, the legislation does not specify the benefits it provides. Section 4.04 of the Regulations does expressly state, however, that certain services, such as those provided solely for legal, industrial or insurance purposes, as well as telephone advice and cosmetic procedures, are not insured. Sign language interpretation is not included. In the usual course, the determination of what constitutes a benefit is left to the discretion of the Medical Services Commission, a 9-member panel composed of representatives from the government, the British Columbia Medical Association and health care consumers. Pursuant to s. 4(1)(j) of the Act, the Commission is authorized to "determine whether a service is a benefit or whether any matter is related to the rendering of a benefit". Conversely, s. 4(1)(c) empowers it to determine the services that are "not benefits under [the] Act". The only limit on the Commission's discretion is set out in s. 4(2), which cautions that its powers must not be exercised "in a manner that does not satisfy the criteria described in section 7 of the *Canada Health Act*".

29 Assuming that the failure to provide sign language interpreters in medical settings violates s. 15(1) of the *Charter* in some circumstances, I do not see how the *Medical and Health Care Services Act* can be interpreted as mandating that result. The legislation simply does not, either expressly or by necessary implication, prohibit the Medical Services Commission from determining that sign language interpretation is a "medically required" service and hence a benefit under the Act. Indeed, the appellants assert in relation to the s. 15(1) issue that sign language interpretation, where it is necessary for effective communication, is integrally related to the provision of general medical services. Their theory, about which I will have more to say later, is that the failure to provide sign language interpreters violates s. 15(1) because it prevents deaf patients from benefiting equally from the provision of medical services in comparison to hearing patients. If this is correct, then the *Charter* demands that free sign language interpretation be provided as part of any medical services offered to the general public, at least where the service requires a level of communication that only an interpreter can ensure. Under this approach, the legislation must be interpreted to include sign language interpretation as a "medically required service" in these circumstances. It is clear, therefore, that the failure to provide expressly for sign language interpretation in the *Medical and Health Care Services Act* does not violate s. 15(1) of the *Charter*. The Act does not list those services that are to be considered benefits; instead, it delegates the power to make that determination to a subordinate authority. It is the decision of authority that is constitutionally suspect, not the statute itself.

30 I pause to emphasize that not every conferral of statutory discretion may be interpreted consistently with the *Charter*. Some grants of discretion will necessarily infringe *Charter* rights notwithstanding that they do not expressly authorize that result; see, e.g., *Ontario Film & Video Appreciation Society v. Ontario (Board of Censors)* (1985), 5 D.L.R. (4th) 766 (Ont. C.A.), affirming (1983), 147 D.L.R. (3d) 58 (Ont. Div. Ct.). In such cases it will generally be the statute, and not its application, that attracts *Charter* scrutiny; see June M. Ross, "Applying the Charter to Discretionary Authority" (1991), 29 *Alta. L. Rev.* 382. In the present case, however, the discretion accorded to the Medical Services Commission to determine whether a service qualifies as a benefit does not necessarily or typically threaten the equality rights set out in s. 15(1) of the *Charter*. It is possible, of course, for the Commission to infringe these rights in the course of exercising its authority. That possibility, however, is incidental to the purpose of discretion, which is to ensure that all medically required services are paid for by the government.

31 The situation is more complicated in the case of the *Hospital Insurance Act*. Section 3(1) of the Act states that "every qualified person or beneficiary is entitled to receive the general hospital services provided under this Act". Unlike the *Medical and Health Care Services Act*, the *Hospital Insurance Act* defines the services it provides with some precision. Mirroring the definition of "hospital services" in the *Canada Health Act*, s. 5(1) of the *Hospital Insurance Act* describes the "general hospital services" that are to be provided by acute care hospitals as follows (equivalent provisions list services for extended care and out-patient (facilities):

5. (1) The general hospital services provided under this Act are

(a) for qualified persons requiring treatment for acute illness or injury: the public ward accommodation, necessary operating and case room facilities, diagnostic or therapeutic Xray and laboratory procedures, anaesthetics, prescriptions, drugs, dressings, cast materials and other services prescribed by regulation;

.....

*but do not include*

(d) transportation to or from the hospital.

(e) services or treatment that the minister, or a person designated by him, determines, on a review of the medical evidence, the qualified persons does not require or

(f) services or treatment for an illness or condition excluded by regulation of the Lieutenant Governor in Council. [Emphasis added.]

32 It could be argued that by including a list of the services to be provided in hospitals that does not include sign language interpretation, the *Hospital Insurance Act* implicates s. 15(1) of the *Charter*. In my view, however, it is preferable to read the Act in conformity with s. 15(1). Though the statute entitles beneficiaries to a specific list of services, hospitals are left with substantial discretion as to how to provide them. This discretion operates in two ways. First, it is clear from the regulations enacted pursuant to s. 29(b) of the Act that no individual hospital is required to offer all of the services set out in s. 5(1). Those regulations state that the hospital services to be provided shall include "such of the following services as are recommended by the attending physician and *as are available* in or through the hospital to which the person is admitted" (emphasis added); *Hospital Insurance Act Regulations*, B.C. Reg. 25/61, as amended, ss. 5.1, 5.7 and 5.8. Generally speaking, the province does not fund specific procedures or services. Instead, it provides hospitals with a global, lump sum payment intended to reimburse them for those listed services that they do in fact provide. This is clear from s. 10(1) of the Act, which reads as follows:

10. (1) There shall be paid annually to every hospital from the hospital insurance fund a sum determined by the minister to reimburse the hospital, in whole or in part, for the cost of rendering to beneficiaries those general hospital services authorized by this Act the hospital is required by the minister to provide for beneficiaries admitted for treatment, excluding those sums payable to the hospital under section 5(4) and section 14.

As stated by the court below, at p. 168, "[t]he extent of the services to be provided by each hospital is thus subject to the hospital's own decision as to how to spend the global grant they receive for general hospital services...."

33 Second, the Act gives individual hospitals considerable discretion as to the manner in which the services they decide to provide are delivered. Nothing in the legislation precludes them from supplying sign language interpreters. Hospitals have the authority, for example, to provide a sign language interpreter for a diagnostic X ray procedure where one is required in order to ensure its efficacy. Like the *Medicare Protection Act Regulations*, moreover, the *Hospital Insurance Act* (in s. 5(1)(d)) and *Regulations* (in s. 5.22) specifically list services, such as transportation to or from hospital, *in vitro* fertilization and cosmetic procedures, that are not covered by the scheme. Sign language interpretation is not included in these lists.

34 Consequently, the fact that the *Hospital Insurance Act* does not expressly mandate the provision of sign language interpretation does not render it constitutionally vulnerable. The Act does not, either expressly or by necessary implication, forbid hospitals from exercising their discretion in favour of providing sign language interpreters. Assuming the correctness of the appellants' s. 15(1) theory, the *Hospital Insurance Act* must thus be read so as to require that sign language interpretation be provided as part of the services offered by hospitals whenever necessary for effective communication. As in the case of the *Medical and Health Care Services Act*, the potential violation of s. 15(1) inheres in the discretion wielded by a subordinate authority, not the legislation itself.

#### ***The Application of the Charter to the Medical Services Commission and Hospitals***

35 Having identified the sources of the alleged s. 15(1) violations, it remains to be considered whether the *Charter* actually applies to them. At first blush, this may seem to be a curious question. As I have discussed, it is a basic principle of constitutional theory that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so; *Slaight, supra*. It is possible, however, for a legislature to give authority to a body that is not subject to the *Charter*. Perhaps the clearest example of this is the power of incorporation. Private corporations are entirely creatures of statute; they have no power or authority that does not derive from the legislation that created them. The *Charter* does not apply to them, however, because legislatures have not entrusted them to implement specific governmental policies. Of course, governments may desire corporations to serve certain social and economic purposes, and may adjust the terms of their existence to accord with those goals. Once brought into being, however, they are completely autonomous from government; they are empowered to exercise only the same contractual and proprietary powers as are possessed by natural persons. As a result, while the legislation creating corporations is subject to the *Charter*, corporations themselves are not part of "government" for the purposes of s. 32 of the *Charter*.

36 Legislatures have created many other statutory entities, however, that are not as clearly autonomous from government. There are myriad public or quasi-public institutions that may be independent from government in some respects, but in other respects may exercise delegated governmental powers or be otherwise responsible for the implementation of government policy. When it is alleged that an action of one of these bodies, and not the legislation that regulates them, violates the *Charter*, it must be established that the entity, in performing that particular action, is part of "government" within the meaning of s. 32 of the *Charter*.

37 Perhaps the fullest discussion of the meaning of "government" in s. 32 is found in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (S.C.C.), and its companion cases, *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 (S.C.C.), *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 (S.C.C.), and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 (S.C.C.). There, this Court was asked to decide whether the mandatory retirement policies adopted by certain institutions (universities, colleges and hospitals) were subject to *Charter* review. In confirming and elaborating upon the view taken by McIntyre J. in *Dolphin Delivery, supra* (*viz.*, that the *Charter* applies only to Parliament, the provincial legislatures and entities that constitute part of the executive or administrative branches of government, and not to private activity), a majority of the Court in *McKinney*, *Harrison* and *Stoffman* found that the *Charter* did not apply on the facts, since the institutions whose policies were impugned were not themselves part of the

apparatus of government in the sense required by s. 32(1), nor were they putting into place a government program or acting in a governmental capacity in adopting those policies.

38 In *Douglas*, however, the same majority found that the *Charter* did apply to the mandatory retirement policy at issue, on the ground that Douglas College was, in light of its constituent Act, simply an emanation of government. I described the differences between *McKinney* and *Harrison*, on the one hand, and *Douglas*, on the other, at pp. 584-85 of the latter case:

As its constituent Act makes clear, the college is a Crown agency established by the government to implement government policy. Though the government may choose to permit the college board to exercise a measure of discretion, the simple fact is that the board is not only appointed and removable at pleasure by the government; the government may at all times by law direct its operation. Briefly stated, it is simply part of the apparatus of government both in form and in fact. In carrying out its functions, therefore, the college is performing acts of government, and I see no reason why this should not include its actions in dealing with persons it employs in performing these functions. Its status is wholly different from the universities in the companion cases of [*McKinney*] and [*Harrison*] which, although extensively regulated and funded by government, are essentially autonomous bodies. Accordingly, the actions of the college in the negotiation and administration of the collective agreement between the college and the association are those of the government for the purposes of s. 32 of the *Charter*. The *Charter*, therefore, applies to these activities.

39 This Court's approach to *Charter* application was further elucidated in *Lavigne v. O.P.S.E.U.* (1991), [1992] 2 S.C.R. 211 (S.C.C.). There, the principal issue was whether a provision of a collective agreement compelling the appellant to pay union dues despite his non-membership in the respondent union violated the *Charter* guarantees of freedom of expression and association, in so far as the dues were being used to pay for specific political purposes chosen by the union. In addressing whether that provision was subject to the *Charter*, I found for the majority that the appellant's employer, the Ontario Council of Regents for Colleges of Applied Arts and Technology, was, in virtue of the terms of its empowering Act, an emanation of the provincial government. On this basis, I held that the *Charter* applied to the provision in question. Comparing the case to *Douglas, supra*, I remarked as follows, at pp. 311-12:

[*Douglas*], like the present appeal, involved a collective agreement between the college and the Association (a union under the applicable legislation). There the Minister of Education by statute exercised a degree of control over the college that closely matched that exercised by the Ministry over the Council in the present case. It is true that in *Douglas* the college's constituent Act expressly described it as an agent of the Crown, whereas here the Act simply gives the Minister power to conduct and govern the colleges and in this endeavour the Minister is to be "assisted" by the Council. But the reality is the same. The government, through the Minister, has the same power of "routine or regular control", to use the expression of the majority of this Court, in [*Harrison, supra* and *Stoffman, supra*], companion cases to *Douglas*.

40 In *Douglas* and *Lavigne*, the argument was made that even if the entities in question were generally part of "government" for the purposes of s. 32, the *Charter* should not apply to the "private" or "commercial" arrangements they engage in. In each case, the Court rejected this contention, holding that when an entity is determined to be part of the fabric of government, the *Charter* will apply to all its activities, including those that might in other circumstances be thought of as "private". The rationale for this principle is obvious: governments should not be permitted to evade their *Charter* responsibilities by implementing policy through the vehicle of private arrangements. I put the matter thus in *Lavigne*, at p. 314:

It was also argued that the *Charter* does not apply to government when it engages in activities that are ..." private, commercial, contractual or non-public (in) nature". In my view, this argument must be rejected. In today's world it is unrealistic to think of the relationship between those who govern and those who are governed solely in terms of the traditional law maker and law subject model. We no longer expect government to be simply a law maker in the traditional sense; we expect government to stimulate and preserve the community's economic and social

welfare. In such circumstances, government activities which are in form "commercial" or "private" transactions are in reality expressions of government policy, be it the support of a particular region or industry, or the enhancement of Canada's overall international competitiveness. In this context, one has to ask: why should our concern that government conform to the principles set out in the *Charter* not extend to these aspects of its contemporary mandate? To say that the *Charter* is only concerned with government as law maker is to interpret our Constitution in light of an understanding of government that was long outdated even before the *Charter* was enacted.

See also *Douglas, supra*, at p. 585.

41 While it is well established that the *Charter* applies to all the activities of government, whether or not those activities may be otherwise characterized as "private", this Court has also recognized that the *Charter* may apply to non-governmental entities in certain circumstances; see generally Robin Elliot, "Scope of the Charter's Application" (1993), 15 *Adv. Q.* 204, at pp. 208-209. It has been suggested, for example, that the *Charter* will apply to a private entity when engaged in activities that can in some way be attributed to government. This possibility was contemplated in *McKinney*, where I stated the following, at pp. 273-74:

Though the legislature may determine much of the environment in which universities operate, the reality is that they function as autonomous bodies within that environment. *There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government*, but there is nothing here to indicate any participation in the decision by the government and ... there is no statutory requirement imposing mandatory retirement on the universities. [Emphasis added.]

I commented further on as follows, at p. 275:

I, therefore, conclude that the respondent universities do not form part of the government apparatus, so their actions, as such, do not fall within the ambit of the *Charter*. *Nor in establishing mandatory retirement for faculty and staff were they implementing a governmental policy*. [Emphasis added.]

The idea that certain activities of non-governmental entities may be viewed as the responsibility of government was further elucidated in my reasons in *Lavigne* where, after discussing *McKinney*, *Harrison*, *Douglas* and *Stoffman*, I stated as follows, at p. 312:

The majority in the above cases relied solely on the element of control in determining what fell within the apparatus of government, *although it made clear that government may, in some circumstances, be subject to Charter scrutiny in respect of activities in the private sector where the government could be said to have some responsibility for that activity*. [Emphasis added.]

42 It seems clear, then, that a private entity may be subject to the *Charter* in respect of certain inherently governmental actions. The factors that might serve to ground a finding that an activity engaged in by a private entity is "governmental" in nature do not readily admit of any *a priori* elucidation. *McKinney* makes it clear, however, that the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities. In *McKinney, supra*, I pointed to *Slaight, supra*, as an example of a situation where action taken in furtherance of a government policy was held to fall within the ambit of the *Charter*. I noted, at p. 265, that the arbitrator in that case was "part of the governmental administrative machinery for effecting the specific purpose of the statute". "It would be strange", I wrote, "if the legislature and the government could evade their *Charter* responsibility by appointing a person to carry out the purposes of the statute"; see *idem*. Although the arbitrator in *Slaight* was entirely a creature of

statute and performed functions that were exclusively governmental, the same rationale applies to any entity charged with performing a governmental activity, even if that entity operates in other respects as a private actor; see A. Anne McLellan and Bruce P. Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986), 24 *Alta. L. Rev.* 361, at p. 371.

43 Two important points must be made with respect to this principle. First, the mere fact that an entity performs what may loosely be termed a "public function", or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of s. 32 of the *Charter*. Thus, with specific reference to the distinction between the applicability of the *Charter*, on the one hand, and the susceptibility of public bodies to judicial review, on the other, I stated as follows, at p. 268 of *McKinney*:

It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, *but this does not in itself make them part of government within the meaning of s. 32 of the Charter....* In a word, the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision-makers. [Emphasis added.]

In order for the *Charter* to apply to a private entity, it must be found to be implementing a *specific* governmental policy or program. As I stated further on in *McKinney*, at p. 269, "[a] public purpose test is simply inadequate" and "...is simply not the test mandated by s. 32".

44 The second important point concerns the precise manner in which the *Charter* may be held to apply to a private entity. As the case law discussed above makes clear, the *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself "government" for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as "private". Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature - for example, the implementation of a specific statutory scheme or a government program - the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

45 In the present case, the controversy over the *Charter's* application centres on the question of hospitals. The respondents argue that if the failure to provide sign language interpreters does not flow from the Act but rather from the discretion of individual hospitals, then s. 15(1) is not engaged because the *Charter* does not apply to hospitals. Hospitals, they say, are not "government" for the purposes of s. 32 of the *Charter*. In their view, this result flows from a straightforward application of this Court's decision in *Stoffman, supra*.

46 The foregoing analysis, however, establishes that it is not enough for the respondents to say that hospitals are not "government" for the purposes of s. 32 of the *Charter*. In *Stoffman*, the Court found that the Vancouver General Hospital was not part of the apparatus of government and that its adoption of a mandatory retirement policy did not implement a government policy. *Stoffman* made it clear that, as presently constituted, hospitals in British Columbia are non-governmental entities whose private activities are not subject to the *Charter*. It remains to be seen, however, whether hospitals effectively implement governmental policy in providing medical services under the *Hospital Insurance Act*.

47 There is language in *Stoffman* that could be read as precluding the application of the *Charter* in the circumstances of the present case. There, I wrote, at p. 516, that "there can be no question of the Vancouver General's being held subject to the *Charter* on the ground that it performs a governmental function, for ... the provision of a public service, even if it is one as important as health care, is not the kind of function that qualifies as a governmental function under s. 32". That

statement, however, must be read in the context of the entire judgment. I determined only that the fact that an entity performs a "public function" in the broad sense does not render it "government" for the purposes of s. 32 and specifically left open the possibility that the *Charter* could be applied to hospitals in different circumstances. Indeed, later in the same paragraph I qualified my position in the following manner:

I would also add that this is not a case for the application of the *Charter* to a specific act of an entity which is not generally bound by the *Charter*. The only specific connection between the actions of the Vancouver General in adopting and applying Regulation 5.04 and the actions of the Government of British Columbia was the requirement that Regulation 5.04 receive ministerial approval. In light of what I have said above in regard to this requirement, a "more direct and a more precisely-defined connection", to borrow McIntyre J.'s phrase used in *Dolphin Delivery*, would have to be shown before I would conclude that the *Charter* applied on this ground.

48 As this passage alludes to, the hospital's mandatory retirement policy, which was embodied in Medical Staff Regulation 5.04, was a matter of internal hospital management. Notwithstanding the requirement of ministerial approval, the Regulation was developed, written and adopted by hospital officials. It was not instigated by the government and did not reflect its mandatory retirement policy. Hospitals in British Columbia, moreover, exhibited great variety in their approaches to retirement. That each of these policies obtained ministerial approval reflected the large measure of managerial autonomy accorded to hospitals in this area.

49 The situation in the present appeal is very different. The purpose of the *Hospital Insurance Act* is to provide particular services to the public. Although the benefits of that service are delivered and administered through private institutions - hospitals - it is the government, and not hospitals, that is responsible for defining both the content of the service to be delivered and the persons entitled to receive it. As previously noted, s. 3(1) states that every person eligible to receive benefits is "entitled to receive the general hospital services provided under this Act". Section 5(1) defines "general hospital services" to include various services normally available in hospitals. As the definition of "hospital" in s. 1 makes clear, moreover, hospitals are *required* to furnish the general hospital services specified in the Act. While no single hospital makes all of these services available, the net effect of the Act is to entitle every qualified person to receive, and to require hospitals to supply, a complete range of medically required hospital services. Indeed, if the legislation did not assure this, it would run afoul of the *Canada Health Act*. It is also apparent that while hospitals are funded on a "lump sum" and not a "fee-for-service" basis, they are not *entirely* free to spend this money as they choose. This is apparent from s. 10(1) of the Act, which mandates the annual payment of a sum "determined by the minister to reimburse the hospital ... for the cost of rendering to beneficiaries those general hospital services authorized by this Act the hospital is required by the minister to provide for beneficiaries...", as well as from s. 15(3)(c), which authorizes the minister to make "payments to hospitals for the service provided for under this Act" and s. 13(1), which provides that payments to a hospital "for services rendered by it ... shall be deemed to be payment in full for the services...."

50 The structure of the *Hospital Insurance Act* reveals, therefore, that in providing medically necessary services, hospitals carry out a specific governmental objective. The Act is not, as the respondents contend, simply a mechanism to prevent hospitals from charging for their services. Rather, it provides for the delivery of a comprehensive social program. Hospitals are merely the vehicles the legislature has chosen to deliver this program. It is true that hospitals existed long before the statute, and have historically provided a full range of medical services. In recent decades, however, health care, including that generally provided by hospitals, has become a keystone tenet of governmental policy. The interlocking federal-provincial medicare system I have described entitles all Canadians to essential medical services without charge. Although this system has retained some of the trappings of the private insurance model from which it derived, it has come to resemble more closely a government service than an insurance scheme; see Canadian Bar Association Task Force on Health Care, *supra*, at p. 9.

51 Unlike *Stoffman*, then, in the present case there is a "direct and ... precisely-defined connection" between a specific government policy and the hospital's impugned conduct. The alleged discrimination - the failure to provide sign language interpretation - is intimately connected to the medical service delivery system instituted by the legislation. The provision of these services is not simply a matter of internal hospital management; it is an expression of government policy. Thus,

while hospitals may be autonomous in their day-to-day operations, they act as agents for the government in providing the specific medical services set out in the Act. The Legislature, upon defining its objective as guaranteeing access to a range of medical services, cannot evade its obligations under s. 15(1) of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective. In so far as they do so, hospitals must conform with the *Charter*.

52 The case of the Medical Services Commission is more straightforward. It was not contested that the *Charter* applies to the Commission in exercising its power to determine whether a service is a benefit pursuant to s. 4(1) of the *Medical and Health Care Services Act*. It is plain that in so doing, the Commission implements a government policy, namely, to ensure that all residents receive medically required services without charge. In lieu of setting out a comprehensive list of insured services in legislation, the government has delegated to the Commission the power to determine what constitutes a "medically required" service. There is no doubt, therefore, that in exercising this discretion the Commission acts in governmental capacity and is thus subject to the *Charter*. As there is no need to do so, I refrain from commenting on whether the Commission might be considered part of government for other purposes.

### Section 15(1) of the Charter

53 Having concluded that the *Charter* applies to the failure of hospitals and the Medical Services Commission to provide sign language interpreters, it remains to be determined whether that failure infringes the appellants' equality rights under s. 15(1) of the *Charter*. That provision states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

I emphasize at the outset that s. 15(1), like other *Charter* rights, is to be generously and purposively interpreted; see *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.), at p. 156, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at pp. 336, 344, *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), at p. 509, *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.), at p. 175, *Cotroni c. Centre de prévention de Montréal*, [1989] 1 S.C.R. 1469 (S.C.C.), at p. 1480, and *Reference re Provincial Electoral Boundaries*, [1991] 2 S.C.R. 158 (S.C.C.), at p. 179. As Lord Wilberforce proclaimed in *Minister of Home Affairs v. Fisher* (1979), [1980] A.C. 319 (Bermuda P.C.), at p. 328, a constitution incorporating a bill of rights calls for "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give individuals the full measure of the fundamental rights and freedoms referred to"; see also *Hunter, supra*, at p. 156.

54 In the case of s. 15(1), this Court has stressed that it serves two distinct but related purposes. First, it expresses a commitment - deeply ingrained in our social, political and legal culture - to the equal worth and human dignity of all persons. As McIntyre J. remarked in *Andrews, supra*, at p. 171, s. 15(1) "entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration". Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups "suffering social, political and legal disadvantage in our society"; see *R. v. Turpin*, [1989] 1 S.C.R. 1296 (S.C.C.), at p. 1333 (*per* Wilson J.); see also Beverley McLachlin, "The Evolution of Equality" (1996), 54 *Advocate* 559, at p. 564. While this Court has confirmed that it is not necessary to show membership in a historically disadvantaged group in order to establish a s. 15(1) violation, the fact that a law draws a distinction on such a ground is an important *indicium* of discrimination; see *Miron v. Trudel*, [1995] 2 S.C.R. 418 (S.C.C.), at para. 15 (*per* Gonthier J.) and at paras. 148-149 (*per* McLachlin J.), and *Egan v. Canada*, [1995] 2 S.C.R. 513 (S.C.C.), at paras. 59-61 (*per* L'Heureux-Dubé J.).

55 As deaf persons, the appellants belong to an enumerated group under s. 15(1) - the physically disabled. While this fact is not contested, it is nonetheless relevant. As Wilson J. held in *Turpin, supra*, the determination of whether a law

is discriminatory is a contextual exercise. It is important, she explained, at p. 1331, "to look not only at the impugned legislation ... but also to the larger social, political and legal context".

56 It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions; see generally M. David Lepofsky, "A Report Card on the *Charter's* Guarantee of Equality to Persons with Disabilities after 10 Years: What Progress? What Prospects?" (1997), 7 *N.J.C.L.* 263. This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the *Charter* demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms; see Sandra A. Goundry and Yvonne Peters, *Litigating for Disability Equality Rights: The Promises and the Pitfalls* (1994), at pp. 5-6. One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled. Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed; see Minister of Human Resources Development, *Persons with Disabilities: A Supplementary Paper* (1994), at pp. 3-4, and Statistics Canada, *A Portrait of Persons with Disabilities* (1995), at pp. 46-49.

57 Deaf persons have not escaped this general predicament. Although many of them resist the notion that deafness is an impairment and identify themselves as members of a distinct community with its own language and culture, this does not justify their compelled exclusion from the opportunities and services designed for and otherwise available to the hearing population. For many hearing persons, the dominant perception of deafness is one of silence. This perception has perpetuated ignorance of the needs of deaf persons and has resulted in a society that is for the most part organized as though everyone can hear; see generally Oliver Sacks, *Seeing Voices: A Journey Into the World of the Deaf* (1989). Not surprisingly, therefore, the disadvantage experienced by deaf persons derives largely from barriers to communication with the hearing population.

58 With this context in mind, I turn to the specific elements of the appellants' s. 15(1) claim. While this Court has not adopted a uniform approach to s. 15(1), there is broad agreement on the general analytic framework; see *Eaton v. Brant (County) Board of Education* (1996), [1997] 1 S.C.R. 241 (S.C.C.), at para. 62, *Miron, supra*, and *Egan, supra*. A person claiming a violation of s. 15(1) must first establish that, because of a distinction drawn between the claimant and others, the claimant has been denied "equal protection" or "equal benefit" of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in s. 15(1) or one analogous thereto. Before concluding that a distinction is discriminatory, some members of this Court have held that it must be shown to be based on an irrelevant personal characteristic; see *Miron, supra* (per Gonthier J.), and *Egan, supra* (per La Forest J.) Under this view, s. 15(1) will not be infringed unless the distinguished personal characteristic is irrelevant to the functional values underlying the law, provided that those values are not themselves discriminatory. Others have suggested that relevance is only one factor to be considered in determining whether a distinction based on an enumerated or analogous ground is discriminatory; see *Miron, supra* (per McLachlin J.), and *Thibaudeau v. R.*, [1995] 2 S.C.R. 627 (S.C.C.) (per Cory and Iacobucci JJ.).

59 In my view, in the present case the same result is reached regardless of which of these approaches is applied; for similar reasoning, see *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 (S.C.C.) (per Iacobucci J. for the Court). There is no question that the distinction here is based on a personal characteristic that is irrelevant to the functional values underlying the health care system. Those values consist of the promotion of health and the prevention and treatment of illness and disease, and the realization of those values through the vehicle of a publicly funded health care system. There could be no personal characteristic less relevant to these values than an individual's physical disability.

60 The only question in this case, then, is whether the appellants have been afforded "equal benefit of the law without discrimination" within the meaning of s. 15(1) of the *Charter*. On its face, the medicare system in British Columbia applies

equally to the deaf and hearing populations. It does not make an explicit "distinction" based on disability by singling out deaf persons for different treatment. Both deaf and hearing persons are entitled to receive certain medical services free of charge. The appellants nevertheless contend that the lack of funding for sign language interpreters renders them unable to benefit from this legislation to the same extent as hearing persons. Their claim, in other words, is one of "adverse effects" discrimination.

61 This Court has consistently held that s. 15(1) of the *Charter* protects against this type of discrimination. In *Andrews, supra*, McIntyre J. found that facially neutral laws may be discriminatory. "It must be recognized at once", he commented, at p. 164, "...that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality"; see also *Big M Drug Mart Ltd., supra*, at p. 347. Section 15(1), the Court held, was intended to ensure a measure of substantive, and not merely formal equality.

62 As a corollary to this principle, this Court has also concluded that a discriminatory purpose or intention is not a necessary condition of a s. 15(1) violation; see *Andrews, supra*, at pp. 173-74, and *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), at pp. 544-49 (*per* Lamer C.J.); see also *O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (S.C.C.), at p. 547. A legal distinction need not be motivated by a desire to disadvantage an individual or group in order to violate s. 15(1). It is sufficient if the *effect* of the legislation is to deny someone the equal protection or benefit of the law. As McIntyre J. stated in *Andrews, supra*, at p. 165, "[t]o approach the ideal of full equality before and under the law ... the main consideration must be the impact of the law on the individual or the group concerned". In this the Court has staked out a different path than the United States Supreme Court, which requires a discriminatory intent in order to ground an equal protection claim under the Fourteenth Amendment of the Constitution; see *Washington v. Davis*, 426 U.S. 229 (U.S. Sup. Ct. 1976), *Arlington Heights v. Metro Housing Department*, 429 U.S. 252 (U.S. Sup. Ct. 1977), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (U.S. Sup. Ct. 1979).

63 This Court first addressed the concept of adverse effects discrimination in the context of provincial human rights legislation. In *Simpsons-Sears Ltd., supra*, the Court was faced with the question of whether a rule requiring employees to be available for work on Friday evenings and Saturdays discriminated against those observing a Saturday Sabbath. Though this rule was neutral on its face in that it applied equally to all employees, the Court nevertheless found it to be discriminatory. Writing for the Court, McIntyre J. commented as follows, at p. 551:

A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." ... On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.

See also *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 (S.C.C.), and *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970 (S.C.C.). I note that in *Andrews*, McIntyre J. made it clear that the equality principles developed by the Court in human rights cases are equally applicable in s. 15(1) cases. The definition of adverse effects discrimination set out in *Simpsons-Sears Ltd., supra*, moreover, has been expressly adopted in the context of s. 15(1); see *Egan, supra*, at para. 138 (*per* Cory J.).

64 Adverse effects discrimination is especially relevant in the case of disability. The government will rarely single out disabled persons for discriminatory treatment. More common are laws of general application that have a disparate impact on the disabled. This was recognized by the Chief Justice in his dissenting opinion in *Rodriguez, supra*, where he held that the law criminalizing assisted suicide violated s. 15(1) of the *Charter* by discriminating on the basis of physical disability. There, a majority of the Court determined, *inter alia*, that the law was saved by s. 1 of the *Charter*, assuming without deciding that it infringed s. 15(1). While I refrain from commenting on the correctness of the Chief Justice's

conclusion on the application of s. 15(1) in that case, I endorse his general approach to the scope of that provision, which he set out as follows, at p. 549:

Not only does s. 15(1) require the government to exercise greater caution in making express or direct distinctions based on personal characteristics, but legislation equally applicable to everyone is also capable of infringing the right to equality enshrined in that provision, and so of having to be justified in terms of s. 1. Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.

65 The Court elaborated upon this principle in its recent decision in *Eaton, supra*. Although *Eaton* involved direct discrimination, Sopinka J. observed that in the case of disabled persons, it is often the failure to take into account the adverse effects of generally applicable laws that results in discrimination. He remarked, at paras. 66-67:

The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 169, McIntyre J. stated that the "accommodation of differences ... is the essence of true equality". This emphasizes that the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.

The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

66 Unlike in *Simpsons-Sears* and *Rodriguez*, in the present case the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that they benefit equally from a service offered to everyone. It is on this basis that the trial judge and the majority of the Court of Appeal found that the failure to provide medically related sign language interpretation was not discriminatory. Their analyses presuppose that there is a categorical distinction to be made between state-imposed burdens and benefits, and that the government is not obliged to ameliorate disadvantage that it has not helped to create or exacerbate. Before attempting to evaluate these assumptions, it will be helpful to relate the reasoning of the courts below in more detail.

67 As previously noted, both the trial judge and majority of the Court of Appeal determined that, while the access of deaf people to medical services is limited to a certain extent by their communication handicap, this limitation does not result from the denial of any benefit of the law within the meaning of s. 15(1) of the *Charter*. They were able to come to this conclusion because of the manner in which they characterized sign language interpretation. Interpretation services, they held, are not medically required. Rather, they are "ancillary services", which, like other non-medical services such as transportation to a doctor's office or hospital, are not publicly funded.

68 Having determined that sign language interpretation is a discrete, non-medical "ancillary" service, the courts below were able to conclude that the appellants were not denied a benefit available to the hearing population. As the majority of the Court of Appeal explained, prior to the introduction of a universal medicare system, deaf and hearing persons were each required to pay their doctors. When necessary for effective communication, deaf persons were also obliged to pay for sign language translators. The Medical Services Plan, the court observed, removes the responsibility of both hearing and deaf persons to pay their physicians. Deaf persons, of course, remain responsible for the payment of translators in order to receive equivalent medical services as hearing persons, as they would be in the absence of the legislation. In the court's view, however, any resulting inequality exists independently of the benefit provided by the state.

69 While this approach has a certain formal, logical coherence, in my view it seriously mischaracterizes the practical reality of health care delivery. Effective communication is quite obviously an integral part of the provision of medical services. At trial, the appellants presented evidence that miscommunication can lead to misdiagnosis or a failure to follow a recommended treatment. This risk is particularly acute in emergency situations, as illustrated by the appellant Linda Warren's experience during the premature birth of her twin daughters. That adequate communication is essential to proper medical care is surely so incontrovertible that the Court could, if necessary, take judicial notice of it. As Professor Pothier observes, for the hearing population "conversation between doctor and patient is so basic to the provision of medical services that it is taken for granted"; see Dianne Pothier, "M'Aider, Mayday: Section 15(1) of the *Charter* in Distress" (1996), 6 *N.J.C.L.* 295, at p. 335.

70 The centrality of communication to the delivery of medical services is particularly evident in the context of negligence law. The duty of disclosure commands physicians to inform patients fully of the risks involved in treatment and answer their questions regarding such risks; see *Reibl v. Hughes*, [1980] 2 S.C.R. 880 (S.C.C.), at p. 884, and *Hopp v. Lepp*, [1980] 2 S.C.R. 192 (S.C.C.), at p. 210. Physicians cannot discharge this obligation without being able to communicate effectively with their patients. In the absence of sign language interpretation, there may well be cases where it will be impossible for doctors to treat deaf persons without breaching their professional responsibilities.

71 If there are circumstances in which deaf patients cannot communicate effectively with their doctors without an interpreter, how can it be said that they receive the same level of medical care as hearing persons? Those who hear do not receive communication as a distinct service. For them, an effective means of communication is routinely available, free of charge, as part of every health care service. In order to receive the same quality of care, deaf persons must bear the burden of paying for the means to communicate with their health care providers, despite the fact that the system is intended to make ability to pay irrelevant. Where it is necessary for effective communication, sign language interpretation should not therefore be viewed as an "ancillary" service. On the contrary, it is the means by which deaf persons may receive the same quality of medical care as the hearing population.

72 Once it is accepted that effective communication is an indispensable component of the delivery of medical services, it becomes much more difficult to assert that the failure to ensure that deaf persons communicate effectively with their health care providers is not discriminatory. In their effort to persuade this Court otherwise, the respondents and their supporting interveners maintain that s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action. Adverse effects only arise from benefit programs, they aver, when those programs exacerbate the disparities between the group claiming a s. 15(1) violation and the general population. They assert, in other words, that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits.

73 In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence. It has been suggested that s. 15(1) of the *Charter* does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality; see *Thibaudeau, supra*, at para. 37 (*per* L'Heureux-Dubé J.). Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner; see *Tétreault-Gadoury v. Canada (Employment & Immigration Commission)*, [1991] 2 S.C.R. 22 (S.C.C.), *Haig v. R.*, [1993] 2 S.C.R. 995 (S.C.C.), at pp. 1041-42, *Native Women's Assn. of Canada v. R.*, [1994] 3 S.C.R. 627 (S.C.C.), at p. 655, and *Miron, supra*. In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons; see *Miron, supra*, *Tétreault-Gadoury, supra*, and *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.). Moreover, it has been suggested that, in taking this sort of positive action, the government should not be the source of further inequality; *Thibaudeau, supra*, at para. 38 (*per* L'Heureux-Dubé J.).

74 The same principle has been applied by this Court in its interpretation of the equality provisions of provincial human rights legislation. In *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (S.C.C.), the Court found that an employer's accident and sickness insurance plan, which disentitled pregnant women from receiving benefits for any reason during a certain period, discriminated on the basis of pregnancy and hence sex. In so holding, it resoundingly rejected the reasoning of *Bliss v. Canada (Attorney General)* (1978), [1979] 1 S.C.R. 183 (S.C.C.), at p. 190, which had held that the inequality resulting from a similar benefit program was "not created by legislation but by nature".

75 In support of the view that the state has no obligation to remedy pre-existing disadvantage in providing benefits to the general population, the respondent relies on this Court's decision in *Symes v. R.*, [1993] 4 S.C.R. 695 (S.C.C.). There, the appellant, a self-employed mother, argued that the wages paid to her nanny were business expenses and that the section of the *Income Tax Act*, R.S.C. 1952, c. 148, that did not allow her to deduct the full cost of these expenses discriminated against her on the basis of sex. The Court rejected this argument, holding that the distinction created between persons who incur child care expenses and those who do not is not related to sex, despite the fact that women are responsible for a disproportionate share of the social costs of child care. Writing for the majority, Iacobucci J. held that the appellant had not proven that the actual *expenses* of child care were borne disproportionately by women. He thus concluded that the appellant had not demonstrated an adverse effect that was created or contributed to by the legislation. He stated the following, at pp. 764-65:

If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.

76 While this statement can be interpreted as supporting the notion that, in providing a benefit, the state is not required to eliminate any pre-existing "social" disadvantage, it should be remembered that it was made in the context of determining whether the legislation made a distinction based on an enumerated or analogous ground. In *Symes*, the appellant was unable to show that the allegedly adverse effect created by the legislation was suffered by members of such a group. There was no relationship, in other words, between the benefit provided by the government and the social disadvantage suffered by women in child-rearing. In the present case, in contrast, the alleged adverse effect *is* suffered by an enumerated group. The social disadvantage borne by the deaf is directly related to their inability to benefit equally from the service provided by the government. As a result, I do not believe that *Symes* is helpful to the respondent.

77 This Court has consistently held, then, that discrimination can arise both from the adverse effects of rules of general application as well as from express distinctions flowing from the distribution of benefits. Given this state of affairs, I can think of no principled reason why it should not be possible to establish a claim of discrimination based on the adverse effects of a facially neutral benefit scheme. Section 15(1) expressly states, after all, that every individual is "equal before and under the law and has the right to the equal protection *and* equal benefit of the law without discrimination..." (emphasis added). The provision makes no distinction between laws that impose unequal burdens and

those that deny equal benefits. If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services. As I will develop below, if there are policy reasons in favour of limiting the government's responsibility to ameliorate disadvantage in the provision of benefits and services, those policies are more appropriately considered in determining whether any violation of s. 15(1) is saved by s. 1 of the *Charter*.

78 The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field. In *Canadian Odeon Theatres Ltd. v. Saskatchewan (Human Rights Commission)* (1985), 18 D.L.R. (4th) 93 (Sask. C.A.), leave to appeal refused *Canadian Odeon Theatres Ltd. v. Saskatchewan (Human Rights Commission)*, [1985] 1 S.C.R. vi (note) (S.C.C.), the court found that the failure of a theatre to provide a disabled person a choice of place from which to view a film comparable to that offered to the general public was discriminatory. Similarly, in *Howard v. University of British Columbia* (1993), 18 C.H.R.R. D/353 (B.C. Human Rights Council), it was held that the university was obligated to provide a deaf student with a sign language interpreter for his classes. "[W]ithout interpreters", the Human Rights Council held, at p. D/358, "the complainant did not have meaningful access to the service." And in *Centre de la communauté sourde du Montréal Métropolitain Inc. c. Québec (Régie du logement)*, [1996] R.J.Q. 1776 (T.D.P.Q.), the Quebec Tribunal des droits de la personne determined that a rent review tribunal must accommodate a deaf litigant by providing sign language interpretation. Moreover, the principle underlying all of these cases was affirmed in *Haig, supra*, where a majority of this Court wrote, at p. 1041, that "a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of s. 15".

79 It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy or rule extends only to the point of "undue hardship"; see *Simpsons-Sears Ltd., supra*, and *Central Alberta Dairy Pool, supra*. In my view, in s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of "reasonable limits". It should not be employed to restrict the ambit of s. 15(1).

80 In my view, therefore, the failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a *prima facie* violation of the s. 15(1) rights of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons.

81 I acknowledge that the standard I have set is a broad one. Given the nature of the evidentiary record before this Court, however, it would not be appropriate to elaborate it in any detail. Some guidance can be provided, however (and I stress that it is guidance - not authoritative pronouncement), by the experience in the United States under the *Rehabilitation Act*, 29 U.S.C. § 794 (1997), and the *Americans with Disabilities Act*, 42 U.S.C. §§ 12182-12189 (1997). Regulations enacted pursuant to those statutes require health care providers to supply appropriate auxiliary aids and services, including qualified sign language interpreters, to ensure "effective communication" with deaf persons; 45 C.F.R. § 84.52(c) (1997); 28 C.F.R. § 36.303(b) and (c) (1997). While the term "effective communication" is not defined in the legislation, it has been held to mean that a deaf individual "actually understood" the content of the communication; see *Bonner v. Lewis*, 857 F.2d 559 (U.S. C.A. 9th Cir. 1988), at pp. 563-64. One would suppose that it would also entail that deaf persons be able to inform medical staff of the basic circumstances surrounding their illness or injury; see Elizabeth Ellen Chilton, "Ensuring Effective Communication: The Duty of Health Care Providers to Supply Sign Language Interpreters for Deaf Patients" (1996), 47 *Hastings L.J.* 871, at p. 883.

82 This is not to say that sign language interpretation will have to be provided in every medical situation. The "effective communication" standard is a flexible one, and will take into consideration such factors as the complexity and importance of the information to be communicated, the context in which the communications will take place and the number of people involved; see 28 C.F.R. § 35.160 (1997). For deaf persons with limited literacy skills, however, it is

probably fair to surmise that sign language interpretation will be required in most cases; see Chilton, *supra*, at p. 886, and the many studies there cited.

83 Finally, I note that it is not in strictness necessary to decide whether, according to this standard, the appellants' s. 15(1) rights were breached. This Court has held that if claimants prove that the equality rights of members of the group to which they belong have been infringed, they need not establish a violation of their own particular rights. In *Egan, supra*, the government contended that, given the net benefit available to them pursuant to other legislation, a homosexual couple was not negatively affected by the denial of a spousal allowance under the *Old Age Security Act*, R.S.C., 1985, c. O-9. In rejecting this submission, I commented as follows, at para. 12:

...the respondent contends that the appellants have suffered no prejudice.... I would simply dispose of this argument on the ground that, while this may be true in this specific instance, there is nothing to show this is generally the case with homosexual couples, which is the point the respondent must establish.

Similarly, Cory J. stated in *Egan*, at para. 153, that "the appellants must demonstrate that homosexual couples *in general* are denied equal benefit of the law, not that they themselves are suffering a particular or unique denial of a benefit" (emphasis in original). That being said, it is fair to say that the absence of a publicly funded sign language interpretation service discriminated against the appellants by denying them the equal benefit of the British Columbia health care system. The evidence at trial established that, generally speaking, the quality of care received by the appellants was inferior to that available to hearing persons.

#### Section 1 of the Charter

84 I come now to possible justification under s. 1 of the *Charter*, which reads:

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.

In order to justify a limitation of a *Charter* right, the government must establish that the limit is "prescribed by law" and is "reasonable" in a "free and democratic society". In *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), this Court set out the analytical framework for determining whether a law constitutes a reasonable limit on a *Charter* right. A succinct restatement of that framework can be found in the reasons of Iacobucci J. in *Egan, supra*, at para. 182:

First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

It is not necessary to consider each of these elements in this case. Assuming without deciding that the decision not to fund medical interpretation services for the deaf constitutes a limit "prescribed by law", that the objective of this decision - controlling health care expenditures - is "pressing and substantial", and that the decision is rationally connected to the objective, I find that it does not constitute a minimum impairment of s. 15(1).

85 This Court has recently confirmed that the application of the *Oakes* test requires close attention to the context in which the impugned legislation operates; see *Attis v. New Brunswick District No. 15 Board of Education*, [1996] 1 S.C.R. 825 (S.C.C.), at para. 78. The Court has also held that where the legislation under consideration involves the balancing of competing interests and matters of social policy, the *Oakes* test should be applied flexibly, and not formally or mechanistically; see *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), at p. 737, *McKinney, supra*, *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at pp. 999-1000, *Cotroni, supra*, at p. 1489, *Comité pour la République du*

*Canada - Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 (S.C.C.), at p. 222 (per L'Heureux-Dubé J.), *Egan, supra*, at para. 29 (per La Forest J.) and at paras. 105-106 (per Sopinka J.), and *RJR-Macdonald Inc. v. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), at para. 63 (per La Forest J.) and at paras. 127-138 (per McLachlin J.). It is also clear that while financial considerations alone may not justify *Charter* infringements (*Schachter, supra*, at p. 709), governments must be afforded wide latitude to determine the proper distribution of resources in society; see *McKinney, supra*, at p. 288, and *Egan, supra*, at para. 104 (per Sopinka J.). This is especially true where Parliament, in providing specific social benefits, has to choose between disadvantaged groups; see *Egan, supra*, at paras. 105-110 (per Sopinka J.). On the other hand, members of this Court have suggested that deference should not be accorded to the legislature merely because an issue is a "social" one or because a need for governmental "incrementalism" is shown; see *Egan, supra*, at para. 97 (per L'Heureux-Dubé J.) and at paras. 215-216 (per Iacobucci J.). In the present case, the failure to provide sign language interpreters would fail the minimal impairment branch of the *Oakes* test under a deferential approach. It is, therefore, unnecessary to decide whether in this "social benefits" context, where the choice is between the needs of the general population and those of a disadvantaged group, a deferential approach should be adopted.

86 At the same time, the leeway to be granted to the state is not infinite. Governments must demonstrate that their actions infringe the rights in question no more than is reasonably necessary to achieve their goals. Thus, I stated the following for the Court in *Tétreault-Gadoury, supra*, at p. 44:

It should go without saying, however, that the deference that will be accorded to the government when legislating in these matters does not give them an unrestricted licence to disregard an individual's *Charter* rights. Where the government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down.

87 In the present case, the government has manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights. As previously noted, the estimated cost of providing sign language interpretation for the whole of British Columbia was only \$150,000, or approximately 0.0025 per cent of the provincial health care budget at the time. This figure was based on an extrapolation from the services then being provided by the Western Institute for the Deaf and Hard of Hearing in the Lower Mainland area. Although there was little evidence presented of the precise content of this service, it was not suggested that its extension throughout the province would not have fulfilled the requirements of s. 15(1). In these circumstances, the refusal to expend such a relatively insignificant sum to continue and extend the service cannot possibly constitute a minimum impairment of the appellants' constitutional rights.

88 The respondents argue, however, that the situation of deaf persons cannot be meaningfully distinguished from that of other non-official language speakers. If they are compelled to provide interpreters for the former, they submit, they will also have to do so for the latter, thereby increasing the expense of the program dramatically and placing severe strain on the fiscal sustainability of the health care system. In this context, they contend, it was reasonable for the government to conclude that they impaired the rights of deaf persons as little as possible.

89 This argument, in my view, is purely speculative. It is by no means clear that deaf persons and non-official language speakers are in a similar position, either in terms of their constitutional status or their practical access to adequate health care. From the perspective of a patient, there is no real difference between sign language and oral language if there is no ability to communicate with a physician. But from the perspective of the state's obligations, there may very well be. In the present case, the only relevant constitutional provisions are ss. 15(1) and 1 of the *Charter*. In a case involving a claim for medical interpretation for hearing patients, in contrast, the analysis would be more complicated. In such a case, it would be necessary to consider the interaction between s. 15(1) and other provisions of the Constitution, specifically those related to the language obligations of governments. Moreover, the respondents have presented no evidence as to the potential scope or cost of an oral language medical interpretation program. It is possible that the nature and extent of any reasonable accommodation required for hearing persons under s. 1 would differ from that required for deaf persons. Thus, any claim for the provision of such a program, whether based on national origin or language as an analogous ground, would proceed on markedly different constitutional terrain than a claim grounded on disability.

90 Further, it is apparent that deaf persons stand in a special position in terms of their ability to communicate with the mainstream population. As I have discussed, it is extremely difficult for many deaf persons to acquire a high level of proficiency in oral languages, whether in spoken or written form. Moreover, it is apparent that the deaf have particular difficulties in obtaining the service of persons in the community who understand sign language. There is no evidentiary basis from which to assess whether non-official language speakers stand in a similar position. So, without wishing to minimize the difficulties faced by hearing persons whose native tongues are neither English nor French, it is by no means clear that the communications barriers they face are analogous to those encountered by deaf persons. As a result, the success of a potential s. 15(1) claim by members of the latter group cannot be predicted in advance. The possibility that such a claim might be made, therefore, cannot justify the infringement of the constitutional rights of the deaf.

91 The respondents also contend that recognition of the appellants' claim will have a ripple effect throughout the health care field, forcing governments to spend precious health care dollars accommodating the needs of myriad disadvantaged persons. "Virtually everyone in the health care system who is denied a service", they submit, "will either be medically disadvantaged or could argue that a medical disadvantage will arise from the lack of service." Similarly, in his concurring opinion in the Court of Appeal, Lambert J.A. observed that many of the medical services and products required by the disabled are not publicly funded. In these circumstances, he asserted, governments must have the freedom to allocate scarce health care dollars among various disadvantaged groups.

92 These arguments miss the mark. If effective communication is integrally connected with the provision of health care - a point that Lambert J.A. accepted - then the fact that there are number of medical services that benefit disabled persons that are not covered by medicare is immaterial. The appellants do not demand that the government provide them with a discrete service or product, such as hearing aids, that will help alleviate their general disadvantage. Their claim is not for a benefit that the government, in the exercise of its discretion to allocate resources to address various social problems, has chosen not to provide. On the contrary, they ask only for equal access to services that are available to all. The respondents have presented no evidence that this type of accommodation, if extended to other government services, will unduly strain the fiscal resources of the state. To deny the appellants' claim on such conjectural grounds, in my view, would denude s. 15(1) of its egalitarian promise and render the disabled's goal of a barrier-free society distressingly remote.

93 Viewed in this light, it is impossible to characterize the government's decision not to fund sign language interpretation as one which "reasonably balances the competing social demands which our society must address"; see *McKinney, supra*, at p. 314. It should be recalled that the Ministry of Health decided not to fund the interpretation program even in part. Other options, such as the partial or interim funding of the program offered by the Western Institute for the Deaf and Hard of Hearing, or the institution of a scheme requiring users to pay either a portion of the cost of interpreters or the full amount if they could afford to do so, were either not considered or were considered and rejected. In this sense, the present case is similar to *Tétreault-Gadoury, supra*, where the Court found that the denial of unemployment insurance benefits to persons over 65 violated s. 15(1) and could not be saved under s. 1 of the *Charter*. Writing for the Court, I found that one of the reasons that this denial failed the minimal impairment test was that persons over 65 were not entitled to *any* benefits. "Even allowing the government a healthy measure of flexibility in legislating in this area", I stated, at p. 47, "the complete denial of unemployment benefits is not an acceptable method of achieving any of the government objectives set forth above...." That being said, I do not wish to be understood as intimating that the alternative measures I have adverted to would survive s. 1 scrutiny. I refer to them solely for the purpose of demonstrating that the government did not attempt to institute a scheme that would constitute a lesser limitation on deaf persons' rights.

94 In summary, I am of the view that the failure to fund sign language interpretation is not a "minimal impairment" of the s. 15(1) rights of deaf persons to equal benefit of the law without discrimination on the basis of their physical disability. The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a

"reasonable accommodation" of the appellants' disability. In the language of this Courts' human rights jurisprudence, it has not accommodated the appellants' needs to the point of "undue hardship"; see *Simpsons-Sears Ltd.*, *supra*, and *Central Alberta Dairy Pool*, *supra*.

### Remedy

95 I have found that where sign language interpreters are necessary for effective communication in the delivery of medical services, the failure to provide them constitutes a denial of s. 15(1) of the *Charter* and is not a reasonable limit under s. 1. Section 24(1) of the *Charter* provides that anyone whose rights under the *Charter* have been infringed or denied may obtain "such remedy as the court considers appropriate and just in the circumstances". In the present case, the appropriate and just remedy is to grant a declaration that this failure is unconstitutional and to direct the government of British Columbia to administer the *Medical and Health Care Services Act* [now the *Medicare Protection Act*] and the *Hospital Insurance Act* in a manner consistent with the requirements of s. 15(1) as I have described them.

96 A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished. Although it is to be assumed that the government will move swiftly to correct the unconstitutionality of the present scheme and comply with this Court's directive, it is appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response. In fashioning its response, the government should ensure that, after the expiration of six months or any other period of suspension granted by this Court, sign language interpreters will be provided where necessary for effective communication in the delivery of medical services. Moreover, it is presumed that the government will act in good faith by considering not only the role of hospitals in the delivery of medical services but also the involvement of the Medical Services Commission and the Ministry of Health.

### Disposition

97 I would allow the appeal. Costs are awarded to the appellants from the respondents throughout. I would answer the Constitutional Questions as follows:

1. Does the definition of "benefits" in s. 1 of the *Medicare Protection Act*, S.B.C. 1992, c. 76, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to include medical interpreter services for the deaf?

No.

2. If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Given my response to question 1, it is not necessary to answer this question.

3. Do ss. 3, 5 and 9 of the *Hospital Insurance Act*, R.S.B.C. 1979, c. 180, and the Regulations enacted pursuant to s. 9 of that Act, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to require that hospitals in the Province of British Columbia provide medical interpreter services for the deaf?

No.

4. If the answer to question 3 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Given my response to question 3, it is not necessary to answer this question.

*Appeal allowed.*

*Pourvoi accueilli.*

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30

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** Moore v. British Columbia (Ministry of Education) | 2010 BCCA 478, 2010 CarswellBC 3446, 195 A.C.W.S. (3d) 1095, 294 B.C.A.C. 185, 498 W.A.C. 185, [2010] B.C.J. No. 2097, 12 B.C.L.R. (5th) 246, [2011] 3 W.W.R. 383, 326 D.L.R. (4th) 77, [2011] B.C.W.L.D. 799, [2011] B.C.W.L.D. 878, 71 C.H.R.R. D/238 | (B.C. C.A., Oct 29, 2010)

2000 SCC 28, 2000 CSC 28  
Supreme Court of Canada

Granovsky v. Canada (Minister of Employment & Immigration)

2000 CarswellNat 760, 2000 CarswellNat 761, 2000 SCC 28, 2000 CSC 28,  
[2000] 1 S.C.R. 703, [2000] S.C.J. No. 29, 186 D.L.R. (4th) 1, 253 N.R. 329,  
50 C.C.E.L. (2d) 177, 74 C.R.R. (2d) 1, 96 A.C.W.S. (3d) 1057, J.E. 2000-1068

**Allan Granovsky, Appellant v. Minister of Employment and Immigration,  
Respondent and Council of Canadians with Disabilities, Intervener**

L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache, Binnie JJ.

Heard: November 10, 1999

Judgment: May 18, 2000 \*

Docket: 26615

Proceedings: affirming (1998), 225 N.R. 2 (Fed. C.A.)

Counsel: *Bryan P. Schwartz* and *Ronald Schmalcel*, for Appellant.

*Edward R. Sojonyk, Q.C.*, and *Catharine Moore*, for Respondent.

*John F. Rook, Q.C.*, and *Mark A. Gelowitz*, for Intervener, Council of Canadians with Disabilities.

Subject: Constitutional; Public; Labour; Employment; Human Rights

APPEAL by claimant from judgment reported at (1998) 225 N.R. 2, 158 D.L.R. (4th) 411, [1998] 3 F.C. 175, 53 C.R.R. (2d) 105, 36 C.C.E.L. (2d) 155, C.E.B. & P.G.R. 8335 (headnote only) (Fed. C.A.) dismissing claimant's application for judicial review of decision dismissing claimant's appeal from decision denying claimant's application for disability benefits under the *Canada Pension Plan*.

Pourvoi du demandeur contre un jugement de la Cour d'appel fédérale rapporté à (1998) 225 N.R. 2, 158 D.L.R. (4th) 411, [1998] 3 F.C. 175, 53 C.R.R. (2d) 105, 36 C.C.E.L. (2d) 155, C.E.B. & P.G.R. 8335 (headnote only) (Fed. C.A.) qui a rejeté la demande de contrôle judiciaire d'une décision rejetant le pourvoi du demandeur contre une décision refusant sa demande de prestations d'invalidité en vertu du *Régime de pensions du Canada*.

**The judgment of the court was delivered by *Binnie J.*:**

1 On May 27, 1980, at the age of 32, the appellant injured his back at work. Thirteen years later, having been employed irregularly at various jobs in the interim, he applied for a permanent disability pension under the *Canada Pension Plan*, R.S.C., 1985, c. C-8 ("CPP"). The Minister refused the application because over the relevant 10-year period prior to the application, the appellant had failed to make the required CPP contributions in any year except 1988. The appellant argues that it was his disability that prevented him from making all of the required CPP contributions in the relevant

1981-92 contribution period, and that the failure of the CPP to take his disability into account in considering his lack of contribution constitutes discrimination contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*.

2 The appellant thus raises issues of considerable importance to persons with disabilities and to governments that undertake to design and implement social benefits legislation. The CPP is a self-funded contributory plan. In what circumstances can the *Charter* alleviate against the contribution requirements imposed by Parliament? CPP *retirement* benefits are universal but *disability* benefits are conditional. They are designed to assist persons with disabilities who were recently in the work force by replacing employment income with a disability pension. The appellant does not have any significant recent attachment to the work force; thus he does not have *recent* employment income for which a CPP disability pension *can* be a substitute. Nevertheless, if the time horizon is broadened, he can point to the fact that in the 27-year period between his entry into the work force in 1967 and his application for a disability pension in 1993 he made CPP contributions in each of 10 years, mostly prior to 1980. He should not, he says, be "branded a non-contributor".

3 The appellant admits that Parliament may, without *Charter* infringement, create a particular type of benefit (a contributory plan) targeted at a particular group of individuals (those recently in the work force) who are disadvantaged with a particular type of disability (severe rather than superficial, permanent rather than temporary), but that Parliament drew the line in the wrong place when it insisted on the same level of contributions from temporarily disabled workers as it does from able-bodied workers. In my view, for the reasons which follow, the CPP as designed and as applied to the appellant does not violate his equality rights. The impugned feature of the CPP disability pension (the "drop-out" provision) relaxes the contribution requirement in the case of individuals with permanent disabilities but not individuals with temporary disabilities. Parliament was entitled to take into account the nature and extent of an individual's disability *both* at the time of the application for a disability pension was made, and during the prior 10-year contribution period. While the CPP draws a statutory distinction between individuals with differing levels of disability during the contribution period, the distinction does not demean the appellant. It simply recognizes that he enjoyed greater economic strength at the relevant time than did the permanently disadvantaged people targeted by the special relief he now seeks to share.

## I. Facts

4 The appellant says he has suffered an intermittent and degenerative back injury since 1980. As a result of a workplace accident in that year, he was assessed to be temporarily totally disabled under the Manitoba *Workmen's Compensation Act*, R.S.M. 1970, c. W200, and received disability benefits under that Act until 1984. Prior to his accident, he had made CPP contributions in six of the ten previous years (1970-1979 inclusive). In his factum he sets out his lifetime CPP contributions as follows:

1967:	Yes	1980:	No
1968:	Yes	1981:	No
1969:	No	1982:	Yes
1970:	No	1983:	No
1971:	No	1984:	No
1972:	No	1985:	No
1973:	Yes	1986:	No
1974:	Yes	1987:	No
1975:	Yes	1988:	Yes
1976:	Yes	1989:	No
1977:	Yes	1990:	No
1978:	No	1991:	No
1979:	Yes	1992:	No
		1993:	No

In 1980-81 and again in 1982-83, the appellant was in receipt of a temporary disability allowance or rehabilitation allowance. In 1983, he was determined by the Neurosis (Psychiatric) Review Panel of the Manitoba Workmen's

Compensation Board to have a 15 percent permanent disability and in 1985 was awarded a lump sum payment of \$40,449.12 in full and final settlement. On January 24, 1985, the Workmen's Compensation Board determined that the appellant was capable of working. Since that time, he has made his CPP contribution in only one year, namely 1988.

5 Although the appellant was profitably employed from time to time following his workplace accident in 1980, he says that throughout this period his back condition continued to deteriorate and the disability became "permanent" in 1993. At that time, claiming a severe *and* permanent disability, he applied for a CPP disability pension. His application was refused by the Minister and refused again by a Review Tribunal in part because he had only made a CPP contribution in one year (1988) of the relevant CPP 10-year contribution period (1983-92) and thus had what was considered to be an insufficiently recent connection to the work force. The Tribunal took a dim view of his application, as is apparent from the terms of its decision dated July 4, 1994, which refers somewhat disparagingly to his "back-ache":

On all of the evidence, medical and otherwise, and having observed the demeanour and mental and physical manouvres [*sic*] of Mr. Granovsky during the hearing, the Tribunal is of the unanimous view that Mr. Granovsky did not suffer from a severe and prolonged mental or physical disability within the meaning of Subsection 42(2) in 1984 nor did he suffer from any such disability at any time up to the present.

Indeed Mr. Granovsky was very candid in stating to the Tribunal that he is anxious and waiting to go out and work if he can find work suited to his physical condition/limitation imposed by his back-ache.

6 Before the Pension Appeals Board on a hearing *de novo*, the parties agreed to go forward only with the *Charter* argument in respect of the appellant's contribution history, and to leave for a later hearing, if necessary, whether or not the appellant in fact suffered from a severe disability at the date of his 1993 application, or otherwise. This splitting of the issues, while intended to be helpful, has given the appeal a somewhat abstract quality on the key questions of the nature and extent of the injury, and its subsequent deterioration, which is unfortunate.

7 In any event, the nub of the appellant's *Charter* complaint is that while the CPP relaxes the contribution requirement for applicants whose severe disability was prolonged during all or part of the 10 years immediately preceding the application, it does not relax the contribution for applicants such as the appellant whose severe disability was sporadic, in the process of developing, or of short duration. He argues that where a contributor has a special burden (such as a temporary disability) that goes "above and beyond the usual", he or she is entitled to increased flexibility in the CPP contribution requirements commensurate with the increased burden.

8 The appellant says that his equality rights as a *temporarily* disabled person were violated by the refusal of the CPP to drop out of its contribution calculations those years in which he was unable to work for at least six months by reason of his disability. If the drop-out provision is applied, he says, as it is for those who suffered a *permanent* disability, he would qualify for a CPP disability pension on the basis of the years in which he *did* make a valid CPP contribution. The appellant thus says that the CPP discriminated against him by insisting on the same rules of recent contribution imposed on more able-bodied workers, which he could not make because of his temporary disability, and denying him the equivalent drop-out privileges allowed to the permanently disabled. The appellant was unsuccessful both before the Pension Appeals Board and before the Federal Court of Appeal.

## II. The Statutory Scheme

9 The CPP was designed to provide social insurance for Canadians who experience a loss of earnings owing to retirement, disability, or the death of a wage-earning spouse or parent. It is not a social welfare scheme. It is a contributory plan in which Parliament has defined both the benefits and the terms of entitlement, including the level and duration of an applicant's financial contribution.

10 The disability pension replaces income for those contributors determined to be "disabled" within the statutory definition. To qualify, applicants must satisfy two legislative requirements:

(a) The contributor must suffer from a "severe and prolonged mental or physical disability". A disability is deemed to be "severe" if the person is "incapable regularly of pursuing any substantially gainful occupation", and "prolonged" if it is "likely to be long continued and of indefinite duration or is likely to result in death" (CPP, s. 42(2)(a)).

(b) Contributors must also satisfy a "recency of contributions" test which, at the time the appellant applied for benefits, required contributions to have been made to the CPP in five of the last 10 years or two of the last three years of the contributory period (CPP, ss. 44(1)(b) and 44(2)(a)). The rationale is that workplace replacement income presupposes a recent attachment to a workplace the income from which is to be replaced.

An applicant has a right to a disability pension only if he or she satisfies *both* tests — permanent medical disability and recency of contribution — at the time of his or her application.

11 The disability pension provisions of the CPP recognize that contributors may not, for a variety of reasons, be able to make payments consistently. Reasons for non-contribution could include everything from plant closures to lack of marketable skills to as in this case) a disability. A measure of flexibility was created for all applicants by the fact that contributions need only have been made in five of the previous 10 years or two out of the previous three years. Anything less, in Parliament's view, falls short of the required *recent* attachment to the work force.

12 The impugned legislative measure (the drop-out provision) was created for two classes of persons: the permanently disabled and family allowance recipients (CPP, s. 44(2)(b)(iii) and (iv)). The drop-out provision permits certain months to be excluded from the contributory period. If a person is permanently disabled in the course of a calendar year, the months during which that person is permanently disabled are not counted against him or her in determining whether recency of CPP contribution requirements are satisfied.

13 It is clear the CPP draws a distinction between those in the position of the appellant and other persons with disabilities. Both groups consist of people with physical or mental impairments and a consequent degree of functional limitation that prevents them from working. The appellant agrees that the CPP is a self-funded contributory plan, not a form of welfare. He accepts that it is designed to provide substitute income for those who have a recent connection to the work force. He does not challenge the "philosophy of the [CPP] scheme", and acknowledges "that there can be some reasonable 'recency' test. That is, a scheme aiming at [earnings] replacement can reasonably say, as a general matter, that a person who has been out of the work force for a long time no longer has a workplace income to replace". His point is that denying him the drop-out privileges afforded to the permanently disabled demeans the importance and sense of self-worth of people with temporary disabilities. The appellant's position is that all people suffering severe disabilities are entitled to a measure of relaxation of CPP contribution requirements imposed on the more able-bodied (or at least those more consistently employed) members of the work force.

14 I note at the outset that the appellant seeks an extension of the s. 15(1) principles laid down in the decided cases, which is understandable, but he does so in circumstances that provide no clear boundaries for the future. If he succeeds in having the "permanence" requirement of the CPP test rewritten, for example, will courts next be asked to dilute the CPP requirement that the disability be severe? The less severely disabled will no doubt argue that their interests are no less worthy of protection than those whose disabilities are more severe. Is the legislature then precluded from targeting the permanently disabled for special programs or services (special paratransit public bus facilities for example) without making the same services and programs available to those whose disabilities are temporary, and if so, *how* temporary would still be sufficient to qualify? The Minister responds that if line-drawing is to be done, as is inevitable in a government benefits scheme, the question is not only *where* they are to be drawn, but also *who* is to draw them, the courts or Parliament? The Minister says that Parliament is the proper constitutional actor to make these policy determinations. This is true, provided Parliament's line drawing does not violate the Constitution.

15 The Minister's denial of the application was based on his view that the "eligibility clock" continued to run even in years in which the appellant was for most of the year unable to work and was thus for those years a non-contributor.

It is common ground that the pension was properly denied unless the legislation infringes the appellant's equality rights under s. 15(1) of the *Charter* and cannot be saved under s. 1.

### III. Constitutional Provisions

16 *Canadian Charter of Rights and Freedoms*

1. *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

.....

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

### IV. Relevant Statutory Provisions

17 *Canada Pension Plan*, R.S.C., 1985, c. C-8

42. ...

(2) For the purposes of this Act,

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and

(b) a person shall be deemed to have become or to have ceased to be disabled at such time as is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

.....

44. (1) Subject to this Part,

.....

(b) a disability pension shall be paid to a contributor ... who is disabled and who

(i) has made contributions for not less than the minimum qualifying period,

(ii) has made contributions for at least two of the last three calendar years included either wholly or partly within his contributory period,

.....

(iv) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled had an application for a disability pension been received prior to the time the contributor's application for a disability pension was actually received;

.....

(2) For the purposes of paragraph (1)(b) ...

(a) a contributor shall be considered to have made contributions for not less than the minimum qualifying period only if he has made contributions

(i) for at least five of the last ten calendar years included either wholly or partly within his contributory period. ...

(b) the contributory period of a contributor shall be the period

(i) commencing January 1, 1966 or when he reaches eighteen years of age, whichever is the later, and

(ii) ending with the month in which he is determined to have become disabled for the purpose of paragraph (1)(b),

but excluding

(iii) any month that was excluded from the contributor's contributory period under this Act or under a provincial pension plan by reason of disability, and

(iv) in relation to any benefits payable under this Act ... any month for which he was a family allowance recipient in a year for which his unadjusted pensionable earnings were equal to or less than his basic exemption for the year.

## V. Judgments in Appeal

### A. Pension Appeals Board

#### 1. *Per Cameron J.A., Rice J.A. concurring*

18 Cameron J.A. concluded that entitlement to disability benefits under the CPP is conditional on the statutory criteria being met. Here, the legislation did not impose a burden upon the appellant that is not imposed on other claimants. The criteria are the same for all groups. These criteria are not based on stereotypical views of disabled individuals, nor can they be said to be designed to exclude disabled people from participation, in his view. The years of unemployment owing to disability, combined with other years of no or little employment, resulted in the appellant not having sufficient contributions to meet the prerequisites under the Act. Mr. Granovsky was denied a pension because he had not made sufficient contributions. The reason for the lack of contributions, in Cameron J.A.'s view, is irrelevant to the CPP. The determination of the appropriate level of contributions is a matter for Parliament. For these reasons, she concluded that the contribution requirements of the disability plan do not violate s. 15(1) of the *Charter*.

#### 2. *Per the Honourable C.R. McQuaid concurring in the result*

19 In concurring reasons, the Honourable C.R. McQuaid expressed the view that exclusion from the contributory requirements of any years that a claimant suffered a work-related injury would discriminate against workers "who suffered from a disabling injury not directly work-related, and that even larger class who by reason of local economic conditions, or industrial downsizing, are, through no fault of their own, not in receipt of earnings, and thus precluded from contributing".

### B. Federal Court of Appeal, [1998] 3 F.C. 175 (Fed. C.A.)

#### 1. *Stone J.A., Isaac C.J. concurring*

20 Stone J.A. concluded that the Pension Appeals Board had erred in analysing the issue on the basis of direct discrimination rather than indirect or "adverse effect" discrimination. In a decision that pre-dated this Court's judgment in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), he concluded at para. 11 that the contributions requirement for disability benefits in the *Canada Pension Plan Act* was contrary to s. 15(1) of the *Charter*:

While neutral on its face, the recency of contributions criterion in subsection 44(1) creates a distinction, in its effect, between disabled and able-bodied persons. This requirement imposes a restrictive condition on disabled persons which arises because of their disability, and which is not imposed on able-bodied persons who apply for disability benefits under the Act. Because of this distinction, disabled persons such as the applicant are denied the "equal benefit" of the law — in this case, equal access to a disability pension to which they have made valid contributions. ... Disabled persons are thereby inhibited from participating fully in the Plan by reason of their disability.

21 Stone J.A. concluded, however, that the eligibility requirements in the CPP were justified pursuant to s. 1 of the *Charter*. He wrote at para. 18:

In my view, the government has made a reasonable attempt, given the social, economic and fiscal considerations involved, to calculate and allocate a disability benefit in the most reasonable manner. The government is uniquely situated to examine this issue and this Court should not second-guess the action it has taken.

22 Stone J.A. therefore concluded that although the CPP did infringe the applicant's rights protected by s. 15(1) of the *Charter*, it was a reasonable limit that was demonstrably justified in a free and democratic society.

## 2. *McDonald J.A., concurring in the result*

23 McDonald J.A. agreed with the result, but for different reasons. Unlike the majority, he was of the view that the applicant had not made a case of discrimination since "[t]he eligibility criteria are imposed on all individuals equally" (para. 36). He went on to hold that if, contrary to his view, s. 15(1) were violated, the government had *not* discharged its s. 1 onus of proving that it had impaired the applicant's right as little as possible.

## VI. Constitutional Questions

24 On February 16, 1999, Lamer C.J. stated the following constitutional questions:

1. Does the *Canada Pension Plan*, R.S.C., 1985, c. C-8, discriminate against persons on the basis of physical or mental disability by including periods of physical or mental disability in a claimant's contributory period, as such period is determined pursuant to s. 44(2)(b) of that Act, in claims for a disability pension under that Act, contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11?

2. If so, does the discrimination come within only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11?

## VII. Analysis

25 The appellant says he has a serious back problem that renders him unemployable. The question is how, if at all, his medical problem becomes a human rights issue.

26 The true focus of the s. 15(1) disability analysis is not on the impairment as such, nor even any associated functional limitations, but is on the problematic response of the state to either or both of these circumstances. It is the state action that stigmatizes the impairment, or which attributes false or exaggerated importance to the functional limitations (if any), or which fails to take into account the "large remedial component" (*Andrews v. Law Society (British Columbia)*),

[1989] 1 S.C.R. 143 (S.C.C.), at p. 171) or "ameliorative purpose" of s. 15(1) (*Eaton v. Brant (County) Board of Education* (1996), [1997] 1 S.C.R. 241 (S.C.C.), at para. 66; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.), at para. 65; *Law, supra*, at para. 72), that creates the *legally relevant* human rights dimension to what might otherwise be a straightforward biomedical condition.

27 Some of the grounds listed in s. 15 are clearly immutable, such as ethnic origin. A disability may be, but is not necessarily, immutable, in the sense of not being subject to change. As this case shows, disabilities may be acquired in the course of life, and may grow more severe or less severe as time goes on. Disabilities are certainly not 'immutable' in the secondary sense of "[n]ot varying in different cases" (*New Shorter Oxford English Dictionary* (1993), vol. 1, p. 1317). Unlike gender or ethnic origin, which generally stamp each member of the class with a singular characteristic, disabilities vary in type, intensity and duration across the full range of personal physical or mental characteristics that, in the context of the CPP, prevent or "disable" an individual from working to earn the annual CPP contribution. As Sopinka J. pointed out in *Eaton, supra*, at para. 69, disability "means vastly different things depending upon the individual and the context".

28 A disability, unlike, for example, race or colour, may entail pertinent functional limitations. These limitations have historically provided a rationale (often unfairly) to explain and justify differential treatment of persons with disabilities. A related consideration is the variety of functions against which the limitations of a person with a disability may be measured. In the context of the CPP, the yardstick is employability. An individual may suffer severe impairments that do not prevent him or her from earning a living. Beethoven was deaf when he composed some of his most enduring works. Franklin Delano Roosevelt, limited to a wheelchair as a result of polio, was the only President of the United States to be elected four times. Terry Fox, who lost a leg to cancer, inspired Canadians in his effort to complete a coast-to-coast marathon even as he raised millions of dollars for cancer research. Professor Stephen Hawking, struck by amyotrophic lateral sclerosis and unable to communicate without assistance, has nevertheless worked with well-known brilliance as a theoretical physicist. (Indeed, with perhaps bitter irony, Professor Hawking is reported to have said that his disabilities give him more time to think.) The fact they have steady work does not, of course, mean that these individuals are necessarily free of discrimination in the workplace. Nor would anyone suggest that, measured against a yardstick other than employment (access to medical care for example), they are not persons with daunting disabilities.

29 The concept of disability must therefore accommodate a multiplicity of impairments, both physical and mental, overlaid on a range of functional limitations, real or perceived, interwoven with recognition that in many important aspects of life the so-called "disabled" individual may not be impaired or limited in any way at all. An appreciation of the common humanity that people with disabilities share with everyone else, and a belief that the qualities and aspirations we share are more important than our differences, are two of the driving forces of s. 15(1) equality rights.

30 The bedrock of the appellant's argument is that many of the difficulties confronting persons with disabilities in everyday life do not flow ineluctably from the individual's condition at all but are located in the problematic response of society to that condition. A proper analysis necessitates unbundling the impairment from the reaction of society to the impairment, and a recognition that much discrimination is socially constructed. See, e.g., D. Pothier, "Miles to Go: Some Personal Reflections on the Social Construction of Disability" (1992), 14 *Dalhousie L.J.* 526. Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself. Problematic responses include, in the case of government action, legislation which discriminates *in its effect* against persons with disabilities, and thoughtless administrative oversight. The appellant says that his treatment by the CPP shows the inequality that can result when government enacts social programs with inadequate attention, at the design stage, for the true circumstances of people with disabilities.

#### A. The Constitutional Aspect of Disability

31 This case presents the first opportunity for the Court to consider the disability ground of s. 15(1) since rendering its decision in *Law, supra*. In that decision, Iacobucci J., speaking for a unanimous Court, set out what he called "a synthesis" of "various articulations" of the s. 15(1) test. I propose at the outset to highlight some of the relevant themes from the Court's earlier *Charter* treatment of disability, in so far as those themes bear on the proper resolution of the

present appeal, and then, in light of that earlier jurisprudence, to turn to the application of the guidelines summarized in *Law* commencing at para. 88.

32 The respondent is somewhat dismissive of the appellant's physical impairment, suggesting disbelief that a severe back ache could rise to the level of a constitutional challenge. The respondent argues that s. 15(1) protection

is for serious disabilities. ... Human Rights Boards and Tribunals in Canada have held that absences from work because of temporary illnesses or injuries are not ordinarily characterized as disabilities. ...

This perspective puts too much focus on the impairment itself and not enough focus on the government's response to it. I therefore propose to discuss what at this stage appear to be circumstances that signal the enumerated ground of disability while underlining the obvious fact that the analysis will undergo further refinement in future cases as they arise.

33 The *Charter* is not a magic wand that can eliminate physical or mental impairments, nor is it expected to create the illusion of doing so. Nor can it alleviate or eliminate the functional limitations truly created by the impairment. What s. 15 of the *Charter* can do, and it is a role of immense importance, is address the way in which the state responds to people with disabilities. Section 15(1) ensures that governments may not, intentionally or through a failure of appropriate accommodation, stigmatize the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfilment in a world relentlessly oriented to the able-bodied.

34 It is therefore useful to keep distinct the component of disability that may be said to be located in an individual, namely the aspects of physical or mental impairment, and functional limitation, and on the other hand the other component, namely, the socially constructed handicap that is not located in the individual at all but in the society in which the individual is obliged to go about his or her everyday tasks. This manner of differentiating among the different aspects of disabilities is elaborated upon in the medical context by the World Health Organization in the *International Classification of Impairments, Disabilities and Handicaps: A Manual of Classification Relating to the Consequences of Disease* (1980); restated in: *United Nations Decade of Disabled Persons 1983-1992; World program of action concerning disabled persons* (1983), at pp. 2-3, and in the human rights area by Professor J. E. Bickenbach, *Physical Disability and Social Policy* (1993), and Professor M. Minow, "When Difference has its Home; Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference" (1987), 22 *Harvard C.R.-C.L.L. Rev.* 111, at p. 124. (While the WHO, in the *medical* context, uses the word "disability" to refer to functional limitation (the second aspect), I prefer to use the expression "functional limitation" to emphasize that in *legal* terms it is all three aspects considered together that constitute the disability.)

35 I have no desire to burden with further nuances the already complicated world of equality rights, but I think that appropriate attention to the distinctions suggested by the WHO helps to bring into sharper focus the disability ground within the larger s. 15(1) framework set out in *Law, supra*.

36 Not all physical or mental impairments (first aspect) give rise to functional limitations (second aspect). This Court recently addressed a number of related employment complaints under s. 10 of the Quebec *Charter*, including an instance where an employer quite erroneously attributed to an applicant for a job as gardener-horticulturalist functional limitations which did not in fact arise from her physical condition, though the employer subsequently resiled from this position: *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Ville)*, 2000 SCC 27 (S.C.C.). Where functional limitations do exist, they may be so minor as to be immaterial. An individual who is slightly colour blind, for example, may not notice any functional limitations, unless he or she chooses to undertake employment where an ability to differentiate colours precisely is important, a home decorator for example, or a commercial airline pilot. In other cases, technology has eliminated any functional limitation that would otherwise exist, as in the case of the short-sighted individual who wears corrective eyeglasses. Does a person whose physical impairment continues but whose functional limitations have been eliminated continue to be a person with disabilities? The United States Supreme Court takes the view that such individuals cease to be disabled for the purpose of the *Americans with Disabilities Act*;

see *Sutton v. United Airlines Inc.*, 119 S. Ct. 2139 (U.S. Colo., 1999). The same result would not necessarily follow under our jurisprudence, as discussed below.

37 Equally, the third aspect (the socially constructed handicap) may wrongly attribute exaggerated or unjustified consequences to whatever functional limitations in fact exist. A government inclination to write people off because of their impairment justifies scrutiny even if the impairment has resulted in very real functional limitations. The consequences the government attaches to such functional limitations may overshoot (or undershoot) the mark. The officials at the Brant Board of Education who undertook the difficult task of evaluating the learning potential of 12-year-old Emily Eaton, as described in *Eaton, supra*, must have been all too aware that another individual, similarly wheelchair bound with reduced communication capacity, turned out to be Professor Stephen Hawking. To say that the state has an obligation not to exaggerate the functional limitations caused by serious disabilities is not to underestimate the difficulty of making the assessment.

38 Equally problematically, there are instances where society passes directly from the first aspect (physical or mental impairment) to the third aspect (imposition of a disadvantage or handicap) without going through the intermediate consideration of evaluating the true functional limitations, if any. An individual with a serious facial disfigurement, for example, or a person who is diagnosed with leprosy, may not have, and may never have, any relevant functional limitations, but may nevertheless suffer discrimination on account of the condition.

39 In summary, while the notions of impairment and functional limitation (real or perceived) are important considerations in the disability analysis, the primary focus is on the inappropriate legislative or administrative response (or lack thereof) of the state. Section 15(1) is ultimately concerned with human rights and discriminatory treatment, not with biomedical conditions.

40 The different elements or aspects of the disability analysis are relevant to human rights legislation as well as to *Charter* scrutiny. In fact, two recent employment cases before this Court further illustrate these relationships. In *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (S.C.C.) (referred to as "*Grismer Estate*"), the appellant, whose eyesight was impaired by a stroke, was *assumed* by the provincial Superintendent of Motor Vehicles, without individual testing, to have a sufficient level of functional limitation to disqualify him from holding a driver's licence. The Court held him to be entitled to an individual test to determine whether the attributed limitation did in fact exist. On the other hand, in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 (S.C.C.), a woman firefighter named Tawney Meiorin failed a series of strenuous physical endurance tests, thus exhibiting a physical limitation broadly related to her gender, but succeeded in her complaint by showing that the standards themselves had never actually been related to the demands of firefighting. The standards merely tracked the aerobic performance of male firefighters. While not a case of disability as such, the *Meiorin* case illustrates a situation where a personal characteristic enumerated in s. 15 (gender) is shown to be related to a more limited aerobic capacity (functional limitation) but this is then wrongly converted into a state-imposed job handicap which was no less objectionable because it was misconceived rather than intentionally discriminatory. The "problem" did not lie with the female applicant, but with the state's substitution of a male norm in place of what the appellant was entitled to, namely a fair-minded gender-neutral job analysis. A parallel view would be urged in cases where the functional limitation is related to a disability.

## **B. The Guidelines Developed in *Law v. Canada***

41 In *Law, supra*, the Court suggested that a s. 15 analysis proceed on the basis of "three broad inquiries" as follows (at para. 39):

First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the

claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1). [Emphasis in original.]

42 I therefore proceed to make these three broad inquiries into the disability claim presented by the appellant.

### (1) Differential Treatment

43 The first step is to determine whether the CPP disability provision draws a distinction, based on one or more personal characteristics, between the appellant and some other person or group to whom he may properly be compared, resulting in unequal treatment. The Pension Appeals Board concluded that the CPP set out objective criteria which applied equally and without distinction to every applicant. This is true in the sense that the same set of criteria was applied to all contributors. Such criteria, however, drew an explicit distinction between people with permanent disabilities and all other contributors, and subjected the groups to different treatment. Moreover, the *effects* were very different depending on the status of a person's disabilities during the contribution period. As Stone J.A. pointed out in the Federal Court of Appeal, "[w]hat the recency of contributions requirement fails to take into account is that disabled persons may not be able to make contributions for the minimum qualifying period in subsection 44(1), because they are physically unable to work" (para. 11). The CPP contribution requirements, which on their face applied the same set of rules to all contributors, operated unequally in their effect on persons who want to work but whose disabilities prevent them from working.

44 Parliament has recognized this problem in two ways: in part by dropping out the years of permanent disability in its assessment of an applicant's contribution history, and in part by relaxing the contribution requirement to five years out of 10 (or two years out of three), thus recognizing that an individual may not have an uninterrupted contribution record for reasons outside their control, including temporary disability. The appellant argues that the 5/10 year or the 2/3 year rules are irrelevant because they apply to everybody, whereas his particular reason for non-contribution is the object of *Charter* protection. He says that because of his severe back problems he too, just as much as the permanently disabled, could not maintain the contribution level expected from able-bodied workers. In short, the CPP both in its design and in its effect creates a distinction, based on disability, between the appellant and more able-bodied members of the work force. Moreover, the CPP draws a further distinction between people like the appellant who were temporarily disabled from participating in the work force during the contribution period and persons with permanent disabilities who were excluded from the work force altogether during all or a part of that period of time.

#### (a) The Comparative Approach

45 The identification of the group in relation to which the appellant can properly claim "unequal treatment" is crucial. The Court established at the outset of its equality jurisprudence in *Andrews, supra*, that claims of distinction and discrimination could only be evaluated "by comparison with the conditions of others in the social and political setting in which the question arises" (p. 164). See also *Law, supra*, at para. 24:

This comparison determines whether the s. 15(1) claimant may be said to experience differential treatment, which is the first step in determining whether there is discriminatory inequality for the purpose of s. 15(1).

46 The appellant contends that he ought to be compared to an ordinary member of the work force who was able-bodied during the contribution period because the appellant was being required to satisfy the level of contribution expected of an ordinary member of the work force with insufficient regard for periods of temporary disability. However, while a s. 15 complainant is given considerable scope to identify the appropriate group for comparison, "the claimant's characterization of the comparison may not always be sufficient. It may be that the differential treatment is not between the groups identified by the claimant, but rather between other groups" (*Law, supra*, at para. 58).

47 Such identification has to bear an appropriate relationship between the group selected for comparison and the benefit that constitutes the subject matter of the complaint. As was pointed out in *Law, supra*, at para. 57:

Both the purpose and the effect of the legislation must be considered in determining the appropriate comparison group or groups.

48 The purpose of the drop-out provision is to facilitate access of people with permanent disabilities to a CPP disability pension. It does so by employing the same criteria ("severe" and "prolonged") as the criteria used for the disability pension itself. I do not suggest that faithful correspondence between the benefit in issue and the purpose of the larger plan necessarily avoids the claim of discrimination, because the discrimination may lie in the purpose or effects of the larger plan, as discussed by McLachlin J., as she then was, in *Gibbs v. Battlefords & District Co-operative Ltd.*, [1996] 3 S.C.R. 566 (S.C.C.), at para. 46 *et seq.* Here, however, the appellant does not take the position that the disability pension itself is discriminatory within the meaning of s. 15.

49 An able-bodied worker who makes more or less regular CPP contributions then suffers a permanent disability will be a paid-up CPP contributor within the 5/10 year or 2/3 year rule and thus will have no need (by reason of the disability) to resort to the drop-out provision. He or she neither comes within the purpose of the drop out provision, nor is disadvantaged by its effects.

50 The people who do benefit from the drop-out provision are those who not only demonstrate a permanent disability at the date of application, but also who possessed the permanent disability during the contribution period, or so much of it as they seek to drop out of the CPP calculation. Thus the permanently disabled are the people whose drop-out benefit the appellant seeks to share, and who in my view constitute the proper comparator group.

51 The intervener, the Council for Canadians with Disabilities says that because in 1993 the appellant *was* suffering a severe and permanent disability, the better *Charter* argument is that Parliament improperly drew a line at the date of the application within the same group of people all of whom *at that time* suffered the same level of disadvantage. The drop-out provision, however, relates to the health status in each of the 10 years prior to the 1993 application, which was the relevant contribution period, at which time the appellant enjoyed a health advantage.

52 I therefore conclude that the appellant has established a denial of equal benefit of the law under the first step of the equality analysis. He was denied a disability pension because he could not bring himself within the drop-out provision made available to applicants who suffered from severe and permanent disabilities during the contribution years in question. The CPP failed to recognize the barrier posed by his temporary disability. His objection, basically, is that the drop-out provision is underinclusive. However, the *relevant* group with which he can claim "unequal treatment" is the body of CPP contributors who suffered a severe and permanent disability in the years of their respective contribution histories and who therefore did benefit from the drop-out provision to which the appellant claims entitlement on the basis of his equality rights.

## **(2) Is the Impugned Distinction Based on an Enumerated or Analogous Ground?**

53 The drop-out provision makes a legislative distinction entirely on the basis of the existence and duration of the disability that rendered the applicant unemployed. Classification on the basis of disability is subject to scrutiny, and the appellant thus satisfies the "second broad inquiry" identified in *Law, supra*. I should add that even though *temporary* disability is not, by definition, immutable in the sense of unchangeable, it is clearly a characteristic that is unchangeable for its duration, and entirely outside the control of the individual thus burdened.

## **(3) Does the Financial Disadvantage Suffered by the Appellant under Section 44(2)(b)(iii) of the CPP Amount to Discrimination Under Section 15 of the Charter?**

54 Classification on the basis of disability is not necessarily disadvantageous. Here, for those who qualify, it results in a CPP disability pension. The appellant's application was refused but this denial, even on grounds related to disability, is not enough to produce a s. 15(1) infringement. The appellant must also show that the failure of the CPP to take into account that his contribution history was at least in part the product of his temporary disability engages the *purpose* of s. 15(1) of the *Charter*. The appellant must go beyond a "formalistic or mechanical approach" (*Law, supra*, para. 88), and address the ultimate issue which, citing *Law* at para. 99, may be formulated as follows:

Does the law, in purpose or effect, conform to a society in which all persons enjoy equal recognition as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect, and consideration?  
Does the law, in purpose or effect, perpetuate the view that [persons with temporary disabilities] are less capable or less worthy of recognition or value as human beings or as members of Canadian society?

55 In this connection, the appellant particularly invokes the "ameliorative purpose" of s. 15, calling in aid the need for accommodation emphasized in *Eaton, supra*, at para. 67:

... it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. ... It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

56 The concept of "human dignity" has been present in s. 15 since the beginning, as is chronicled by Iacobucci J. in *Law, supra*, at paras. 40 to 65. Indeed it was emphasized by the then Prime Minister Trudeau in his advocacy of an entrenched Charter, when he wrote:

The very adoption of a constitutional charter is in keeping with the purest liberalism, according to which all members of a civil society enjoy certain fundamental, inalienable rights and cannot be deprived of them by any collectivity (state or government) or on behalf of any collectivity (*nation*, ethnic group, religious group, or other). To use Maritain's phrase, they are "human personalities," they are beings of a moral order - that is, free and equal among themselves, each having absolute dignity and infinite value. As such, they transcend the accidents of place and time, and partake in the essence of universal Humanity. They are therefore not coercible by any ancestral tradition, being vassals neither of their race, nor to their religion, nor to their condition of birth, nor to their collective history. [Italics in original; underlining added.]

Ron Graham, ed., *The Essential Trudeau* (1998), at p. 80.

57 I underline the words "free and equal among themselves, each having absolute dignity and infinite value". While the Court has made it clear that it is not bound by the various interpretations of *Charter* provisions offered by individuals "however distinguished" in the drafting process (see *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), at p. 508), nevertheless it is worth noting that with the decision in *Law, supra*, which endeavoured to unify the strands of almost 15 years of judicial interpretation, the concept of human dignity has been confirmed to have the centrality in the interpretation of s. 15 that the framers intended. Iacobucci J. stated in *Law, supra*, at para. 51 that

differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way...

and stated again, at para. 42 where he cited with approval the test advanced by McIntyre J. in *Andrews, supra*, at p. 171, that:

The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings, equally deserving of concern, respect and consideration. ...

L'Heureux-Dubé J. restated the test in *Egan v. Canada*, [1995] 2 S.C.R. 513 (S.C.C.), at para. 39, as follows:

A person or group of persons has been discriminated against within the meaning of s. 15 of the *Charter* when members of the group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.

58 The question therefore is not just whether the appellant has suffered the deprivation of a financial benefit, which he has, but whether the deprivation promotes the view that persons with temporary disabilities are "less capable, or less worthy of recognition or value *as human beings or as members of Canadian society*, equally deserving of concern, respect, and consideration" [emphasis added]. In *Miron v. Trudel*, [1995] 2 S.C.R. 418 (S.C.C.), McLachlin J. (as she then was) noted, at para. 132, that "distinctions made on enumerated or analogous grounds may prove to be, upon examination, non-discriminatory".

**(a) The Contextual Factors**

*(i) Pre-existing Disadvantage*

59 In *Law, supra*, Iacobucci J. emphasized the importance of approaching the third stage of the s. 15 analysis by considering a range of contextual factors. (Although *Law* also dealt with the CPP, the benefit at issue in that case was a widow's survivor pension, which raises a quite different context than the disability pension provisions at issue here.) Context is important. As Marshall J. said, dissenting, in *Cleburne (City) v. Cleburne Living Centre*, 473 U.S. 432 (U.S. Tex., 1985), at pp. 468-69, "[a] sign that says 'men only' looks very different on a bathroom door than a courthouse door".

60 Relevant contextual factors include any pre-existing disadvantage, stereotyping or vulnerability of the claimant. These factors, though not determinative, do not favour the appellant. While no one who has suffered back pain would be dismissive of the appellant's condition, most of the population can probably be qualified as having experienced some form of "temporary" disability in the course of their work at one time or other. The ranks of the temporarily disabled may have little in common except some degree of impairment or physical limitation of shorter or longer duration, and unless more precisely circumscribed, the group is really not comparable to others that have attracted s. 15 protection. Nor does the appellant complain about stereotyping. His objection is that while the CPP may be based on a true assessment of the "individual's merits and capacities" (*Andrews, supra*, at p. 175), the provision is "too stinting" to pass muster under the *Charter*.

*(ii) Relationship between Grounds and the Claimant's Characteristics or Circumstances*

61 A second contextual issue is the relationship between the ground (i.e., disability) and the nature of the differential treatment. Iacobucci J., in *Law, supra*, at para. 69, refers to *Eaton, supra*, and *Eldridge, supra*, as establishing that "avoidance of discrimination will frequently require distinctions to be made to take into account the actual personal characteristics of disabled persons". The mere fact that the legislation does not completely ignore the circumstances of the claimant is not a complete answer to the claim, as pointed out in *Law*, at para. 70:

This is not to say that the mere fact of impugned legislation's having to some degree taken into account the actual situation of persons like the claimant will be sufficient to defeat a s. 15(1) claim. The focus must always remain upon the central question of whether, viewed from the perspective of the claimant, the differential treatment imposed by the legislation has the effect of violating human dignity. The fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the s. 15(1) guarantee.

Here the CPP is preoccupied with the plight of the CPP contributors who suffer a "severe and prolonged mental or physical disability". The drop-out provision is framed to be consistent with the entitlement to the disability pension itself

and focuses on the "actual personal characteristics of disabled persons". Both the pension entitlement and the drop out provision target a specific group of CPP contributors whose needs and circumstances correspond precisely to the purpose of the legislation. There is no such exact fit (or correspondence) between the drop-out provision and the appellant who experienced only bouts of *temporary* disability from time to time during the contribution period.

62 The alignment of the drop-out exception with the legislative purpose of the CPP disability pension distinguishes this case from the situation in *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (S.C.C.). In that case, the ameliorative purpose of the *Individual's Rights Protection Act* was not advanced by the exclusion of sexual orientation. Indeed, the exclusion defeated aspects of the stated legislative purpose of a comprehensive human rights code to promote a society "where each and every man and woman will be able to stand on his own two feet and be recognized as an individual and not as a member of a particular class" (Cory J., at p. 505, quoting the Alberta *Hansard*). Here there is no such contradiction between the impugned measure and the laudable legislative purpose.

63 In the relevant years prior to 1993, the appellant was not permanently disabled, and the CPP targeted the drop-out provision at those who were, i.e., whose greater need at the time corresponded to the purpose of creating the statutory benefit in the first place. Moreover, the CPP took into account the "actual personal characteristics" of temporary non-contributors, including the temporarily disabled, by permitting a sporadic contribution history under the 5/10 years or 2/3 years rule. The fact this accommodation applied to individuals who failed to make their CPP contributions for reasons (e.g., plant closures) totally unrelated to the *Charter*, as well as to people like the appellant with *Charter* arguments, does not diminish the fact that an accommodation was made.

64 The appellant's argument depends upon the correctness of his choice of able-bodied workers as the comparator group. He says, "The appellant Granovsky wishes to make it clear that his submission is that he is relying on a comparison between temporary disabled persons and able-bodied persons. The fact that some adjustment has been made for 'permanently disabled' persons is not the gravamen of Mr. Granovsky's complaint." If, as I believe, he has picked the wrong comparator group, the rest of his analysis collapses under the weight of an erroneous premise.

(iii) *Ameliorative Purpose or Effect*

65 A third related contextual factor is the ameliorative purpose or effect of the impugned law on other groups in society. As M. D. Lepofsky has justly observed:

Most of our mainstream institutions, laws, organizations, buildings, telecommunication systems, schools and universities, public policy initiatives, job descriptions, transit services and other facilities are designed and operated on the unarticulated, erroneous and unfair premise that only persons without disabilities could, would or should participate in or use them.

"A Report Card on the *Charter's* Guarantee of Equality to Persons with Disabilities after 10 Years - What Progress? What Prospects?" (1998), 7 *N.J.C.L.* 263, at p. 270.

66 In this sense, s. 15(1) recognizes the legitimate desire of persons with disabilities to join in the everyday world taken for granted by the rest of the population. Equality has to do with "similarities that transcend as well as differences that endure": Minow, *supra*, at p. 124.

67 In this case, however, the group whose situation Parliament sought to ameliorate is the more disadvantaged group of the permanently disabled. As the Court held in *Law*, in terms applicable to the present appeal, at para. 72:

An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. [Emphasis added.]

I do not suggest that s. 15 claims can properly be decided by pitting groups of disadvantaged people against each other to determine who is *more* disadvantaged. The fact the CPP drop-out provision "corresponds to the greater need or the different circumstances" of the permanently disabled is, however, a relevant contextual factor.

(iv) *Nature of the Interest Affected*

68 A further contextual factor is the nature and scope of the interest represented by the impugned law. Persons with disabilities have been the target of a variety of legislative responses through the years. In an earlier era, laws were imposed to protect society against the presumed impact of impairments. Thus people with mental disabilities were classified as "lunatics" and precluded from exercising a number of civil rights, including voting. A later generation of laws tried to ameliorate the financial effect of a disabled person's functional limitations with the solace of financial benefits, as in the comprehensive legislation passed to assist disabled war veterans. The more recent wave of legislative activity, including the provincial human rights legislation, seeks to improve the legal position of individuals with disabilities to counteract socially constructed handicaps, as La Forest J. noted in *Eldridge, supra*, at para. 56:

... disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the *Charter* demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms.

69 Here the "interest" represented by the impugned law is the drop-out provision which, if applied, might open the door to a disability pension. The appellant is entitled to have taken into consideration the actual impact on him of the denial of that financial benefit. (He says he will be thrown onto the welfare rolls.) While Parliament was not required to create the CPP benefit scheme in the first place, having decided to do so, it must not confer benefits in a discriminatory manner contrary to s. 15(1). Thus, in *Vriend, supra*, when the Alberta legislature set out to create a comprehensive human rights code, its decision to exclude sexual orientation from the prohibited grounds of discrimination was held to be unconstitutionally underinclusive. Here, in contrast, the design of the CPP contribution rules, and in particular Parliament's delineation of the drop-out provision, are directed to a narrow class of persons seeking a narrowly restricted benefit. In *Vriend*, the underinclusion was designed to reinforce the rejection of gays and lesbians as individuals equally deserving of respect. No such lack of respect or loss of dignity is manifested in the CPP drop-out provision, which is simply tailored to correspond to the requirements of the pension benefit itself, none of which are challenged by the appellant. In these circumstances, in my opinion, the appellant fails to show that viewed from the perspective of the hypothetical "reasonable" individual who shares the appellant's attributes and who is dispassionate and fully apprised of the relevant circumstances (*Egan, supra*, at para. 56; *Law, supra*, at para. 60), his dignity or legitimate aspirations to human self-fulfilment have been engaged.

70 In other words, the appellant has not demonstrated a convincing human rights dimension to his complaint. Assuming he can show an impairment and significant functional limitations, he fails to show that the government's response through the design of the CPP or its application demeans persons with temporary disabilities, or casts any doubt on their worthiness as human beings.

(b) *Disability Jurisprudence*

71 The appellant contends that his claim is fully consistent with the principles laid down in this Court's jurisprudence and refers in his factum to *Eldridge, supra*, (factum paras. 27, 37, 38 and 94), and to *Eaton, supra*, (factum paras. 38 and 94). He also cites *Gibbs, supra*, (para. 42), and the dissenting judgment of Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), (paras. 35, 37), on all of which he relies. While the prior case law is rightly presented as supportive of people with disabilities, I think with respect that the prior decisions do not support this particular claim, for reasons that I will endeavour to outline briefly.

(i) *Eaton v. Brant (County) Board of Education (1996)*, [1997] 1 S.C.R. 241 (S.C.C.)

72 The *Eaton* case involved the disputed school placement of a 12-year-old girl with cerebral palsy. The Board of Education had placed Emily in a "special education class". Emily's parents wanted her to remain in the ordinary education stream. There is no doubt that Emily suffered severe impairment. The cerebral palsy had caused considerable brain damage (the impairment) resulting in an inability to communicate except in the most basic terms, her lack of control over her body which required that she use a wheelchair, and a number of loosely identified learning disabilities (the functional limitation). In terms of the third aspect (the handicap), Emily argued that the School Board's response exacerbated her isolation, undermined her progress toward integration and self-fulfilment, and thus attacked the core purpose of her s. 15(1) equality rights. It was established that her classroom behaviour — "the increasing incidents of crying, sleeping and vocalization" (Sopinka J., at para. 19) — undoubtedly created some disruption for the "mainstream" children around her and raised a serious potential issue as to whether the special educational placement was for Emily's benefit or for the presumed benefit of her mainstream classmates. The Court therefore examined whether the criteria (which on their face were directed solicitously to her education needs) were in fact discriminatory in that they exaggerated the benefits of segregation and minimized the benefits to Emily that would flow from her inclusion in the educational mainstream.

73 While this Court refused to read into s. 15 a *presumption* in favour of inclusion in the mainstream (on the basis that inclusion might be contrary to the best interest of a person with severe disabilities because the application of the presumption might compel a bad placement in some cases), Sopinka J. nevertheless clearly stated that, viewed in human rights terms, "[i]ntegration [of Emily in the mainstream environment] was the preferred accommodation" (para. 68). Reference might be made here to the similar sentiment of Marshall J., dissenting, in *Cleburne (City)*, *supra*, at p. 461, that exclusion "deprives the [disabled] of much of what makes for human freedom and fulfilment — the ability to form bonds and take part in the life of a community".

74 Emily's claim of discrimination was defeated on the facts. The Board's local placement committee, in a decision upheld after a 21-day hearing by the province's Special Education Tribunal, had fairly (in the Court's view) determined that integration had had "the counterproductive effect of *isolating* her, of segregating her in the *theoretically* integrated setting" (para. 72, emphasis added). Walls do not a prison make and inclusion in a mainstream classroom is not necessarily a liberating or self-fulfilling experience. The Court could find no evidence that the School Board had adopted an insensitive or self-serving response to Emily's condition, or that the criteria used in placing Emily in a special education program failed to take into account the desirability of integrating disabled students into mainstream education. On the contrary, the process had put the focus on substantive equality, not merely formal equality. McIntyre J. in *Andrews*, *supra*, counselled, at p. 169: "The accommodation of differences ... is the essence of true equality" (quoted by Sopinka J. at para. 66). A reading of the decision as a whole makes it clear, I think, that Emily's claim might have succeeded if the appellant Board had wrongly attributed to Emily functional limitations which she did not in fact possess, or if the Court had been persuaded that the Board's response to the challenge posed by Emily's placement had itself violated Emily's dignity as a human being equally deserving of consideration, or placed discriminatory obstacles in the way of her self-fulfilment. In short, Emily Eaton's claim failed for some of the same principled reasons that, in my view, require rejection of the appellant's s. 15(1) claims in this case.

(ii) *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.)

75 The appellant relies on the dissenting reasons of Lamer C.J. In that case, the appellant had established a physical impairment (amyotrophic lateral sclerosis (ALS), widely known as Lou Gehrig's disease) which produced such severe loss of muscular control (functional limitation) that she expected to be unable to commit suicide without assistance when her life inevitably deteriorated to the point of utter intolerability. She claimed that criminalizing the act of assisting her suicide imposed an indignity related entirely to her physical disability and thereby violated her s. 15 rights (the state-imposed handicap). Whereas people without disabilities could, if they wished, commit suicide unassisted, she because of her disability could not do so, and was thus differentially impacted by the legal prohibition on suicide assistance. Lamer C.J. recognized that the legal handicap was not the inevitable product of the disease, but a consequence imposed by society through s. 241(b) of the *Criminal Code*. Leaving aside the fact that the other members of the Court declined to characterize the issue raised by Sue Rodriguez as a s. 15(1) issue, the analysis of the Chief Justice is of no help to the

appellant because Sue Rodriguez, like Emily Eaton, was comparing her situation to that of able-bodied people, and a breach of s. 15(1) was found by the Chief Justice on that basis. In this case, as stated, the proper comparator is the class of persons who suffer from severe and permanent disabilities.

(iii) *Gibbs v. Battlefords & District Co-operative Ltd.*, [1996] 3 S.C.R. 566 (S.C.C.)

76 The *Gibbs* case, like the present appeal, involved a claim of discriminatory exclusion from disability benefits. Unlike the present appeal, *Gibbs* was not a *Charter* case. It did, however, proceed on a comparable analysis. An employer provided a medical insurance plan under which any employee unable to work by reason of physical or mental disability received replacement income. The benefit terminated after two years in the case of persons suffering a mental disability (unless the applicant was institutionalized), whereas persons suffering a physical disability continued to receive the income benefit indefinitely. The Court held that this income replacement benefit discriminated against persons with a mental disability. The appeal turned on whether the employer's health plan, which on the face of it made the same insurance available to all employees without discrimination, was nevertheless discriminatory in its design. Scrutiny of the design was required because otherwise, the employer (or, in the present appeal, the state) could escape the charge of discrimination by pointing out that the plaintiff, for whatever reason, simply fell outside the targeted group. Sopinka J., for the majority, recognized this danger, and upheld the complaint on the basis that persons with mental disabilities were treated in comparable circumstances less favourably than persons with other health disabilities. The proper comparison was not between the respondents and the able-bodied employees, but between two classes of disabled persons.

77 The appellant relies on the *Gibbs* analysis for his proposition that here, as in *Gibbs*, a distinction has wrongly been made between different disabilities. The difference, however, is that in *Gibbs* the health plan stigmatized people with mental disabilities as being less worthy of benefits than those with physical handicaps, whereas here, there is no stigma in being treated as "better off" where in fact that is the reality of the appellant's medical history.

(iv) *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.)

78 In the *Eldridge* case, the three appellants were born deaf, and their hearing impairment led to the functional limitation that without sign language interpreters they could not communicate effectively with their doctors and other health care providers. Lack of effective communication diminished the health care benefits and increased the risk of misdiagnosis and ineffective treatment. As in *Eaton, supra*, therefore, the physical impairment was established, as was the consequent functional limitation. Unlike *Eaton*, the government's response could not be portrayed as being in the best interest of the deaf appellants. Nevertheless, the government contended that deafness is a condition of the user that really has nothing to do with the health scheme, and that in refusing sign language interpreters the health plan treated the deaf and non-deaf on an equal footing. The majority opinion in the British Columbia Court of Appeal drew a distinction between the adverse effects to the complainant attributable to the legislation and those that exist independently of the impugned legislation (i.e., the deafness). In this Court, La Forest J. rejected as too broad the general proposition that "government is not obliged to ameliorate disadvantage that it has not helped to create or exacerbate" (para. 66). Adequate communication, he held, was "an integral part of the provision of medical services" (para. 69). The failure to provide sign language interpreters created a second class group of health plan users who were denied the full benefits of the health scheme available to the non-deaf. The government was *not* required to provide "extra" services. *It was* required to provide the medical services its Commission had already recognized as "necessary" in a way that was understandable and usable to the deaf. The government had looked at its health scheme only from the perspective of a more able-bodied user. It was, from the deaf user's perspective, the differentiated delivery of a theoretically undifferentiated medical service that infringed s. 15(1) and failed to support a s. 1 justification.

#### **(4) The Drop-Out Provision Does Not Infringe the Charter**

79 I return to the observation of Sopinka J. in *Eaton, supra*, at para. 66, that "the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has

been the case with disabled persons". The differential treatment afforded by the s. 44 drop-out provision ameliorates the position of those with a history of severe *and permanent* disabilities. It does not assist more fortunate people such as the appellant, but in the context of a contributory benefits plan, Parliament is inevitably called upon to target the particular group or groups it wishes the CPP to subsidize. Drawing lines is an unavoidable feature of the CPP and comparable schemes. Parliament did not violate the purpose of s. 15(1) by seeking to benefit individuals with a history of severe and prolonged disability. (In fact, the appellant wants more advantageous treatment than is given to the permanently disabled. The CPP at present drops out the contribution requirement at the rate of one month at a time when the statutory conditions are satisfied. Under the appellant's scheme, by contrast, seven months' disability would "drop" 12 months out of the CPP calculation instead of only 7 months.)

80 The "purposive" interpretation of s. 15 puts the focus squarely on the third aspect of disabilities, namely on the state's response to an individual's physical or mental impairment. If the state's response were, intentionally or through effects produced by oversight, to stigmatize the underlying physical or mental impairment, or to attribute functional limitations to the appellant that his underlying physical or mental impairment did not warrant, or to fail to recognize the added burdens which persons with temporary disabilities may encounter in achieving self-fulfilment, or otherwise to misuse the impairment or its consequences in a discriminatory fashion that engages the purpose of s. 15, an infringement of equality rights would be established. But neither Parliament in the design of the CPP, nor the Minister in his administration of the CPP in relation to the appellant, did any of these things, in my opinion.

81 While I have every sympathy for the appellant's injured back and the problematic employment history to which it may have contributed, I do not believe that a reasonably objective person, standing in his shoes and taking into account the context of the CPP and its method of financing through contributions, would consider that the greater allowance made for persons with greater disabilities in terms of CPP contributions "marginalized" or "stigmatized" him or demeaned his sense of worth and dignity as a human being.

82 In these circumstances, my opinion is that the CPP drop-out provision does not engage the larger human rights purpose of s. 15(1) of the *Charter*, and the appellant's claim that s. 15 has been infringed must therefore be rejected.

### C. Section 1 of the Charter

83 As there is no violation of s. 15(1), it is not necessary to turn to s. 1. It is thus unnecessary to deal with the appellant's argument that the government has failed "to show why it is reasonable to deny a modest adjustment which would do justice to Mr. Granovsky and people like Mr. Granovsky". As the appellant has failed to show a violation of his s. 15(1) rights, the issue of justification does not arise.

### VIII. Disposition

84 I would dismiss the appeal. The respondent has not requested costs and none are awarded. The constitutional questions should be answered as follows:

Question 1: Does the *Canada Pension Plan*, R.S.C., 1985, c. C-8, discriminate against persons on the basis of physical or mental disability by including periods of physical or mental disability in a claimant's contributory period, as such period is determined pursuant to paragraph 44(2)(b) of that Act, in claims for a disability pension under that Act, contrary to section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11?

Answer: No.

Question 2: If so, does the discrimination come within only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11?

Answer: The second constitutional question need not be answered.

*Appeal dismissed.*

*Pourvoi rejeté.*

#### Footnotes

\* Corrigenda issued by the court on May 29, June 14 and June 30, 2000 have been incorporated herein.

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2004 BCCA 382  
British Columbia Court of Appeal [In Chambers]

Doman Industries Ltd., Re

2004 CarswellBC 1545, 2004 BCCA 382, [2004] B.C.W.L.D. 938, [2004] B.C.J. No.  
1402, 132 A.C.W.S. (3d) 52, 201 B.C.A.C. 223, 2 C.B.R. (5th) 141, 328 W.A.C. 223

**In the Matter of the Companies' Creditors Arrangement Act R.S.C. 1985, c. C-36**

And In the Matter of the Canada Business Corporations Act R.S.C. 1985, c. C-44

And In the Matter of the Partnership Act, R.S.B.C. 1996, c. 348

And In the Matter of Doman Industries Limited, Alpine Projects Limited, Diamond Lumber Sales Limited, Doman Forest Products Limited, Doman's Freightways Ltd., Doman Holdings Limited, Doman Investments Limited, Doman Log Supply Ltd., Doman-Western Lumber Ltd., Eacom Timer Sales Ltd., Western Forest Products Limited, Western Pulp Inc., Western Pulp Limited Partnership, and Quatsino Navigation Company Limited (Appellants / Petitioners) And Hayes Forest Services Limited and Strathcona Contracting Ltd. (Respondents / Respondents)

Low J.A.

Heard: June 30, 2004

Judgment: June 30, 2004

Docket: Vancouver CA032015

Proceedings: refusing leave to appeal *Doman Industries Ltd., Re* (2004), 2004 BCSC 733, 2004 CarswellBC 1262 (B.C. S.C.)

Counsel: P.G. Foy, Q.C., P.D. McLean for Appellants  
M. Buttery for Tricap Restructuring Fund  
S. Schachter, Q.C. for Hayes Forest Services Ltd.  
L. Friend, Q.C. for Informal Committee of Doman Unsecured Bondholders  
S.R. Ross for Strathcona Contracting

Subject: Insolvency; Corporate and Commercial

APPLICATION by insolvent company for leave to appeal from judgment reported at *Doman Industries Ltd., Re* (2004), 2004 BCSC 733, 2004 CarswellBC 1262 (B.C. S.C.), refusing to give approval for termination of contracts.

**Low J.A. (orally):**

1 This is an application for leave to appeal an order of Mr. Justice Tysoe made on 25 May 2004 in these ongoing proceedings under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("the CCAA"). The order dismisses an application by Western Forest Products Ltd. for court approval of cancellation by Western of replaceable contracts it has with Hayes Forest Services Ltd. and Strathcona Contracting Ltd. The Hayes contract is for logging and the Strathcona contract is for the construction of logging roads, both in the Nootka region of Vancouver Island in a specific area known as Plumper Harbour. Replaceable contracts are provided for in regulations made under the *Forest Act*, R.S.B.C. 1996 c. 57. They are designed to give contractors such as Hayes and Strathcona security of tenure similar to that enjoyed by the larger forestry companies that hold forest harvesting licences.

2 Western and the other petitioners are a collection of related forestry companies known as "the Doman Group". Western is a wholly owned subsidiary of Doman Industries Limited. To cope with otherwise insurmountable financial difficulties, the Doman Group brought proceedings in November 2002 seeking court-supervised and court-sanctioned financial and corporate restructuring under the *CCAA*. I understand that Mr. Justice Tysoe has had judicial responsibility for the proceedings throughout. In his reasons leading to the order for which leave to appeal is sought by Western, he introduced the history of the proceedings as follows:

[3] The restructuring process is nearing completion. A plan of compromise and arrangement (the "Restructuring Plan") has been filed and the meeting of creditors to consider it has been scheduled to be held in approximately two weeks. The deadline for creditors to file proofs of claim is today.

[4] In very simple terms, the Restructuring Plan contemplates that the lumber and pulp assets of Doman will be transferred into new corporations and that the unsecured noteholders, trade creditors and other unsecured creditors will have their debt converted into shares in one of the new corporations, which will own the lumber assets and the shares of the other corporation holding the pulp assets. The secured term debt is to be refinanced and the secured operating line of credit will be unaffected. The existing shareholders of Doman are to receive warrants entitling them to purchase a limited number of shares in the new parent corporation.

[5] The implementation of the Restructuring Plan is subject to the fulfilment of numerous conditions precedent. One of the conditions is the termination of the contracts with Hayes and Strathcona which are the subject matter of this application.

3 On 6 April 2004, Mr. Justice Tysoe made an order that included a provision making termination of replaceable contracts by Western subject to court approval. On 27 April 2004, Western terminated its contracts with both Hayes and Strathcona in writing, to be effective upon court approval.

4 In lengthy and carefully worded reasons, the learned chambers judge discussed the evidence and the applicable law before exercising his discretion against approving the contract terminations. On this application, Western argues that his reasons disclose that he applied the wrong test or that, alternatively, he incorrectly applied the correct test. Western's position is supported by the Committee of Unsecured Noteholders who are the holders of unsecured notes having a face value of about \$795,000,000, and by Tricap Restructuring Fund.

5 On an application for leave to appeal an interlocutory order in a civil proceeding, four criteria are considered: (1) whether the point on appeal is of significance to the practice; (2) whether the point is of significance to the action itself; (3) whether the proposed appeal raises a meritorious or arguable issue or whether the appeal is frivolous; and (4) whether the appeal will unduly hinder the progress of the action. Counsel said nothing directly applicable to the fourth factor. The arguments on both sides relate to the merits of the appeal and Western and the creditors supporting it say that the point of the appeal is of importance to the practice of insolvency law.

6 Hayes and Strathcona say that Western has not demonstrated any arguable misapprehension of the evidence or any arguable error in the judge's understanding or application of the law.

7 It is common ground that the order under attack is a discretionary order and, therefore, not easily overturned. Deference to the chambers judge is an even stronger factor here because this is a complex proceeding that Mr. Justice Tysoe has supervised from its inception. He is in a better position than is anybody else to balance the competing factors at play in the proceeding generally, as well as those at play with respect to the particular issue of cancellation of the two contracts.

8 This Court has already decided that replaceable contracts can be terminated in a *CCAA* proceeding notwithstanding that such contracts are mandated by statute as to many of their terms and as to arbitration of negotiable terms from

time to time: see *Skeena Cellulose Inc., Re*, 2003 BCCA 344 (B.C. C.A.). There is no request in this case for the court to revisit that issue.

9 There is no dispute among the parties as to what a chambers judge must consider in determining whether to approve termination of a contract in a *CCAA* proceeding. The law was clearly stated by Madam Justice Newbury in *Skeena Cellulose Inc.* The test is whether the business decision to cancel a contract as part of the reorganization of the insolvent company is fair and reasonable. In para. 53 she observed that the court approves the plan but does not create it. She stated that the plan "is a compromise arrived at by the debtor company and the requisite number of its creditors. The court should not readily interfere with their business decision, especially where the plan has been approved by a high percentage of creditors." She approved of comments by Mr. Justice Blair in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.), that it is not the court's function "to second guess the business people with respect to the 'business aspects' of the Plan, descending into the negotiating arena and substituting [the court's] own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas."

10 Elsewhere in the *Skeena Cellulose Inc.* decision it is said that if a contract termination is made in bad faith it ought not to be approved by the court. No doubt the existence of bad faith is simply an example of a situation in which it could not be said that the cancellation is fair and reasonable as part of a business plan. There is no suggestion of bad faith in the present case.

11 Madam Justice Newbury observed in para. 60 that the scope of the fairness and reasonableness enquiry is not limited to the effect of the termination on the party who has the contract with the insolvent company. Nor is it limited to the creditors as a whole. A "broad constituency" is involved that includes a "wide range of interests that may be properly asserted by individuals, corporations, government entities and communities."

12 In *Skeena Cellulose Inc.*, the court reviewed the evidence and determined that it supported the conclusion reached by the chambers judge in the trial court that termination of the contracts in question was fair and reasonable in the circumstances.

13 In the present case, the chambers judge reviewed the evidence in support of the application to approve termination of the two contracts and the evidence and arguments to the contrary. He determined that he ought to exercise his discretion against approval of the terminations. He expressed his final conclusion thus:

[38] In my opinion, therefore, there is insufficient evidence for me to conclude that the proposed contract terminations are fair and reasonable in all of the circumstances. All that the evidence available to me supports is a conclusion that the restructured company will have an opportunity of being more profitable if the contracts are terminated. It has not been demonstrated that the loss of this opportunity will outweigh the prejudice which will be suffered by Hayes and Strathcona if the contracts are terminated. In weighing the competing interests on the evidence before me, it is my conclusion that I should exercise my discretion against approving the contract terminations. I dismiss the application with costs.

14 Western seeks leave to attempt to persuade a panel of this Court that the chambers judge erred in three respects.

15 First, Western says that Mr. Justice Tysoe limited his enquiry to fairness as between Western, the two respondent contractors and the other creditors without taking into account the broader community as required by the authorities, particularly *Skeena Cellulose Inc.* Western says this overly narrow scope is apparent in para. 38 of the judgment that I have reproduced above.

16 In my opinion, this is not an arguable ground of appeal. Earlier in the judgment, the judge correctly stated the law in all respects as extracted from *Skeena Cellulose Inc.* In para. 38 he stated that he had weighed the competing interests. It cannot be argued that he failed to take into account the interests of the community as a whole. He clearly directed his mind to the possibility of greater profitability, a matter of obvious interest to the entire community, and he weighed

the strength of that possibility against the prejudice to Hayes and Strathcona. That balancing is precisely what he was required by law to do.

17 Second, Western argues that the judge erred by calling for more evidence as to the business efficacy of the terminations and thereby descended into the arena of business negotiation contrary to the authorities. I am not persuaded that it is arguable that he fell into error in this way.

18 Western refers to para. 37 of the reasons which reads:

[37] Some reliance was placed by counsel on the fact that the termination of these contracts is a condition precedent of the Restructuring Plan. In my view, this condition precedent is materially different than the condition precedent in *Skeena Cellulose*. In that case, it was an independent purchaser of the shares in *Skeena* that negotiated the condition on the basis that it was not prepared to purchase the shares unless two of the five replaceable contracts were terminated. The condition resulted from an arm's length negotiation which required the purchaser to put up funds to purchase the shares. In the present case, the bondholder committee produced the initial draft of the Restructuring Plan, which was finalized after a limited negotiation that served to advance the interests of the existing directors and shareholders of Doman. The condition precedent in question was not contained in the initial draft of the Restructuring Plan put forward by the bondholders and there is no evidence as to why the condition was inserted in the Restructuring Plan. I am unable to conclude that the condition precedent was the result of a truly adversarial negotiation and that, unlike the situation in *Skeena Cellulose*, the restructuring is unlikely to proceed if the condition is not satisfied.

19 I had some trouble sorting out the last sentence of that paragraph but I now see that the judge was simply saying that he could not conclude either of two things. The first was that the condition precedent in the Restructuring Plan (court-approved termination of the Hayes and Strathcona contracts) was the result of a "truly adversarial [business] negotiation". The second was that the evidence did not support the conclusion that non-achievement of the condition precedent would sink the Plan. He made an obvious distinction between this case and *Skeena Cellulose Inc.* In that case the condition precedent was insisted upon by a purchaser of the company shares who would not complete without it whereas in the present case the condition came into being by what the judge considered to be a process that was inadequately explained. This was simply a legitimate distinction of *Skeena Cellulose Inc.* on the facts as part of the analysis leading to the conclusion as to how the court's discretion ought to be exercised. I am unable to see how this part of the analysis could possibly be seen to amount to legal error or a misapplication of the law.

20 It cannot be said that the judge called for more evidence on the issue before him. He simply described the conflicting evidence and commented on some matters about which there was no evidence. In para. 11 he described the affidavit evidence offered by Western to justify the termination provision. There were conflicting projections and opinions in the affidavits of representatives of Hayes and Strathcona described in paras. 13 and 14. In para. 36 the judge commenced his analysis of the evidence thus:

[36] On the present application, all that the evidence established is that Doman will likely be able to reduce its costs to some extent at some point in the future if it can terminate the two contracts in question. Mr. Zimmerman's affidavit states that the reason Western made the recommendation to terminate the two contracts was to improve or increase its profitability. There is no evidence on this application with respect to the following points:

- (a) whether the logging at Plumper Harbour under the existing contracts has produced a loss in the past or is expected to produce a loss in the future;
- (b) whether other logging operations of Doman produce a greater loss;
- (c) whether other aspects of Doman's business produce a loss and, if so, what consideration has been given to rationalizing that loss in comparison to the termination of the contracts in question;

- (d) whether it is expected that the restructured company will operate at a profit;
- (e) what parts of the constituency of stakeholders will benefit from the termination of the contracts in question;
- (f) whether the developed timber at Plumper Harbour can be harvested in the next two years by other contractors at a cost less than the cost under the contracts in question; and
- (g) what is the fallacy, if any, in the assertion of Mr. Hayes that the termination of the contracts will have no material impact on cost reduction after taking into account the 20% government take-back.

21 I do not understand Western to be arguing that there was any misapprehension of the evidence and I am unable to detect any suggestion in the judge's discussion of the evidence that he was calling for more evidence to keep negotiations alive. It is clear that all he did in para. 36 reproduced above was point out an absence of evidence that emphasized the weakness of Western's position and the strength of the position of Hayes and Strathcona. It is clear that this was simply a valid part of the analysis leading to a conclusion as to how the court's discretion ought properly to be exercised in the circumstances of the case.

22 Finally, Western argues that the chambers judge erred in placing on Western the onus of establishing how much saving would result from termination of the contracts and of demonstrating that the Restructuring Plan would likely not proceed without court approval of the terminations.

23 I am unable to find any arguable merit in this intended ground of appeal. As I have said, the judge properly enunciated the principles stated in *Skeena Cellulose Inc.* I see nothing in his analysis that could possibly support an argument that he strayed from those principles or misapplied them to the facts. He did not require Western to quantify anticipated savings or increase in profit flowing from termination. Nor did he require Western to demonstrate that the Plan would fail if the court did not approve the contract terminations. He simply was not persuaded that the Plan would fail in that event. Then he weighed the evidence plus the arguments for and against termination and arrived at a conclusion. Again, that is precisely what he was required to do in exercising his discretion.

24 In summary, Western has not identified any arguable error of law, any misapprehension of the evidence or any arrival at unavailable factual conclusions on the part of the chambers judge.

25 I should say something about the argument made by Western's allies on this application to the effect that if this decision is not reviewed by the Court of Appeal it will adversely affect desired certainty in other *CCAA* proceedings. There was little elaboration of this argument. I think the answer to it is that, as between this case and *Skeena Cellulose Inc.*, the results were different because the circumstances in the two cases were different. The principles are stated identically in both but because each case must be decided on its own facts the results in the two cases happened to be different. Two cases in the same area of law involving the exercise of judicial discretion are not irreconcilable simply because of differing results.

26 The application for leave to appeal is dismissed.

*Application dismissed.*

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**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** Shermag Inc., Re | 2009 QCCS 537, 2009 CarswellQue 2487, [2009] R.J.Q. 1289, EYB 2009-156550, J.E. 2009-897, 51 C.B.R. (5th) 95 | (C.S. Qué., Mar 26, 2009)

2000 ABQB 442  
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 662, 2000 ABQB 442, [2000] 10 W.W.R. 269, [2000] A.W.L.D. 654, [2000] A.J. No. 771, 20 C.B.R. (4th) 1, 265 A.R. 201, 84 Alta. L.R. (3d) 9, 98 A.C.W.S. (3d) 334, 9 B.L.R. (3d) 41

**In the Matter of the Companies' Creditors  
Arrangement Act, R.S.C. 1985, c. C-36, as Amended**

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c. B-15, as Amended, Section 185

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

Paperny J.

Heard: June 5-19, 2000

Judgment: June 27, 2000 \*

Docket: Calgary 0001-05071

Counsel: *A.L. Friend, Q.C., H.M. Kay, Q.C., R.B. Low, Q.C., and L. Goldbach*, for Petitioners.

*S.F. Dunphy, P. O'Kelly, and E. Kolers*, for Air Canada and 853350 Alberta Ltd.

*D.R. Haigh, Q.C., D.N. Nishimura, A.Z.A. Campbell and D. Tay*, for Resurgence Asset Management LLC.

*L.R. Duncan, Q.C., and G. McCue*, for Neil Baker, Michael Salter, Hal Metheral, and Roger Midiaty.

*F.R. Foran, Q.C., and P.T. McCarthy, Q.C.*, for Monitor, PwC.

*G.B. Morawetz, R.J. Chadwick and A. McConnell*, for Senior Secured Noteholders and the Bank of Nova Scotia Trust Co.

*C.J. Shaw, Q.C.*, for Unionized Employees.

*T. Mallett and C. Feasby*, for Amex Bank of Canada.

*E.W. Halt*, for J. Stephens Allan, Claims Officer.

*M. Hollins*, for Pacific Costal Airlines.

*P. Pastewka*, for JHHD Aircraft Leasing No. 1 and No. 2.

*J. Thom*, for Royal Bank of Canada.

*J. Medhurst-Tivadar*, for Canada Customs and Revenue Agency.

*R. Wilkins, Q.C.*, for Calgary and Edmonton Airport Authority.

Subject: Corporate and Commercial; Insolvency

APPLICATION by airline for approval of plan of arrangement; COUNTER-APPLICATION by investment corporation for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial; COUNTER-APPLICATION by minority shareholders.

**Paperny J.:**

## I. Introduction

1 After a decade of searching for a permanent solution to its ongoing, significant financial problems, Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") seek the court's sanction to a plan of arrangement filed under the *Companies' Creditors Arrangement Act* ("CCAA") and sponsored by its historic rival, Air Canada Corporation ("Air Canada"). To Canadian, this represents its last choice and its only chance for survival. To Air Canada, it is an opportunity to lead the restructuring of the Canadian airline industry, an exercise many suggest is long overdue. To over 16,000 employees of Canadian, it means continued employment. Canadian Airlines will operate as a separate entity and continue to provide domestic and international air service to Canadians. Tickets of the flying public will be honoured and their frequent flyer points maintained. Long term business relationships with trade creditors and suppliers will continue.

2 The proposed restructuring comes at a cost. Secured and unsecured creditors are being asked to accept significant compromises and shareholders of CAC are being asked to accept that their shares have no value. Certain unsecured creditors oppose the plan, alleging it is oppressive and unfair. They assert that Air Canada has appropriated the key assets of Canadian to itself. Minority shareholders of CAC, on the other hand, argue that Air Canada's financial support to Canadian, before and during this restructuring process, has increased the value of Canadian and in turn their shares. These two positions are irreconcilable, but do reflect the perception by some that this plan asks them to sacrifice too much.

3 Canadian has asked this court to sanction its plan under s. 6 of the CCAA. The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all the stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.

## II. Background

### *Canadian Airlines and its Subsidiaries*

4 CAC and CAIL are corporations incorporated or continued under the *Business Corporations Act* of Alberta, S.A. 1981, c. B-15 ("ABCA"). 82% of CAC's shares are held by 853350 Alberta Ltd. ("853350") and the remaining 18% are held publicly. CAC, directly or indirectly, owns the majority of voting shares in and controls the other Petitioner, CAIL and these shares represent CAC's principal asset. CAIL owns or has an interest in a number of other corporations directly engaged in the airline industry or other businesses related to the airline industry, including Canadian Regional Airlines Limited ("CRAL"). Where the context requires, I will refer to CAC and CAIL jointly as "Canadian" in these reasons.

5 In the past fifteen years, CAIL has grown from a regional carrier operating under the name Pacific Western Airlines ("PWA") to one of Canada's two major airlines. By mid-1986, Canadian Pacific Air Lines Limited ("CP Air"), had acquired the regional carriers Nordair Inc. ("Nordair") and Eastern Provincial Airways ("Eastern"). In February, 1987, PWA completed its purchase of CP Air from Canadian Pacific Limited. PWA then merged the four predecessor carriers (CP Air, Eastern, Nordair, and PWA) to form one airline, "Canadian Airlines International Ltd.", which was launched in April, 1987.

6 By April, 1989, CAIL had acquired substantially all of the common shares of Wardair Inc. and completed the integration of CAIL and Wardair Inc. in 1990.

7 CAIL and its subsidiaries provide international and domestic scheduled and charter air transportation for passengers and cargo. CAIL provides scheduled services to approximately 30 destinations in 11 countries. Its subsidiary, Canadian Regional Airlines (1998) Ltd. ("CRAL 98") provides scheduled services to approximately 35 destinations in Canada and the United States. Through code share agreements and marketing alliances with leading carriers, CAIL and its

subsidiaries provide service to approximately 225 destinations worldwide. CAIL is also engaged in charter and cargo services and the provision of services to third parties, including aircraft overhaul and maintenance, passenger and cargo handling, flight simulator and equipment rentals, employee training programs and the sale of Canadian Plus frequent flyer points. As at December 31, 1999, CAIL operated approximately 79 aircraft.

8 CAIL directly and indirectly employs over 16,000 persons, substantially all of whom are located in Canada. The balance of the employees are located in the United States, Europe, Asia, Australia, South America and Mexico. Approximately 88% of the active employees of CAIL are subject to collective bargaining agreements.

#### ***Events Leading up to the CCAA Proceedings***

9 Canadian's financial difficulties significantly predate these proceedings.

10 In the early 1990s, Canadian experienced significant losses from operations and deteriorating liquidity. It completed a financial restructuring in 1994 (the "1994 Restructuring") which involved employees contributing \$200,000,000 in new equity in return for receipt of entitlements to common shares. In addition, Aurora Airline Investments, Inc. ("Aurora"), a subsidiary of AMR Corporation ("AMR"), subscribed for \$246,000,000 in preferred shares of CAIL. Other AMR subsidiaries entered into comprehensive services and marketing arrangements with CAIL. The governments of Canada, British Columbia and Alberta provided an aggregate of \$120,000,000 in loan guarantees. Senior creditors, junior creditors and shareholders of CAC and CAIL and its subsidiaries converted approximately \$712,000,000 of obligations into common shares of CAC or convertible notes issued jointly by CAC and CAIL and/or received warrants entitling the holder to purchase common shares.

11 In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number of factors including higher than expected fuel costs, rising interest rates, decline of the Canadian dollar, a strike by pilots of Time Air and the temporary grounding of Inter-Canadien's ATR-42 fleet undermined this improved operational performance. In 1995, in response to additional capacity added by emerging charter carriers and Air Canada on key transcontinental routes, CAIL added additional aircraft to its fleet in an effort to regain market share. However, the addition of capacity coincided with the slow-down in the Canadian economy leading to traffic levels that were significantly below expectations. Additionally, key international routes of CAIL failed to produce anticipated results. The cumulative losses of CAIL from 1994 to 1999 totalled \$771 million and from January 31, 1995 to August 12, 1999, the day prior to the issuance by the Government of Canada of an Order under Section 47 of the *Canada Transportation Act* (relaxing certain rules under the *Competition Act* to facilitate a restructuring of the airline industry and described further below), the trading price of Canadian's common shares declined from \$7.90 to \$1.55.

12 Canadian's losses incurred since the 1994 Restructuring severely eroded its liquidity position. In 1996, Canadian faced an environment where the domestic air travel market saw increased capacity and aggressive price competition by two new discount carriers based in western Canada. While Canadian's traffic and load factor increased indicating a positive response to Canadian's post-restructuring business plan, yields declined. Attempts by Canadian to reduce domestic capacity were offset by additional capacity being introduced by the new discount carriers and Air Canada.

13 The continued lack of sufficient funds from operations made it evident by late fall of 1996 that Canadian needed to take action to avoid a cash shortfall in the spring of 1997. In November 1996, Canadian announced an operational restructuring plan (the "1996 Restructuring") aimed at returning Canadian to profitability and subsequently implemented a payment deferral plan which involved a temporary moratorium on payments to certain lenders and aircraft operating lessors to provide a cash bridge until the benefits of the operational restructuring were fully implemented. Canadian was able successfully to obtain the support of its lenders and operating lessors such that the moratorium and payment deferral plan was able to proceed on a consensual basis without the requirement for any court proceedings.

14 The objective of the 1996 Restructuring was to transform Canadian into a sustainable entity by focussing on controllable factors which targeted earnings improvements over four years. Three major initiatives were adopted: network enhancements, wage concessions as supplemented by fuel tax reductions/rebates, and overhead cost reductions.

15 The benefits of the 1996 Restructuring were reflected in Canadian's 1997 financial results when Canadian and its subsidiaries reported a consolidated net income of \$5.4 million, the best results in 9 years.

16 In early 1998, building on its 1997 results, Canadian took advantage of a strong market for U.S. public debt financing in the first half of 1998 by issuing U.S. \$175,000,000 of senior secured notes in April, 1998 ("Senior Secured Notes") and U.S. \$100,000,000 of unsecured notes in August, 1998 ("Unsecured Notes").

17 The benefits of the 1996 Restructuring continued in 1998 but were not sufficient to offset a number of new factors which had a significant negative impact on financial performance, particularly in the fourth quarter. Canadian's eroded capital base gave it limited capacity to withstand negative effects on traffic and revenue. These factors included lower than expected operating revenues resulting from a continued weakness of the Asian economies, vigorous competition in Canadian's key western Canada and the western U.S. transborder markets, significant price discounting in most domestic markets following a labour disruption at Air Canada and CAIL's temporary loss of the ability to code-share with American Airlines on certain transborder flights due to a pilot dispute at American Airlines. Canadian also had increased operating expenses primarily due to the deterioration of the value of the Canadian dollar and additional airport and navigational fees imposed by NAV Canada which were not recoverable by Canadian through fare increases because of competitive pressures. This resulted in Canadian and its subsidiaries reporting a consolidated loss of \$137.6 million for 1998.

18 As a result of these continuing weak financial results, Canadian undertook a number of additional strategic initiatives including entering the *oneworld*<sup>TM</sup> Alliance, the introduction of its new "Proud Wings" corporate image, a restructuring of CAIL's Vancouver hub, the sale and leaseback of certain aircraft, expanded code sharing arrangements and the implementation of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

19 Beginning in late 1998 and continuing into 1999, Canadian tried to access equity markets to strengthen its balance sheet. In January, 1999, the Board of Directors of CAC determined that while Canadian needed to obtain additional equity capital, an equity infusion alone would not address the fundamental structural problems in the domestic air transportation market.

20 Canadian believes that its financial performance was and is reflective of structural problems in the Canadian airline industry, most significantly, over capacity in the domestic air transportation market. It is the view of Canadian and Air Canada that Canada's relatively small population and the geographic distribution of that population is unable to support the overlapping networks of two full service national carriers. As described further below, the Government of Canada has recognized this fundamental problem and has been instrumental in attempts to develop a solution.

#### ***Initial Discussions with Air Canada***

21 Accordingly, in January, 1999, CAC's Board of Directors directed management to explore all strategic alternatives available to Canadian, including discussions regarding a possible merger or other transaction involving Air Canada.

22 Canadian had discussions with Air Canada in early 1999. AMR also participated in those discussions. While several alternative merger transactions were considered in the course of these discussions, Canadian, AMR and Air Canada were unable to reach agreement.

23 Following the termination of merger discussions between Canadian and Air Canada, senior management of Canadian, at the direction of the Board and with the support of AMR, renewed its efforts to secure financial partners

with the objective of obtaining either an equity investment and support for an eventual merger with Air Canada or immediate financial support for a merger with Air Canada.

***Offer by Onex***

24 In early May, the discussions with Air Canada having failed, Canadian focussed its efforts on discussions with Onex Corporation ("Onex") and AMR concerning the basis upon which a merger of Canadian and Air Canada could be accomplished.

25 On August 23, 1999, Canadian entered into an Arrangement Agreement with Onex, AMR and Airline Industry Revitalization Co. Inc. ("AirCo") (a company owned jointly by Onex and AMR and controlled by Onex). The Arrangement Agreement set out the terms of a Plan of Arrangement providing for the purchase by AirCo of all of the outstanding common and non-voting shares of CAC. The Arrangement Agreement was conditional upon, among other things, the successful completion of a simultaneous offer by AirCo for all of the voting and non-voting shares of Air Canada. On August 24, 1999, AirCo announced its offers to purchase the shares of both CAC and Air Canada and to subsequently merge the operations of the two airlines to create one international carrier in Canada.

26 On or about September 20, 1999 the Board of Directors of Air Canada recommended against the AirCo offer. On or about October 19, 1999, Air Canada announced its own proposal to its shareholders to repurchase shares of Air Canada. Air Canada's announcement also indicated Air Canada's intention to make a bid for CAC and to proceed to complete a merger with Canadian subject to a restructuring of Canadian's debt.

27 There were several rounds of offers and counter-offers between AirCo and Air Canada. On November 5, 1999, the Quebec Superior Court ruled that the AirCo offer for Air Canada violated the provisions of the *Air Canada Public Participation Act*. AirCo immediately withdrew its offers. At that time, Air Canada indicated its intention to proceed with its offer for CAC.

28 Following the withdrawal of the AirCo offer to purchase CAC, and notwithstanding Air Canada's stated intention to proceed with its offer, there was a renewed uncertainty about Canadian's future which adversely affected operations. As described further below, Canadian lost significant forward bookings which further reduced the company's remaining liquidity.

***Offer by 853350***

29 On November 11, 1999, 853350 (a corporation financed by Air Canada and owned as to 10% by Air Canada) made a formal offer for all of the common and non-voting shares of CAC. Air Canada indicated that the involvement of 853350 in the take-over bid was necessary in order to protect Air Canada from the potential adverse effects of a restructuring of Canadian's debt and that Air Canada would only complete a merger with Canadian after the completion of a debt restructuring transaction. The offer by 853350 was conditional upon, among other things, a satisfactory resolution of AMR's claims in respect of Canadian and a satisfactory resolution of certain regulatory issues arising from the announcement made on October 26, 1999 by the Government of Canada regarding its intentions to alter the regime governing the airline industry.

30 As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related services to Canadian provided for a termination fee of approximately \$500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of \$500 million (as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of proceeding without AMR's consent was simply too high.

31 Canadian had continued its efforts to seek out all possible solutions to its structural problems following the withdrawal of the AirCo offer on November 5, 1999. While AMR indicated its willingness to provide a measure of support by allowing a deferral of some of the fees payable to AMR under the Services Agreement, Canadian was unable to find any investor willing to provide the liquidity necessary to keep Canadian operating while alternative solutions were sought.

32 After 853350 made its offer, 853350 and Air Canada entered into discussions with AMR regarding the purchase by 853350 of AMR's shareholding in CAIL as well as other matters regarding code sharing agreements and various services provided to Canadian by AMR and its subsidiaries and affiliates. The parties reached an agreement on November 22, 1999 pursuant to which AMR agreed to reduce its potential damages claim for termination of the Services Agreement by approximately 88%.

33 On December 4, 1999, CAC's Board recommended acceptance of 853350's offer to its shareholders and on December 21, 1999, two days before the offer closed, 853350 received approval for the offer from the Competition Bureau as well as clarification from the Government of Canada on the proposed regulatory framework for the Canadian airline industry.

34 As noted above, Canadian's financial condition deteriorated further after the collapse of the AirCo Arrangement transaction. In particular:

- a) the doubts which were publicly raised as to Canadian's ability to survive made Canadian's efforts to secure additional financing through various sale-leaseback transactions more difficult;
- b) sales for future air travel were down by approximately 10% compared to 1998;
- c) CAIL's liquidity position, which stood at approximately \$84 million (consolidated cash and available credit) as at September 30, 1999, reached a critical point in late December, 1999 when it was about to go negative.

35 In late December, 1999, Air Canada agreed to enter into certain transactions designed to ensure that Canadian would have enough liquidity to continue operating until the scheduled completion of the 853350 take-over bid on January 4, 2000. Air Canada agreed to purchase rights to the Toronto-Tokyo route for \$25 million and to a sale-leaseback arrangement involving certain unencumbered aircraft and a flight simulator for total proceeds of approximately \$20 million. These transactions gave Canadian sufficient liquidity to continue operations through the holiday period.

36 If Air Canada had not provided the approximate \$45 million injection in December 1999, Canadian would likely have had to file for bankruptcy and cease all operations before the end of the holiday travel season.

37 On January 4, 2000, with all conditions of its offer having been satisfied or waived, 853350 purchased approximately 82% of the outstanding shares of CAC. On January 5, 1999, 853350 completed the purchase of the preferred shares of CAIL owned by Aurora. In connection with that acquisition, Canadian agreed to certain amendments to the Services Agreement reducing the amounts payable to AMR in the event of a termination of such agreement and, in addition, the unanimous shareholders agreement which gave AMR the right to require Canadian to purchase the CAIL preferred shares under certain circumstances was terminated. These arrangements had the effect of substantially reducing the obstacles to a restructuring of Canadian's debt and lease obligations and also significantly reduced the claims that AMR would be entitled to advance in such a restructuring.

38 Despite the \$45 million provided by Air Canada, Canadian's liquidity position remained poor. With January being a traditionally slow month in the airline industry, further bridge financing was required in order to ensure that Canadian would be able to operate while a debt restructuring transaction was being negotiated with creditors. Air Canada negotiated an arrangement with the Royal Bank of Canada ("Royal Bank") to purchase a participation interest in the operating credit facility made available to Canadian. As a result of this agreement, Royal Bank agreed to extend Canadian's operating credit facility from \$70 million to \$120 million in January, 2000 and then to \$145 million in March,

2000. Canadian agreed to supplement the assignment of accounts receivable security originally securing Royal's \$70 million facility with a further Security Agreement securing certain unencumbered assets of Canadian in consideration for this increased credit availability. Without the support of Air Canada or another financially sound entity, this increase in credit would not have been possible.

39 Air Canada has stated publicly that it ultimately wishes to merge the operations of Canadian and Air Canada, subject to Canadian completing a financial restructuring so as to permit Air Canada to complete the acquisition on a financially sound basis. This pre-condition has been emphasized by Air Canada since the fall of 1999.

40 Prior to the acquisition of majority control of CAC by 853350, Canadian's management, Board of Directors and financial advisors had considered every possible alternative for restoring Canadian to a sound financial footing. Based upon Canadian's extensive efforts over the past year in particular, but also the efforts since 1992 described above, Canadian came to the conclusion that it must complete a debt restructuring to permit the completion of a full merger between Canadian and Air Canada.

41 On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders. As a result of this moratorium Canadian defaulted on the payments due under its various credit facilities and aircraft leases. Absent the assistance provided by this moratorium, in addition to Air Canada's support, Canadian would not have had sufficient liquidity to continue operating until the completion of a debt restructuring.

42 Following implementation of the moratorium, Canadian with Air Canada embarked on efforts to restructure significant obligations by consent. The further damage to public confidence which a CCAA filing could produce required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection.

43 Before the Petitioners started these CCAA proceedings, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

44 Canadian and Air Canada have also been able to reach agreement with the remaining affected secured creditors, being the holders of the U.S. \$175 million Senior Secured Notes, due 2005, (the "Senior Secured Noteholders") and with several major unsecured creditors in addition to AMR, such as Loyalty Management Group Canada Inc.

45 On March 24, 2000, faced with threatened proceedings by secured creditors, Canadian petitioned under the CCAA and obtained a stay of proceedings and related interim relief by Order of the Honourable Chief Justice Moore on that same date. Pursuant to that Order, PricewaterhouseCoopers, Inc. was appointed as the Monitor, and companion proceedings in the United States were authorized to be commenced.

46 Since that time, due to the assistance of Air Canada, Canadian has been able to complete the restructuring of the remaining financial obligations governing all aircraft to be retained by Canadian for future operations. These arrangements were approved by this Honourable Court in its Orders dated April 14, 2000 and May 10, 2000, as described in further detail below under the heading "The Restructuring Plan".

47 On April 7, 2000, this court granted an Order giving directions with respect to the filing of the plan, the calling and holding of meetings of affected creditors and related matters.

48 On April 25, 2000 in accordance with the said Order, Canadian filed and served the plan (in its original form) and the related notices and materials.

49 The plan was amended, in accordance with its terms, on several occasions, the form of Plan voted upon at the Creditors' Meetings on May 26, 2000 having been filed and served on May 25, 2000 (the "Plan").

### ***The Restructuring Plan***

50 The Plan has three principal aims described by Canadian:

- (a) provide near term liquidity so that Canadian can sustain operations;
- (b) allow for the return of aircraft not required by Canadian; and
- (c) permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset values and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

51 The proposed treatment of stakeholders is as follows:

1. Unaffected Secured Creditors- Royal Bank, CAIL's operating lender, is an unaffected creditor with respect to its operating credit facility. Royal Bank holds security over CAIL's accounts receivable and most of CAIL's operating assets not specifically secured by aircraft financiers or the Senior Secured Noteholders. As noted above, arrangements entered into between Air Canada and Royal Bank have provided CAIL with liquidity necessary for it to continue operations since January 2000.

Also unaffected by the Plan are those aircraft lessors, conditional vendors and secured creditors holding security over CAIL's aircraft who have entered into agreements with CAIL and/or Air Canada with respect to the restructuring of CAIL's obligations. A number of such agreements, which were initially contained in the form of letters of intent ("LOIs"), were entered into prior to the commencement of the CCAA proceedings, while a total of 17 LOIs were completed after that date. In its Second and Fourth Reports the Monitor reported to the court on these agreements. The LOIs entered into after the proceedings commenced were reviewed and approved by the court on April 14, 2000 and May 10, 2000.

The basis of the LOIs with aircraft lessors was that the operating lease rates were reduced to fair market lease rates or less, and the obligations of CAIL under the leases were either assumed or guaranteed by Air Canada. Where the aircraft was subject to conditional sale agreements or other secured indebtedness, the value of the secured debt was reduced to the fair market value of the aircraft, and the interest rate payable was reduced to current market rates reflecting Air Canada's credit. CAIL's obligations under those agreements have also been assumed or guaranteed by Air Canada. The claims of these creditors for reduced principal and interest amounts, or reduced lease payments, are Affected Unsecured Claims under the Plan. In a number of cases these claims have been assigned to Air Canada and Air Canada disclosed that it would vote those claims in favour of the Plan.

2. Affected Secured Creditors- The Affected Secured Creditors under the Plan are the Senior Secured Noteholders with a claim in the amount of US\$175,000,000. The Senior Secured Noteholders are secured by a diverse package of Canadian's assets, including its inventory of aircraft spare parts, ground equipment, spare engines, flight simulators, leasehold interests at Toronto, Vancouver and Calgary airports, the shares in CRAL 98 and a \$53 million note payable by CRAL to CAIL.

The Plan offers the Senior Secured Noteholders payment of 97 cents on the dollar. The deficiency is included in the Affected Unsecured Creditor class and the Senior Secured Noteholders advised the court they would be voting the deficiency in favour of the Plan.

3. Unaffected Unsecured Creditors-In the circular accompanying the November 11, 1999 853350 offer it was stated that:

The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.

The Offeror is of the view that the pursuit of these three principles is essential in order to ensure that the long term value of Canadian is preserved.

Canadian's employees, customers and suppliers of goods and services are unaffected by the CCAA Order and Plan.

Also unaffected are parties to those contracts or agreements with Canadian which are not being terminated by Canadian pursuant to the terms of the March 24, 2000 Order.

4. Affected Unsecured Creditors- CAIL has identified unsecured creditors who do not fall into the above three groups and listed these as Affected Unsecured Creditors under the Plan. They are offered 14 cents on the dollar on their claims. Air Canada would fund this payment.

The Affected Unsecured Creditors fall into the following categories:

- a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");
- b. Claims in respect of certain outstanding or threatened litigation involving Canadian;
- c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;
- d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;
- e. Claims of tax authorities against Canadian; and
- f. Claims in respect of the under-secured or unsecured portion of amounts due to the Senior Secured Noteholders.

52 There are over \$700 million of proven unsecured claims. Some unsecured creditors have disputed the amounts of their claims for distribution purposes. These are in the process of determination by the court-appointed Claims Officer and subject to further appeal to the court. If the Claims Officer were to allow all of the disputed claims in full and this were confirmed by the court, the aggregate of unsecured claims would be approximately \$1.059 million.

53 The Monitor has concluded that if the Plan is not approved and implemented, Canadian will not be able to continue as a going concern and in that event, the only foreseeable alternative would be a liquidation of Canadian's assets by a receiver and/or a trustee in bankruptcy. Under the Plan, Canadian's obligations to parties essential to ongoing operations, including employees, customers, travel agents, fuel, maintenance and equipment suppliers, and airport authorities are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights and statutory priorities, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if Canadian were to cease operations as a going concern and be forced into liquidation would be in excess of \$1.1 billion.

54 In connection with its assessment of the Plan, the Monitor performed a liquidation analysis of CAIL as at March 31, 2000 in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event of disposition of CAIL's assets by a receiver or trustee. The Monitor concluded that a liquidation would result in a shortfall to certain secured creditors, including the Senior Secured Noteholders, a recovery by ordinary unsecured creditors of between one cent and three cents on the dollar, and no recovery by shareholders.

55 There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to the laws of New York, U.S.A. and has its head office in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence clients hold \$58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9

million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

56 Resurgence seeks declarations that: the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to the provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 are oppressive and unfairly prejudicial to it pursuant to section 234 of the Business Corporations Act.

57 Four shareholders of CAC also oppose the plan. Neil Baker, a Toronto resident, acquired 132,500 common shares at a cost of \$83,475.00 on or about May 5, 2000. Mr. Baker sought to commence proceedings to "remedy an injustice to the minority holders of the common shares". Roger Midiaty, Michael Salter and Hal Metheral are individual shareholders who were added as parties at their request during the proceedings. Mr. Midiaty resides in Calgary, Alberta and holds 827 CAC shares which he has held since 1994. Mr. Metheral is also a Calgary resident and holds approximately 14,900 CAC shares in his RRSP and has held them since approximately 1994 or 1995. Mr. Salter is a resident of Scottsdale, Arizona and is the beneficial owner of 250 shares of CAC and is a joint beneficial owner of 250 shares with his wife. These shareholders will be referred in the Decision throughout as the "Minority Shareholders".

58 The Minority Shareholders oppose the portion of the Plan that relates to the reorganization of CAIL, pursuant to section 185 of the *Alberta Business Corporations Act* ("ABCA"). They characterize the transaction as a cancellation of issued shares unauthorized by section 167 of the ABCA or alternatively is a violation of section 183 of the ABCA. They submit the application for the order of reorganization should be denied as being unlawful, unfair and not supported by the evidence.

### III. Analysis

59 Section 6 of the CCAA provides that:

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

60 Prior to sanctioning a plan under the CCAA, the court must be satisfied in regard to each of the following criteria:

(1) there must be compliance with all statutory requirements;

(2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(3) the plan must be fair and reasonable.

61 A leading articulation of this three-part test appears in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) and has been regularly followed, see for example *Re*

*Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at 172 and *Re T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 7. Each of these criteria are reviewed in turn below.

### **1. Statutory Requirements**

62 Some of the matters that may be considered by the court on an application for approval of a plan of compromise and arrangement include:

- (a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;
- (b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of \$5,000,000;
- (c) the notice calling the meeting was sent in accordance with the order of the court;
- (d) the creditors were properly classified;
- (e) the meetings of creditors were properly constituted;
- (f) the voting was properly carried out; and
- (g) the plan was approved by the requisite double majority or majorities.

63 I find that the Petitioners have complied with all applicable statutory requirements. Specifically:

- (a) CAC and CAIL are insolvent and thus each is a "debtor company" within the meaning of section 2 of the CCAA. This was established in the affidavit evidence of Douglas Carty, Senior Vice President and Chief Financial Officer of Canadian, and so declared in the March 24, 2000 Order in these proceedings and confirmed in the testimony given by Mr. Carty at this hearing.
- (b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of \$5,000,000.
- (c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24<sup>th</sup> and April 7<sup>th</sup> Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.
- (d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.
- (e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC ("Resurgence"), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading "Fair and Reasonable".

### **2. Matters Unauthorized**

64 This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in *Re Cadillac Fairview Inc.* (February 6, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

65 In this proceeding, the dissenting groups have raised two matters which in their view are unauthorized by the CCAA: firstly, the Minority Shareholders of CAC suggested the proposed share capital reorganization of CAIL is illegal under the ABCA and Ontario Securities Commission Policy 9.1, and as such cannot be authorized under the CCAA and secondly, certain unsecured creditors suggested that the form of release contained in the Plan goes beyond the scope of release permitted under the CCAA.

*a. Legality of proposed share capital reorganization*

66 Subsection 185(2) of the ABCA provides:

(2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 167.

67 Sections 6.1(2)(d) and (e) and Schedule "D" of the Plan contemplate that:

a. All CAIL common shares held by CAC will be converted into a single retractable share, which will then be retracted by CAIL for \$1.00; and

b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

68 The Articles of Reorganization in Schedule "D" to the Plan provide for the following amendments to CAIL's Articles of Incorporation to effect the proposed reorganization:

(a) consolidating all of the issued and outstanding common shares into one common share;

(b) redesignating the existing common shares as "Retractable Shares" and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;

(c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;

(d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;

(e) redesignating the existing Class A Preferred Shares as "Common Shares" and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and

(f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

*Section 167 of the ABCA*

69 Reorganizations under section 185 of the ABCA are subject to two preconditions:

a. The corporation must be "subject to an order for re-organization"; and

b. The proposed amendments must otherwise be permitted under section 167 of the ABCA.

70 The parties agreed that an order of this court sanctioning the Plan would satisfy the first condition.

71 The relevant portions of section 167 provide as follows:

167(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to

(e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,

(f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,

(g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

72 Each change in the proposed CAIL Articles of Reorganization corresponds to changes permitted under s. 167(1) of the ABCA, as follows:

**Proposed Amendment in Schedule "D"**

- (a) — consolidation of Common Shares
- (b) — change of designation and rights
- (c) — cancellation
- (d) — change in shares
- (e) — change of designation and rights
- (f) — cancellation

**Subsection 167(1), ABCA**

- 167(1)(f)
- 167(1)(e)
- 167(1)(g.1)
- 167(1)(f)
- 167(1)(e)
- 167(1)(g.1)

73 The Minority Shareholders suggested that the proposed reorganization effectively cancels their shares in CAC. As the above review of the proposed reorganization demonstrates, that is not the case. Rather, the shares of CAIL are being consolidated, altered and then retracted, as permitted under section 167 of the ABCA. I find the proposed reorganization of CAIL's share capital under the Plan does not violate section 167.

74 In R. Dickerson et al, *Proposals for a New Business Corporation Law for Canada*, Vol.1: Commentary (the "Dickerson Report") regarding the then proposed Canada Business Corporations Act, the identical section to section 185 is described as having been inserted with the object of enabling the "court to effect any necessary amendment of the articles of the corporation in order to achieve the objective of the reorganization without having to comply with the formalities of the Draft Act, particularly shareholder approval of the proposed amendment".

75 The architects of the business corporation act model which the ABCA follows, expressly contemplated reorganizations in which the insolvent corporation would eliminate the interest of common shareholders. The example given in the Dickerson Report of a reorganization is very similar to that proposed in the Plan:

For example, the reorganization of an insolvent corporation may require the following steps: first, reduction or even elimination of the interest of the common shareholders; second, relegation of the preferred shareholders to the status of common shareholders; and third, relegation of the secured debenture holders to the status of either unsecured Noteholders or preferred shareholders.

76 The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading "Fair and Reasonable", there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.

77 The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of *Re Royal Oak Mines Inc.* (1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List]) and *T. Eaton Co.*, *supra* in which Farley J. of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

78 Section 185 provides for amendment to articles by court order. I see no requirement in that section for a meeting or vote of shareholders of CAIL, quite apart from shareholders of CAC. Further, dissent and appraisal rights are expressly removed in subsection (7). To require a meeting and vote of shareholders and to grant dissent and appraisal rights in circumstances of insolvency would frustrate the object of section 185 as described in the Dickerson Report.

79 In the circumstances of this case, where the majority shareholder holds 82% of the shares, the requirement of a special resolution is meaningless. To require a vote suggests the shares have value. They do not. The formalities of the ABCA serve no useful purpose other than to frustrate the reorganization to the detriment of all stakeholders, contrary to the CCAA.

#### *Section 183 of the ABCA*

80 The Minority Shareholders argued in the alternative that if the proposed share reorganization of CAIL were not a cancellation of their shares in CAC and therefore allowed under section 167 of the ABCA, it constituted a "sale, lease, or exchange of substantially all the property" of CAC and thus required the approval of CAC shareholders pursuant to section 183 of the ABCA. The Minority Shareholders suggested that the common shares in CAIL were substantially all of the assets of CAC and that all of those shares were being "exchanged" for \$1.00.

81 I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.) aff'd (1988), 70 C.B.R. (N.S.) xxxii (S.C.C.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

#### *Ontario Securities Commission Policy 9.1*

82 The Minority Shareholders also submitted the proposed reorganization constitutes a "related party transaction" under Policy 9.1 of the Ontario Securities Commission. Under the Policy, transactions are subject to disclosure, minority approval and formal valuation requirements which have not been followed here. The Minority Shareholders suggested that the Petitioners were therefore in breach of the Policy unless and until such time as the court is advised of the relevant requirements of the Policy and grants its approval as provided by the Policy.

83 These shareholders asserted that in the absence of evidence of the going concern value of CAIL so as to determine whether that value exceeds the rights of the Preferred Shares of CAIL, the Court should not waive compliance with the Policy.

84 To the extent that this reorganization can be considered a "related party transaction", I have found, for the reasons discussed below under the heading "Fair and Reasonable", that the Plan, including the proposed reorganization, is fair and reasonable and accordingly I would waive the requirements of Policy 9.1.

#### *b. Release*

85 Resurgence argued that the release of directors and other third parties contained in the Plan does not comply with the provisions of the CCAA.

86 The release is contained in section 6.2(2)(ii) of the Plan and states as follows:

As of the Effective Date, each of the Affected Creditors will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities...that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Applicants and Subsidiaries, the CCAA Proceedings, or the Plan against: (i) The Applicants and Subsidiaries; (ii) The Directors, Officers and employees of the Applicants or Subsidiaries in each case as of the date of filing (and in addition, those who became Officers and/or Directors thereafter but prior to the Effective Date); (iii) The former Directors, Officers and employees of the Applicants or Subsidiaries, or (iv) the respective current and former professionals of the entities in subclauses (1) to (3) of this s.6.2(2) (including, for greater certainty, the Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.

87 Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 states:

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) A provision for the compromise of claims against directors may not include claims that:

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

(3) The Court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

88 Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly. Resurgence relied on *Crabtree (Succession de) c. Barrette*, [1993] 1 S.C.R. 1027 (S.C.C.) at 1044 and *Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of)* (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.) at para. 5 in this regard.

89 With respect to Resurgence's complaint regarding the breadth of the claims covered by the release, the Petitioners asserted that the release is not intended to override section 5.1(2). Canadian suggested this can be expressly incorporated into the form of release by adding the words "*excluding the claims excepted by s. 5.1(2) of the CCAA*" immediately prior to subsection (iii) and clarifying the language in Section 5.1 of the Plan. Canadian also acknowledged, in response to a concern raised by Canada Customs and Revenue Agency, that in accordance with s. 5.1(1) of the CCAA, directors of CAC and CAIL could only be released from liability arising before March 24, 2000, the date these proceedings commenced. Canadian suggested this was also addressed in the proposed amendment. Canadian did not address the propriety of including individuals in addition to directors in the form of release.

90 In my view it is appropriate to amend the proposed release to expressly comply with section 5.1(2) of the CCAA and to clarify Section 5.1 of the Plan as Canadian suggested in its brief. The additional language suggested by Canadian to achieve this result shall be included in the form of order. Canada Customs and Revenue Agency is apparently satisfied with the Petitioners' acknowledgement that claims against directors can only be released to the date of commencement of proceedings under the CCAA, having appeared at this hearing to strongly support the sanctioning of the Plan, so I will not address this concern further.

91 Resurgence argued that its claims fell within the categories of excepted claims in section 5.1(2) of the CCAA and accordingly, its concern in this regard is removed by this amendment. Unsecured creditors JHHD Aircraft Leasing No. 1 and No. 2 suggested there may be possible wrongdoing in the acts of the directors during the restructuring process which should not be immune from scrutiny and in my view this complaint would also be caught by the exception captured in the amendment.

92 While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception.

93 Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

### **3. Fair and Reasonable**

94 In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in *Olympia & York Developments Ltd. v. Royal Trust Co.*, *supra*, at page 9:

"Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction — although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity — and "reasonableness" is what lends objectivity to the process.

95 The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), [1989] 2 W.W.R. 566 (Alta. Q.B.) at 574; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 (B.C. C.A.) at 368.

96 The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

- a. The composition of the unsecured vote;
- b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
- c. Alternatives available to the Plan and bankruptcy;
- d. Oppression;

e. Unfairness to Shareholders of CAC; and

f. The public interest.

a. *Composition of the unsecured vote*

97 As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position than the courts to gauge business risk. As stated by Blair J. at page 11 of *Olympia & York Developments Ltd.*, *supra*:

As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

98 However, given the manner of voting under the CCAA, the court must be cognizant of the treatment of minorities within a class: see for example *Re Quintette Coal Ltd.* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.) and *Re Alabama, New Orleans, Texas & Pacific Junction Railway* (1890), 60 L.J. Ch. 221 (Eng. C.A.). The court can address this by ensuring creditors' claims are properly classified. As well, it is sometimes appropriate to tabulate the vote of a particular class so the results can be assessed from a fairness perspective. In this case, the classification was challenged by Resurgence and I dismissed that application. The vote was also tabulated in this case and the results demonstrate that the votes of Air Canada and the Senior Secured Noteholders, who voted their deficiency in the unsecured class, were decisive.

99 The results of the unsecured vote, as reported by the Monitor, are:

1. For the resolution to approve the Plan: 73 votes (65% in number) representing \$494,762,304 in claims (76% in value);
2. Against the resolution: 39 votes (35% in number) representing \$156,360,363 in claims (24% in value); and
3. Abstentions: 15 representing \$968,036 in value.

100 The voting results as reported by the Monitor were challenged by Resurgence. That application was dismissed.

101 The members of each class that vote in favour of a plan must do so in good faith and the majority within a class must act without coercion in their conduct toward the minority. When asked to assess fairness of an approved plan, the court will not countenance secret agreements to vote in favour of a plan secured by advantages to the creditor: see for example, *Hochberger v. Rittenberg* (1916), 36 D.L.R. 450 (S.C.C.)

102 In *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at 192-3 aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), dissenting priority mortgagees argued the plan violated the principle of equality due to an agreement between the debtor company and another priority mortgagee which essentially amounted to a preference in exchange for voting in favour of the plan. Trainor J. found that the agreement was freely disclosed and commercially reasonable and went on to approve the plan, using the three part test. The British Columbia Court of Appeal upheld this result and in commenting on the minority complaint McEachern J.A. stated at page 206:

In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p.29:

I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.

Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

103 Resurgence submitted that Air Canada manipulated the indebtedness of CAIL to assure itself of an affirmative vote. I disagree. I previously ruled on the validity of the deficiency when approving the LOIs and found the deficiency to be valid. I found there was consideration for the assignment of the deficiency claims of the various aircraft financiers to Air Canada, namely the provision of an Air Canada guarantee which would otherwise not have been available until plan sanction. The Monitor reviewed the calculations of the deficiencies and determined they were calculated in a reasonable manner. As such, the court approved those transactions. If the deficiency had instead remained with the aircraft financiers, it is reasonable to assume those claims would have been voted in favour of the plan. Further, it would have been entirely appropriate under the circumstances for the aircraft financiers to have retained the deficiency and agreed to vote in favour of the Plan, with the same result to Resurgence. That the financiers did not choose this method was explained by the testimony of Mr. Carty and Robert Peterson, Chief Financial Officer for Air Canada; quite simply it amounted to a desire on behalf of these creditors to shift the "deal risk" associated with the Plan to Air Canada. The agreement reached with the Senior Secured Noteholders was also disclosed and the challenge by Resurgence regarding their vote in the unsecured class was dismissed. There is nothing inappropriate in the voting of the deficiency claims of Air Canada or the Senior Secured Noteholders in the unsecured class. There is no evidence of secret vote buying such as discussed in *Re Northland Properties Ltd.*

104 If the Plan is approved, Air Canada stands to profit in its operation. I do not accept that the deficiency claims were devised to dominate the vote of the unsecured creditor class, however, Air Canada, as funder of the Plan is more motivated than Resurgence to support it. This divergence of views on its own does not amount to bad faith on the part of Air Canada. Resurgence submitted that only the Unsecured Noteholders received 14 cents on the dollar. That is not accurate, as demonstrated by the list of affected unsecured creditors included earlier in these Reasons. The Senior Secured Noteholders did receive other consideration under the Plan, but to suggest they were differently motivated suggests that those creditors did not ascribe any value to their unsecured claims. There is no evidence to support this submission.

105 The good faith of Resurgence in its vote must also be considered. Resurgence acquired a substantial amount of its claim after the failure of the Onex bid, when it was aware that Canadian's financial condition was rapidly deteriorating. Thereafter, Resurgence continued to purchase a substantial amount of this highly distressed debt. While Mr. Symington maintained that he bought because he thought the bonds were a good investment, he also acknowledged that one basis for purchasing was the hope of obtaining a blocking position sufficient to veto a plan in the proposed debt restructuring. This was an obvious ploy for leverage with the Plan proponents.

106 The authorities which address minority creditors' complaints speak of "substantial injustice" (*Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.), "confiscation" of rights (*Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.); *Re SkyDome Corp.* (March 21, 1999), Doc. 98-CL-3179 (Ont. Gen. Div. [Commercial List])) and majorities "feasting upon" the rights of the minority (*Re Quintette Coal Ltd.* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.)). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice

with respect to the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) and *Re Northland Properties Ltd.*, *supra* at 9.

107 Further, to the extent that greater or discrete motivation to support a Plan may be seen as a conflict, the Court should take this same approach and look at the creditors as a whole and to the objecting creditors specifically and determine if their rights are compromised in an attempt to balance interests and have the pain of compromise borne equally.

108 Resurgence represents 58.2% of the Unsecured Noteholders or \$96 million in claims. The total claim of the Unsecured Noteholders ranges from \$146 million to \$161 million. The affected unsecured class, excluding aircraft financing, tax claims, the noteholders and claims under \$50,000, ranges from \$116.3 million to \$449.7 million depending on the resolutions of certain claims by the Claims Officer. Resurgence represents between 15.7% - 35% of that portion of the class.

109 The total affected unsecured claims, excluding tax claims, but including aircraft financing and noteholder claims including the unsecured portion of the Senior Secured Notes, ranges from \$673 million to \$1,007 million. Resurgence represents between 9.5% - 14.3% of the total affected unsecured creditor pool. These percentages indicate that at its very highest in a class excluding Air Canada's assigned claims and Senior Secured's deficiency, Resurgence would only represent a maximum of 35% of the class. In the larger class of affected unsecured it is significantly less. Viewed in relation to the class as a whole, there is no injustice being worked against Resurgence.

110 The thrust of the Resurgence submissions suggests a mistaken belief that they will get more than 14 cents on liquidation. This is not borne out by the evidence and is not reasonable in the context of the overall Plan.

*b. Receipts on liquidation or bankruptcy*

111 As noted above, the Monitor prepared and circulated a report on the Plan which contained a summary of a liquidation analysis outlining the Monitor's projected realizations upon a liquidation of CAIL ("Liquidation Analysis").

112 The Liquidation Analysis was based on: (1) the draft unaudited financial statements of Canadian at March 31, 2000; (2) the distress values reported in independent appraisals of aircraft and aircraft related assets obtained by CAIL in January, 2000; (3) a review of CAIL's aircraft leasing and financing documents; and (4) discussions with CAIL Management.

113 Prior to and during the application for sanction, the Monitor responded to various requests for information by parties involved. In particular, the Monitor provided a copy of the Liquidation Analysis to those who requested it. Certain of the parties involved requested the opportunity to question the Monitor further, particularly in respect to the Liquidation Analysis and this court directed a process for the posing of those questions.

114 While there were numerous questions to which the Monitor was asked to respond, there were several areas in which Resurgence and the Minority Shareholders took particular issue: pension plan surplus, CRAL, international routes and tax pools. The dissenting groups asserted that these assets represented overlooked value to the company on a liquidation basis or on a going concern basis.

*Pension Plan Surplus*

115 The Monitor did not attribute any value to pension plan surplus when it prepared the Liquidation Analysis, for the following reasons:

- 1) The summaries of the solvency surplus/deficit positions indicated a cumulative net deficit position for the seven registered plans, after consideration of contingent liabilities;

- 2) The possibility, based on the previous splitting out of the seven plans from a single plan in 1988, that the plans could be held to be consolidated for financial purposes, which would remove any potential solvency surplus since the total estimated contingent liabilities exceeded the total estimated solvency surplus;
- 3) The actual calculations were prepared by CAIL's actuaries and actuaries representing the unions could conclude liabilities were greater; and
- 4) CAIL did not have a legal opinion confirming that surpluses belonged to CAIL.

116 The Monitor concluded that the entitlement question would most probably have to be settled by negotiation and/or litigation by the parties. For those reasons, the Monitor took a conservative view and did not attribute an asset value to pension plans in the Liquidation Analysis. The Monitor also did not include in the Liquidation Analysis any amount in respect of the claim that could be made by members of the plan where there is an apparent deficit after deducting contingent liabilities.

117 The issues in connection with possible pension surplus are: (1) the true amount of any of the available surplus; and (2) the entitlement of Canadian to any such amount.

118 It is acknowledged that surplus prior to termination can be accessed through employer contribution holidays, which Canadian has taken to the full extent permitted. However, there is no basis that has been established for any surplus being available to be withdrawn from an ongoing pension plan. On a pension plan termination, the amount available as a solvency surplus would first have to be further reduced by various amounts to determine whether there was in fact any true surplus available for distribution. Such reductions include contingent benefits payable in accordance with the provisions of each respective pension plan, any extraordinary plan wind up cost, the amounts of any contribution holidays taken which have not been reflected, and any litigation costs.

119 Counsel for all of Canadian's unionized employees confirmed on the record that the respective union representatives can be expected to dispute all of these calculations as well as to dispute entitlement.

120 There is a suggestion that there might be a total of \$40 million of surplus remaining from all pension plans after such reductions are taken into account. Apart from the issue of entitlement, this assumes that the plans can be treated separately, that a surplus could in fact be realized on liquidation and that the Towers Perrin calculations are not challenged. With total pension plan assets of over \$2 billion, a surplus of \$40 million could quickly disappear with relatively minor changes in the market value of the securities held or calculation of liabilities. In the circumstances, given all the variables, I find that the existence of any surplus is doubtful at best and I am satisfied that the Monitor's Liquidation Analysis ascribing it zero value is reasonable in this circumstances.

#### *CRAL*

121 The Monitor's liquidation analysis as at March 31, 2000 of CRAL determined that in a distress situation, after payments were made to its creditors, there would be a deficiency of approximately \$30 million to pay Canadian Regional's unsecured creditors, which include a claim of approximately \$56.5 million due to Canadian. In arriving at this conclusion, the Monitor reviewed internally prepared unaudited financial statements of CRAL as of March 31, 2000, the Houlihan Lokey Howard and Zukin, distress valuation dated January 21, 2000 and the Simat Helliesen and Eichner valuation of selected CAIL assets dated January 31, 2000 for certain aircraft related materials and engines, rotables and spares. The Avitas Inc., and Avmark Inc. reports were used for the distress values on CRAL's aircraft and the CRAL aircraft lease documentation. The Monitor also performed its own analysis of CRAL's liquidation value, which involved analysis of the reports provided and details of its analysis were outlined in the Liquidation Analysis.

122 For the purpose of the Liquidation Analysis, the Monitor did not consider other airlines as comparable for evaluation purposes, as the Monitor's valuation was performed on a distressed sale basis. The Monitor further assumed

that without CAIL's national and international network to feed traffic into and a source of standby financing, and considering the inevitable negative publicity which a failure of CAIL would produce, CRAL would immediately stop operations as well.

123 Mr. Peterson testified that CRAL was worth \$260 million to Air Canada, based on Air Canada being a special buyer who could integrate CRAL, on a going concern basis, into its network. The Liquidation Analysis assumed the windup of each of CRAL and CAIL, a completely different scenario.

124 There is no evidence that there was a potential purchaser for CRAL who would be prepared to acquire CRAL or the operations of CRAL 98 for any significant sum or at all. CRAL has value to CAIL, and in turn, could provide value to Air Canada, but this value is attributable to its ability to feed traffic to and take traffic from the national and international service operated by CAIL. In my view, the Monitor was aware of these features and properly considered these factors in assessing the value of CRAL on a liquidation of CAIL.

125 If CAIL were to cease operations, the evidence is clear that CRAL would be obliged to do so as well immediately. The travelling public, shippers, trade suppliers, and others would make no distinction between CAIL and CRAL and there would be no going concern for Air Canada to acquire.

#### *International Routes*

126 The Monitor ascribed no value to Canadian's international routes in the Liquidation Analysis. In discussions with CAIL management and experts available in its aviation group, the Monitor was advised that international routes are unassignable licenses and not property rights. They do not appear as assets in CAIL's financials. Mr. Carty and Mr. Peterson explained that routes and slots are *not* treated as assets by airlines, but rather as rights in the control of the Government of Canada. In the event of bankruptcy/receivership of CAIL, CAIL's trustee/receiver could not sell them and accordingly they are of no value to CAIL.

127 Evidence was led that on June 23, 1999 Air Canada made an offer to purchase CAIL's international routes for \$400 million cash plus \$125 million for aircraft spares and inventory, along with the assumption of certain debt and lease obligations for the aircraft required for the international routes. CAIL evaluated the Air Canada offer and concluded that the proposed purchase price was insufficient to permit it to continue carrying on business in the absence of its international routes. Mr. Carty testified that something in the range of \$2 billion would be required.

128 CAIL was in desperate need of cash in mid December, 1999. CAIL agreed to sell its Toronto — Tokyo route for \$25 million. The evidence, however, indicated that the price for the Toronto — Tokyo route was not derived from a valuation, but rather was what CAIL asked for, based on its then-current cash flow requirements. Air Canada and CAIL obtained Government approval for the transfer on December 21, 2000.

129 Resurgence complained that despite this evidence of offers for purchase and actual sales of international routes and other evidence of sales of slots, the Monitor did not include Canadian's international routes in the Liquidation Analysis and only attributed a total of \$66 million for all intangibles of Canadian. There is some evidence that slots at some foreign airports may be bought or sold in some fashion. However, there is insufficient evidence to attribute any value to other slots which CAIL has at foreign airports. It would appear given the regulation of the airline industry, in particular, the *Aeronautics Act* and the *Canada Transportation Act*, that international routes for a Canadian air carrier only have full value to the extent of federal government support for the transfer or sale, and its preparedness to allow the then-current license holder to sell rather than act unilaterally to change the designation. The federal government was prepared to allow CAIL to sell its Toronto — Tokyo route to Air Canada in light of CAIL's severe financial difficulty and the certainty of cessation of operations during the Christmas holiday season in the absence of such a sale.

130 Further, statements made by CAIL in mid-1999 as to the value of its international routes and operations in response to an offer by Air Canada, reflected the amount CAIL needed to sustain liquidity without its international routes and was not a representation of market value of what could realistically be obtained from an arms length purchaser. The

Monitor concluded on its investigation that CAIL's Narida and Heathrow slots had a realizable value of \$66 million, which it included in the Liquidation Analysis. I find that this conclusion is supportable and that the Monitor properly concluded that there were no other rights which ought to have been assigned value.

#### *Tax Pools*

131 There are four tax pools identified by Resurgence and the Minority Shareholders that are material: capital losses at the CAC level, undepreciated capital cost pools, operating losses incurred by Canadian and potential for losses to be reinstated upon repayment of fuel tax rebates by CAIL.

#### *Capital Loss Pools*

132 The capital loss pools at CAC will not be available to Air Canada since CAC is to be left out of the corporate reorganization and will be severed from CAIL. Those capital losses can essentially only be used to absorb a portion of the debt forgiveness liability associated with the restructuring. CAC, who has virtually all of its senior debt compromised in the plan, receives compensation for this small advantage, which cost them nothing.

#### *Undepreciated capital cost ("UCC")*

133 There is no benefit to Air Canada in the pools of UCC unless it were established that the UCC pools are in excess of the fair market value of the relevant assets, since Air Canada could create the same pools by simply buying the assets on a liquidation at fair market value. Mr. Peterson understood this pool of UCC to be approximately \$700 million. There is no evidence that the UCC pool, however, could be considered to be a source of benefit. There is no evidence that this amount is any greater than fair market value.

#### *Operating Losses*

134 The third tax pool complained of is the operating losses. The debt forgiven as a result of the Plan will erase any operating losses from prior years to the extent of such forgiven debt.

#### *Fuel tax rebates*

135 The fourth tax pool relates to the fuel tax rebates system taken advantage of by CAIL in past years. The evidence is that on a consolidated basis the total potential amount of this pool is \$297 million. According to Mr. Carty's testimony, CAIL has not been taxable in his ten years as Chief Financial Officer. The losses which it has generated for tax purposes have been sold on a 10 - 1 basis to the government in order to receive rebates of excise tax paid for fuel. The losses can be restored retroactively if the rebates are repaid, but the losses can only be carried forward for a maximum of seven years. The evidence of Mr. Peterson indicates that Air Canada has no plan to use those alleged losses and in order for them to be useful to Air Canada, Air Canada would have to complete a legal merger with CAIL, which is not provided for in the plan and is not contemplated by Air Canada until some uncertain future date. In my view, the Monitor's conclusion that there was no value to any tax pools in the Liquidation Analysis is sound.

136 Those opposed to the Plan have raised the spectre that there may be value unaccounted for in this liquidation analysis or otherwise. Given the findings above, this is merely speculation and is unsupported by any concrete evidence.

#### *c. Alternatives to the Plan*

137 When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on

speculative desires or hope for the future. As Farley J. stated in *T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 6:

One has to be cognizant of the function of a balancing of their prejudices. Positions must be realistically assessed and weighed, all in the light of what an alternative to a successful plan would be. Wishes are not a firm foundation on which to build a plan; nor are ransom demands.

138 The evidence is overwhelming that all other options have been exhausted and have resulted in failure. The concern of those opposed suggests that there is a better plan that Air Canada can put forward. I note that significant enhancements were made to the plan during the process. In any case, this is the Plan that has been voted on. The evidence makes it clear that there is not another plan forthcoming. As noted by Farley J. in *T. Eaton Co.*, *supra*, "no one presented an alternative plan for the interested parties to vote on" (para. 8).

#### *d. Oppression*

##### *Oppression and the CCAA*

139 Resurgence and the Minority Shareholders originally claimed that the Plan proponents, CAC and CAIL and the Plan supporters 853350 and Air Canada had oppressed, unfairly disregarded or unfairly prejudiced their interests, under Section 234 of the ABCA. The Minority Shareholders (for reasons that will appear obvious) have abandoned that position.

140 Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation, it attempts to balance the interests of shareholders, creditors and management to ensure adequate investor protection and maximum management flexibility. The Act requires the court to judge the conduct of the company and the majority in the context of equity and fairness: *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.). Equity and fairness are measured against or considered in the context of the rights, interests or reasonable expectations of the complainants: *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (B.C. S.C.).

141 The starting point in any determination of oppression requires an understanding as to what the rights, interests, and reasonable expectations are and what the damaging or detrimental effect is on them. MacDonald J. stated in *First Edmonton Place*, *supra* at 57:

In deciding what is unfair, the history and nature of the corporation, the essential nature of the relationship between the corporation and the creditor, the type of rights affected in general commercial practice should all be material. More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: The protection of the underlying expectation of a creditor in the arrangement with the corporation, the extent to which the acts complained of were unforeseeable where the creditor could not reasonably have protected itself from such acts and the detriment to the interests of the creditor.

142 While expectations vary considerably with the size, structure, and value of the corporation, all expectations must be reasonably and objectively assessed: *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.).

143 Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: *Royal Oak*

*Mines Ltd.*, *supra*, para. 4., *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Company*, *supra*.

144 To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.

145 It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

*Oppression allegations by Resurgence*

146 Resurgence alleges that it has been oppressed or had its rights disregarded because the Petitioners and Air Canada disregarded the specific provisions of their trust indenture, that Air Canada and 853350 dealt with other creditors outside of the CCAA, refusing to negotiate with Resurgence and that they are generally being treated inequitably under the Plan.

147 The trust indenture under which the Unsecured Notes were issued required that upon a "change of control", 101% of the principal owing thereunder, plus interest would be immediately due and payable. Resurgence alleges that Air Canada, through 853350, caused CAC and CAIL to purposely fail to honour this term. Canadian acknowledges that the trust indenture was breached. On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders, including the Unsecured Noteholders. As a result of this moratorium, Canadian defaulted on the payments due under its various credit facilities and aircraft leases.

148 The moratorium was not directed solely at the Unsecured Noteholders. It had the same impact on other creditors, secured and unsecured. Canadian, as a result of the moratorium, breached other contractual relationships with various creditors. The breach of contract is not sufficient to found a claim for oppression in this case. Given Canadian's insolvency, which Resurgence recognized, it cannot be said that there was a reasonable expectation that it would be paid in full under the terms of the trust indenture, particularly when Canadian had ceased making payments to other creditors as well.

149 It is asserted that because the Plan proponents engaged in a restructuring of Canadian's debt before the filing under the CCAA, that its use of the Act for only a small group of creditors, which includes Resurgence is somehow oppressive.

150 At the outset, it cannot be overlooked that the CCAA does not require that a compromise be proposed to *all* creditors of an insolvent company. The CCAA is a flexible, remedial statute which recognizes the unique circumstances that lead to and away from insolvency.

151 Next, Air Canada made it clear beginning in the fall of 1999 that Canadian would have to complete a financial restructuring so as to permit Air Canada to acquire CAIL on a financially sound basis and as a wholly owned subsidiary. Following the implementation of the moratorium, absent which Canadian could not have continued to operate, Canadian and Air Canada commenced efforts to restructure significant obligations by consent. They perceived that further damage to public confidence that a CCAA filing could produce, required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection. Before the Petitioners started the CCAA

proceedings on March 24, 2000, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

152 The purpose of the CCAA is to create an environment for negotiations and compromise. Often it is the stay of proceedings that creates the necessary stability for that process to unfold. Negotiations with certain key creditors in advance of the CCAA filing, rather than being oppressive or conspiratorial, are to be encouraged as a matter of principle if their impact is to provide a firm foundation for a restructuring. Certainly in this case, they were of critical importance, staving off liquidation, preserving cash flow and allowing the Plan to proceed. Rather than being detrimental or prejudicial to the interests of the other stakeholders, including Resurgence, it was beneficial to Canadian and all of its stakeholders.

153 Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the operations of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it.

154 The evidence demonstrates that the sales of the Toronto — Tokyo route, the Dash 8s and the simulators were at the suggestion of Canadian, who was in desperate need of operating cash. Air Canada paid what Canadian asked, based on its cash flow requirements. The evidence established that absent the injection of cash at that critical juncture, Canadian would have ceased operations. It is for that reason that the Government of Canada willingly provided the approval for the transfer on December 21, 2000.

155 Similarly, the renegotiation of CAIL's aircraft leases to reflect market rates supported by Air Canada covenant or guarantee has been previously dealt with by this court and found to have been in the best interest of Canadian, not to its detriment. The evidence establishes that the financial support and corporate integration that has been provided by Air Canada was not only in Canadian's best interest, but its only option for survival. The suggestion that the renegotiations of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.

156 I find the transactions predating the CCAA proceedings, were in fact Canadian's life blood in ensuring some degree of liquidity and stability within which to conduct an orderly restructuring of its debt. There was no detriment to Canadian or to its creditors, including its unsecured creditors. That Air Canada and Canadian were so successful in negotiating agreements with their major creditors, including aircraft financiers, without resorting to a stay under the CCAA underscores the serious distress Canadian was in and its lenders recognition of the viability of the proposed Plan.

157 Resurgence complained that other significant groups held negotiations with Canadian. The evidence indicates that a meeting was held with Mr. Symington, Managing Director of Resurgence, in Toronto in March 2000. It was made clear to Resurgence that the pool of unsecured creditors would be somewhere between \$500 and \$700 million and that Resurgence would be included within that class. To the extent that the versions of this meeting differ, I prefer and accept the evidence of Mr. Carty. Resurgence wished to play a significant role in the debt restructuring and indicated it was prepared to utilize the litigation process to achieve a satisfactory result for itself. It is therefore understandable that no further negotiations took place. Nevertheless, the original offer to affected unsecured creditors has been enhanced since the filing of the plan on April 25, 2000. The enhancements to unsecured claims involved the removal of the cap on the unsecured pool and an increase from 12 to 14 cents on the dollar.

158 The findings of the Commissioner of Competition establishes beyond doubt that absent the financial support provided by Air Canada, Canadian would have failed in December 1999. I am unable to find on the evidence that Resurgence has been oppressed. The complaint that Air Canada has plundered Canadian and robbed it of its assets is not supported but contradicted by the evidence. As described above, the alternative is liquidation and in that event the Unsecured Noteholders would receive between one and three cents on the dollar. The Monitor's conclusions in this regard are supportable and I accept them.

*e. Unfairness to Shareholders*

159 The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC — the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350, without any compensation or any vote. When the reorganization is completed as contemplated by the Plan, their shares will remain in CAC but CAC will be a bare shell.

160 They further submitted that Air Canada's cash infusion, the covenants and guarantees it has offered to aircraft financiers, and the operational changes (including integration of schedules, "quick win" strategies, and code sharing) have all added significant value to CAIL to the benefit of its stakeholders, including the Minority Shareholders. They argued that they should be entitled to continue to participate into the future and that such an expectation is legitimate and consistent with the statements and actions of Air Canada in regard to integration. By acting to realign the airlines before a corporate reorganization, the Minority Shareholders asserted that Air Canada has created the expectation that it is prepared to consolidate the airlines with the participation of a minority. The Minority Shareholders take no position with respect to the debt restructuring under the CCAA, but ask the court to sever the corporate reorganization provisions contained in the Plan.

161 Finally, they asserted that CAIL has increased in value due to Air Canada's financial contributions and operational changes and that accordingly, before authorizing the transfer of the CAIL shares to 853350, the current holders of the CAIL Preferred Shares, the court must have evidence before it to justify a transfer of 100% of the equity of CAIL to the Preferred Shares.

162 That CAC will have its shareholding in CAIL extinguished and emerge a bare shell is acknowledged. However, the evidence makes it abundantly clear that those shares, CAC's "only asset", have no value. That the Minority Shareholders are content to have the debt restructuring proceed suggests by implication that they do not dispute the insolvency of both Petitioners, CAC and CAIL.

163 The Minority Shareholders base their expectation to remain as shareholders on the actions of Air Canada in acquiring only 82% of the CAC shares before integrating certain of the airlines' operations. Mr. Baker (who purchased *after* the Plan was filed with the Court and almost six months after the take over bid by Air Canada) suggested that the contents of the bid circular misrepresented Air Canada's future intentions to its shareholders. The two dollar price offered and paid per share in the bid must be viewed somewhat skeptically and in the context in which the bid arose. It does not support the speculative view that some shareholders hold, that somehow, despite insolvency, their shares have some value on a going concern basis. In any event, any claim for misrepresentation that Minority Shareholders might have arising from the take over bid circular against Air Canada or 853350, if any, is unaffected by the Plan and may be pursued after the stay is lifted.

164 In considering Resurgence's claim of oppression I have already found that the financial support of Air Canada during this restructuring period has benefited Canadian and its stakeholders. Air Canada's financial support and the integration of the two airlines has been critical to keeping Canadian afloat. The evidence makes it abundantly clear that without this support Canadian would have ceased operations. However it has not transformed CAIL or CAC into solvent companies.

165 The Minority Shareholders raise concerns about assets that are ascribed limited or no value in the Monitor's report as does Resurgence (although to support an opposite proposition). Considerable argument was directed to the future operational savings and profitability forecasted for Air Canada, its subsidiaries and CAIL and its subsidiaries. Mr. Peterson estimated it to be in the order of \$650 to \$800 million on an annual basis, commencing in 2001. The Minority Shareholders point to the tax pools of a restructured company that they submit will be of great value once CAIL becomes profitable as anticipated. They point to a pension surplus that at the very least has value by virtue of the contribution holidays that it affords. They also look to the value of the compromised claims of the restructuring itself which they submit are in the order of \$449 million. They submit these cumulative benefits add value, currently or at least realizable in the future. In sharp contrast to the Resurgence position that these acts constitute oppressive behaviour, the

Minority Shareholders view them as enhancing the value of their shares. They go so far as to suggest that there may well be a current going concern value of the CAC shares that has been conveniently ignored or unquantified and that the Petitioners must put evidence before the court as to what that value is.

166 These arguments overlook several important facts, the most significant being that CAC and CAIL are insolvent and will remain insolvent until the debt restructuring is fully implemented. These companies are not just technically or temporarily insolvent, they are massively insolvent. Air Canada will have invested upward of \$3 billion to complete the restructuring, while the Minority Shareholders have contributed nothing. Further, it was a fundamental condition of Air Canada's support of this Plan that it become the sole owner of CAIL. It has been suggested by some that Air Canada's share purchase at two dollars per share in December 1999 was unfairly prejudicial to CAC and CAIL's creditors. Objectively, any expectation by Minority Shareholders that they should be able to participate in a restructured CAIL is not reasonable.

167 The Minority Shareholders asserted the plan is unfair because the effect of the reorganization is to extinguish the common shares of CAIL held by CAC and to convert the voting and non-voting Preferred Shares of CAIL into common shares of CAIL. They submit there is no expert valuation or other evidence to justify the transfer of CAIL's equity to the Preferred Shares. There is no equity in the CAIL shares to transfer. The year end financials show CAIL's shareholder equity at a deficit of \$790 million. The Preferred Shares have a liquidation preference of \$347 million. There is no evidence to suggest that Air Canada's interim support has rendered either of these companies solvent, it has simply permitted operations to continue. In fact, the unaudited consolidated financial statements of CAC for the quarter ended March 31, 2000 show total shareholders equity went from a deficit of \$790 million to a deficit of \$1.214 million, an erosion of \$424 million.

168 The Minority Shareholders' submission attempts to compare and contrast the rights and expectations of the CAIL preferred shares as against the CAC common shares. This is not a meaningful exercise; the Petitioners are not submitting that the Preferred Shares have value and the evidence demonstrates unequivocally that they do not. The Preferred Shares are merely being utilized as a corporate vehicle to allow CAIL to become a wholly owned subsidiary of Air Canada. For example, the same result could have been achieved by issuing new shares rather than changing the designation of 853350's Preferred Shares in CAIL.

169 The Minority Shareholders have asked the court to sever the reorganization from the debt restructuring, to permit them to participate in whatever future benefit might be derived from the restructured CAIL. However, a fundamental condition of this Plan and the expressed intention of Air Canada on numerous occasions is that CAIL become a wholly owned subsidiary. To suggest the court ought to sever this reorganization from the debt restructuring fails to account for the fact that it is not two plans but an integral part of a single plan. To accede to this request would create an injustice to creditors whose claims are being seriously compromised, and doom the entire Plan to failure. Quite simply, the Plan's funder will not support a severed plan.

170 Finally, the future profits to be derived by Air Canada are not a relevant consideration. While the object of any plan under the CCAA is to create a viable emerging entity, the germane issue is what a prospective purchaser is prepared to pay in the circumstances. Here, we have the one and only offer on the table, Canadian's last and only chance. The evidence demonstrates this offer is preferable to those who have a remaining interest to a liquidation. Where secured creditors have compromised their claims and unsecured creditors are accepting 14 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of \$1 billion, it is not unfair that shareholders receive nothing.

*e. The Public Interest*

171 In this case, the court cannot limit its assessment of fairness to how the Plan affects the direct participants. The business of the Petitioners as a national and international airline employing over 16,000 people must be taken into account.

172 In his often cited article, *Reorganizations Under the Companies' Creditors Arrangement Act* (1947), 25 Can.Bar R.ev. 587 at 593 Stanley Edwards stated:

Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A.

173 In *Re Repap British Columbia Inc.* (1998), 1 C.B.R. (4th) 49 (B.C. S.C.) the court noted that the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In *Re Quintette Coal Ltd.*, *supra*, Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) and *Algoma Steel Corp. v. Royal Bank* (April 16, 1992), Doc. Toronto B62/91-A (Ont. Gen. Div.)

174 The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.

175 More than sixteen thousand unionized employees of CAIL and CRAL appeared through counsel. The unions and their membership strongly support the Plan. The unions represented included the Airline Pilots Association International, the International Association of Machinists and Aerospace Workers, Transportation District 104, Canadian Union of Public Employees, and the Canadian Auto Workers Union. They represent pilots, ground workers and cabin personnel. The unions submit that it is essential that the employee protections arising from the current restructuring of Canadian not be jeopardized by a bankruptcy, receivership or other liquidation. Liquidation would be devastating to the employees and also to the local and national economies. The unions emphasize that the Plan safeguards the employment and job dignity protection negotiated by the unions for their members. Further, the court was reminded that the unions and their members have played a key role over the last fifteen years or more in working with Canadian and responsible governments to ensure that Canadian survived and jobs were maintained.

176 The Calgary and Edmonton Airport authorities, which are not for profit corporations, also supported the Plan. CAIL's obligations to the airport authorities are not being compromised under the Plan. However, in a liquidation scenario, the airport authorities submitted that a liquidation would have severe financial consequences to them and have potential for severe disruption in the operation of the airports.

177 The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the *Transportation Act*, which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which

addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

178 In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required: see for example *Re Wandlyn Inns Ltd.* (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.), *Quintette Coal, supra* and *Repap, supra*. Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole. I return to *Algoma Steel v. Royal Bank, supra* at 9 in which Farley J. endorsed this approach:

What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate.

179 Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable. As stated in *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at 173:

A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment.

180 I find that in all the circumstances, the Plan is fair and reasonable.

#### IV. Conclusion

181 The Plan has obtained the support of many affected creditors, including virtually all aircraft financiers, holders of executory contracts, AMR, Loyalty Group and the Senior Secured Noteholders.

182 Use of these proceedings has avoided triggering more than \$1.2 billion of incremental claims. These include claims of passengers with pre-paid tickets, employees, landlords and other parties with ongoing executory contracts, trade creditors and suppliers.

183 This Plan represents a solid chance for the continued existence of Canadian. It preserves CAIL as a business entity. It maintains over 16,000 jobs. Suppliers and trade creditors are kept whole. It protects consumers and preserves the integrity of our national transportation system while we move towards a new regulatory framework. The extensive efforts by Canadian and Air Canada, the compromises made by stakeholders both within and without the proceedings and the commitment of the Government of Canada inspire confidence in a positive result.

184 I agree with the opposing parties that the Plan is not perfect, but it is neither illegal nor oppressive. Beyond its fair and reasonable balancing of interests, the Plan is a result of bona fide efforts by all concerned and indeed is the only alternative to bankruptcy as ten years of struggle and creative attempts at restructuring by Canadian clearly demonstrate. This Plan is one step toward a new era of airline profitability that hopefully will protect consumers by promoting affordable and accessible air travel to all Canadians.

185 The Plan deserves the sanction of this court and it is hereby granted. The application pursuant to section 185 of the ABCA is granted. The application for declarations sought by Resurgence are dismissed. The application of the Minority Shareholders is dismissed.

*Application granted; counter-applications dismissed.*

Footnotes

\* Leave to appeal refused 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, [2000] 10 W.W.R. 314, 2000 ABCA 238, 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]).

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2000 ABCA 238  
Alberta Court of Appeal [In Chambers]

Canadian Airlines Corp., Re

2000 CarswellAlta 919, 2000 ABCA 238, [2000] 10 W.W.R. 314, [2000] A.W.L.D. 655, [2000] A.J. No. 1028,  
20 C.B.R. (4th) 46, 228 W.A.C. 131, 266 A.R. 131, 84 Alta. L.R. (3d) 52, 99 A.C.W.S. (3d) 533, 9 B.L.R. (3d) 86

**In the Matter of the Companies' Creditors  
Arrangement Act, R.S.C. 1985, c. C-36, as amended;**

And In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c. B-15, as amended, Section 185;

And In the Matter of Canadian Airlines Corporation and Canadian Airlines  
International Ltd.; Resurgence Asset Management LLC (Applicant) and Canadian  
Airlines Corporation and Canadian Airlines International Ltd. (Respondents)

Wittmann J.A.

Heard: August 3, 2000

Judgment: August 29, 2000

Docket: Calgary Appeal 00-08901

Proceedings: refused leave to appeal *Canadian Airlines Corp., Re* (2000), 2000 CarswellAlta 662, 2000 ABQB 442, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.); affirmed (2000), 2000 CarswellAlta 1556, 2001 ABCA 9, [2001] 3 W.W.R. 1 (Alta. C.A.)

Counsel: *D.R. Haigh, Q.C.*, *D.S. Nishimura*, and *A.Z.A. Campbell*, for Applicant.

*H.M. Kay, Q.C.*, *A.L. Friend, Q.C.*, and *L.A. Goldbach*, for Respondents.

*S.F. Dunphy*, for Air Canada.

*F.R. Foran, Q.C.*, for Monitor, Pricewaterhouse Coopers.

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

APPLICATION by investment corporation for leave to appeal from judgment reported at 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, [2000] 10 W.W.R. 269, 2000 ABQB 442, 20 C.B.R. (4th) 1 (Alta. Q.B.), approving airline's plan of arrangement under *Companies' Creditors Arrangement Act*.

***Wittmann J.A.* [In Chambers]:**

## INTRODUCTION

1 This is an application by Resurgence Asset Management LLC ("Resurgence") for leave to appeal the order of Paperny, J., dated June 27, 2000, [reported 84 Alta. L.R. (3d) 9, [2000] 10 W.W.R. 269 (Alta. Q.B.)] pursuant to proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, ("*CCAA*"). The order sanctioned a plan of compromise and arrangement ("the Plan") proposed by Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") (together, "Canadian") and dismissed an application by Resurgence for a declaration that Resurgence was an unaffected creditor under the Plan.

## BACKGROUND

2 Resurgence was the holder of 58.2 per cent of \$100,000,000.00 (U.S.) of the unsecured notes issued by CAC.

3 CAC was a publicly traded Alberta corporation which, prior to the June 27 order of Paperny, J., owned 100 per cent of the common shares of CAIL, the operating company of Canadian Airlines.

4 Air Canada is a publicly traded Canadian corporation. Air Canada owned 10 per cent of the shares of 853350 Alberta Ltd. ("853350"), which prior to the June 27 order of Paperny, J., owned all the preferred shares of CAIL.

5 As described in detail by the learned chambers judge in her reasons, Canadian had been searching for a decade for a solution to its ongoing, significant financial difficulties. By December 1999, it was on the brink of bankruptcy. In a series of transactions including 853350's acquisition of the preferred shares of CAIL, Air Canada infused capital into Canadian and assisted in debt restructuring.

6 Canadian came to the conclusion that it must conclude its debt restructuring to permit the completion of a full merger between Canadian and Air Canada. On February 1, 2000, to secure liquidity to continue operating until debt restructuring was achieved, Canadian announced a moratorium on payments to lessors and lenders. CAIL, Air Canada and lessors of 59 aircraft reached an agreement in principle on a restructuring plan. They also reached agreement with other secured creditors and several major unsecured creditors with respect to restructuring.

7 Canadian still faced threats of proceedings by secured creditors. It commenced proceedings under the *CCAA* on March 24, 2000. Pricewaterhouse Coopers Inc. was appointed as Monitor by court order.

8 Arrangements with various aircraft lessors, lenders and conditional vendors which would benefit Canadian by reducing rates and other terms were approved by court orders dated April 14, 2000 and May 10, 2000.

9 On April 25, 2000, in accordance with the March 24 court order, Canadian filed the Plan which was described as having three principal objectives:

- (a) To provide near term liquidity so that Canadian can sustain operations;
- (b) To allow for the return of aircraft not required by Canadian; and
- (c) To permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset value and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

10 The Plan generally provided for stakeholders by category as follows:

- (a) Affected unsecured creditors, which included unsecured noteholders, aircraft claimants, executory contract claimants, tax claimants and various litigation claimants, would receive 12 cents per dollar (later changed to 14 cents per dollar) of approved claims;
- (b) Affected secured creditors, the senior secured noteholders, would receive 97 per cent of the principal amount of their claim plus interest and costs in respect of their secured claim, and a deficiency claim as unsecured creditors for the remainder;
- (c) Unaffected unsecured creditors, which included Canadian's employees, customers and suppliers of goods and services, would be unaffected by the Plan;
- (d) Unaffected secured creditor, the Royal Bank, CAIL's operating lender, would not be affected by the Plan.

11 The Plan also proposed share capital reorganization by having all CAIL common shares held by CAC converted into a single retractable share, which would then be retracted by CAIL for \$1.00, and all CAIL preferred shares held by 853350 converted into CAIL common shares. The Plan provided for amendments to CAIL's articles of incorporation to effect the proposed reorganization.

12 On May 26, 2000, in accordance with the orders and directions of the court, two classes of creditors, the senior secured noteholders and the affected unsecured creditors voted on the Plan as amended. Both classes approved the Plan by the majorities required by ss. 4 and 5 of the *CCAA*.

13 On May 29, 2000, by notice of motion, Canadian sought court sanction of the Plan under s. 6 of the *CCAA* and an order for reorganization pursuant to s. 185 of the *Business Corporations Act* (Alberta), S.A. 1981, c. B-15 as amended ("*ABCA*"). Resurgence was among those who opposed the Plan. Its application, along with that of four shareholders of CAC, was ordered to be tried during a hearing to consider the fairness and reasonableness of the Plan ("the fairness hearing").

14 Resurgence sought declarations that the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 were oppressive and unfairly prejudicial to it pursuant to s. 234 of the *ABCA*.

15 The fairness hearing lasted two weeks during which *viva voce* evidence of six witnesses was heard, including testimony of the chief financial officers of Canadian and Air Canada. Submissions by counsel were made on behalf of the federal government, the Calgary and Edmonton airport authorities, unions representing employees of Canadian and various creditors of Canadian. The court also received two special reports from the Monitor.

16 As part of assessing the fairness of the Plan, the learned chambers judge received a liquidation analysis of CAIL, prepared by the Monitor, in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event that CAIL's assets were disposed of by a receiver or trustee. The Monitor concluded that liquidation would result in a shortfall to certain secured creditors, that recovery by unsecured creditors would be between one and three cents on the dollar, and that there would be no recovery by shareholders.

17 The learned chambers judge stated that she agreed with the parties opposing the Plan that it was not perfect, but it was neither illegal, nor oppressive, and therefore, dismissed the requested declarations and relief sought by Resurgence. Further, she held that the Plan was the only alternative to bankruptcy as ten years of struggle and failed creative attempts at restructuring clearly demonstrated. She ruled that the Plan was fair and reasonable and deserving of the sanction of the court. She granted the order sanctioning the Plan, and the application pursuant to s. 185 of the *ABCA* to reorganize the corporation.

#### **LEAVE TO APPEAL UNDER THE *CCAA***

18 The *CCAA* provides for appeals to this Court as follows:

13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge or the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

19 As set out in *Re Canadian Airlines Corp.*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) ("*Resurgence No. 1*"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be serious and arguable grounds that are of real and significant interest to the parties. This criterion subsumes four factors to be considered by the court:

- (1) whether the point on appeal is of significance to the practice;
- (2) whether the point raised is of significance to the action itself;
- (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action.

20 The respondents argue that apart from the test for leave, mootness is an additional overriding factor in the present case which is dispositive against the granting of leave to appeal.

### MOOTNESS

21 In *Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd.* (1993), 81 B.C.L.R. (2d) 142 (B.C. C.A.), an order authorizing the distribution of substantially all the assets of a limited partnership had been fully performed. The appellants appealed, seeking to have the order vacated. The appellants had unsuccessfully applied for a stay of the order. In deciding whether to allow the appeal to be presented, Gibbs, J.A., for the court, said there was no merit, substance or prospective benefit that could accrue to the appellants, and that the appeal was therefore moot.

22 In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.), Sopinka, J. for the court, held that where there is no longer a live controversy or concrete dispute, an appeal is moot.

23 No stay of the June 27 order was obtained or even sought. In reliance on that order, most of the transactions contemplated by the Plan have been completed. According to the Affidavit of Paul Brotto, sworn July 6, 2000, filed July 7, 2000, the following occurred:

5. The transactions contemplated by the Plan have been completed in reliance upon the Sanction Order. The completion of the transactions has involved, among other things, the following steps:

(a) Effective July 4, 2000, all of the depreciable property of CAIL was transferred to a wholly-owned subsidiary of CAIL and leased back from such subsidiary by CAIL;

(b) Articles of Reorganization of CAIL, being Schedule "D" to the Plan (which is Exhibit "A" to the Sanction Order), were filed and a Certificate of Amendment and Registration of Restated Articles was issued by the Registrar of Corporations pursuant to the Sanction Order, and in accordance with sections 185 and 255 of the Business Corporations Act (Alberta) (the "Certificate") on July 5, 2000. Pursuant to the Articles of Reorganization, the common shares of CAIL formerly held by CAC were converted to retractable preferred shares and the same were retracted. All preferred shares of CAIL held by 853350 Alberta Ltd. ("853350") were converted into CAIL common shares;

(c) The "Section 80.04 Agreement" referred to in the Plan between CAIL and CAC, pursuant to which certain forgiveness of debt obligations under s.80 of the Income Tax Act were transferred from CAIL to CAC, has been entered into as of July 5, 2000;

(d) Payment of \$185,973,411 (US funds) has been made to the Trustee on behalf of all holders of Senior Secured Notes as provided for in the Plan and 853350 has acquired the Amended Secured Intercompany Note; and

(e) Payments have been made to Affected Unsecured Creditors holding Unsecured Proven Claims and further payments will be made upon the resolution of disputed claims by the Claims officer; and

(f) It is expected that payment will be made within several days of the date of this Affidavit to the Trustee, on behalf of the Unsecured Notes, in the amount 14 percent of approximately \$160,000,000.

24 In *Norcan Oils Ltd. v. Fogler* (1964), [1965] S.C.R. 36 (S.C.C.), it was held that the Alberta Supreme Court Appellate Division could not set aside or revoke a certificate of amalgamation after the registrar of companies had issued the certificate in accordance with a valid court order and the corporations legislation. A notice appealing the order had been served but no stay had been obtained. Absent express legislative authority to reverse the process once the certificate had

been issued, the majority of the Supreme Court of Canada held the amalgamation could not be unwound and therefore, an appellate court ought not to make an order which could have no effect.

25 Courts following *Norcan Oils Ltd.* have recognized that any right to appeal will be lost if a party does not obtain a stay of the filing of an amalgamation approval order: *Harris v. Universal Explorations Ltd.* (1982), 35 A.R. 71 (Alta. T.D.) and *Gibbex Mines Ltd. v. International Video Cassettes Ltd.*, [1975] 2 W.W.R. 10 (B.C. S.C.).

26 *Norcan* applies to bind this Court in the present action where CAIL's articles of reorganization were filed with the Registrar of Corporations on July 5, 2000 and pursuant to the provisions of the *ABCA*, a certificate amending the articles was issued. The certificate cannot now be rescinded. There is no provision in the *ABCA* for reversing a reorganization.

27 The respondents point out that there are other irreversible changes which have occurred since the date of the June 27, 2000 order. They include changes in share structure, changes in management personnel, implementation of a restructuring plan that included a repayment agreement with its principal lender and other creditors and payments to third parties. [Affidavit of Paul Brotto, paras. 6, 7, 8, 9, 10, 11, 12.]

28 The applicant relies on *Re Blue Range Resource Corp.* (1999), 244 A.R. 103 (Alta. C.A.), to argue that leave to appeal can be granted after a *CCAA* plan has been implemented. In that case, as noted by Fruman, J.A. at 106, a plan was in place and an appeal of the issues which were before her would not unduly hinder the progress of restructuring.

29 In this case, however, the proposed appeal by Resurgence would interfere with the restructuring since the remedies it seeks requires that the Plan be set aside. One proposed ground of appeal attacks the fairness and reasonableness of the Plan itself when the Plan has been almost fully implemented. It cannot be said that the proposed appeal would not unduly hinder the progress of restructuring.

30 If the proposed appeal were allowed, this Court cannot rewrite the Plan; nor could it remit the matter back to the *CCAA* supervising judge for such purpose. It must either uphold or set aside the approval of the Plan granted by the court below. In effect, if Resurgence succeeded on appeal, the Plan would be vacated. However, that remedy is no longer possible, at minimum, because the certificate issued by the Registrar cannot be revoked. As stated in *Norcan Oils Ltd.*, an appellate court cannot order a remedy which could have no effect. This Court cannot order that the Plan be undone in its entirety.

31 Similarly, the other ground of Resurgence's proposed appeal, oppression under s. 234 of the *ABCA*, cannot be allowed since that remedy must be granted within the context of the *CCAA* proceedings. As recognized by the learned chambers judge, allegations of oppression were considered in the test for fairness when seeking judicial sanction of the Plan. As she discussed at paragraphs 140-145 of her reasons, the starting point in any determination of oppression under the *ABCA* requires an understanding of the rights, interests and reasonable expectations which must be objectively assessed. In this action, the rights, interests and reasonable expectations of both shareholders and creditors must be considered through the lens of *CCAA* insolvency legislation. The complaints of Resurgence, that its rights under its trust indenture have been ignored or eliminated, are to be seen as the function of the insolvency, and not of oppressive conduct. As a consequence, even if Resurgence were to successfully appeal on the ground of oppression, the remedy would not be to give effect to the terms of the trust indenture. This Court could only hold that the fairness test for the court's sanction was not met and therefore, the approval of the Plan should be set aside. Again, as explained above, reversing the Plan is no longer possible.

32 The applicant was unable to point to any issue where this Court could grant a remedy and yet leave the Plan unaffected. It proposed on appeal to seek a declaration that it be declared an unaffected unsecured creditor. That is not a ground of appeal but is rather a remedy. As the respondents argued, the designation of Resurgence as an affected unsecured creditor was part of the Plan. To declare it an unaffected unsecured creditor requires vacating the Plan. On every ground proposed by the applicant, it appears that the response of this Court can only be to either uphold or set aside the approval of the court below. Setting aside the approval is no longer possible since essential elements of the

Plan have been implemented and are now irreversible. Thus, the applicant cannot be granted the remedy it seeks. No prospective benefit can accrue to the applicant even if it succeeded on appeal. The appeal, therefore, is moot.

### DISCRETION TO HEAR MOOT APPEALS

33 Even if an appeal could provide no benefit to the applicants, should leave be granted?

34 In *Borowski*, *supra*, Sopinka, J. described the doctrine of mootness at 353. He said that, as an aspect of a general policy or practice, a court may decline to decide a case which raises merely a hypothetical or abstract questions and will apply the doctrine when the decision of the court will have no practical effect of resolving some controversy affecting the rights of parties.

35 After discussing the principles involved in deciding whether an issue was moot, Sopinka, J. continued at 358 to describe the second stage of the analysis by examining the basis upon which a court should exercise its discretion either to hear or decline to hear a moot appeal. He examined three underlying factors in the rationale for the exercise of discretion in departing from the usual practice. The first is the requirement of an adversarial context which helps guarantee that issues are well and fully argued when resolving legal disputes. He suggested the presence of collateral consequences may provide the necessary adversarial context. Second is the concern for judicial economy which requires that special circumstances exist in a case to make it worthwhile to apply scarce judicial resources to resolve it. Third is the need for the court to demonstrate a measure of awareness of its proper law-making function as the adjudicative branch in the political framework. Judgments in the absence of a dispute may be viewed as intruding into the role of the legislative branch. He concluded at 363:

In exercising its discretion in an appeal which is moot, the court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third and vice versa.

36 The third factor underlying the rationale does not apply in this case. As for the first criterion, the circumstances of this case do not reveal any collateral consequences, although, it may be assumed that the necessary adversarial context could be present. However, there are no special circumstances making it worthwhile for this Court to ration scarce judicial resources to the resolution of this dispute. This outweighs the other two factors in concluding that the mootness doctrine should be enforced.

37 On the ground of mootness, leave to appeal should not be granted.

38 I am supported in this conclusion by similar cases before the British Columbia Court of Appeal, *Sparling v. Northwest Digital Ltd.* (1991), 47 C.P.C. (2d) 124 (B.C. C.A.) and *Galcor*, *supra*.

39 In *Sparling*, a company sought to restructure its financial basis and called a special meeting of shareholders. A court order permitted the voting of certain shares at the shareholders' meeting. A director sought to appeal that order. On the basis of the initial order, the meeting was held, the shares were voted and some significant changes to the company occurred as a result. Hollinrake, J.A. for the court described these as substantial changes which are irreversible. He found that the appeal was moot because there was no longer a live controversy. After considering *Borowski*, he also concluded that the court should not exercise its discretion to depart from the usual practice of declining to hear moot appeals.

40 In *Galcor*, as stated earlier, an order authorizing the distribution of certain monies to limited partners was appealed. A stay was sought but the application was dismissed. An injunction to restrain the distribution of monies was also sought and refused. The monies were distributed. The B.C. Court of Appeal held there was no merit, no substance and no prospective benefit to the appellants nor could they find any merit in the argument that there would be a collateral advantage if the appeal were heard and allowed. None of the criteria in *Borowski* were of assistance as there was no issue

of public importance and no precedent value to other cases. Gibbs, J.A. was of the opinion it would not be prudent to use judicial time to hear a moot case as the rationing of scarce judicial resources was of importance and concern to the court.

#### APPLICATION OF THE CRITERIA FOR LEAVE

41 In any event, consideration of the usual factors in granting leave to appeal does not result in the granting of leave.

42 In particular, the applicant has not established *prima facie* meritorious grounds. The issue in the proposed appeal must be whether the learned chambers judge erred in determining that the Plan was fair and reasonable. As discussed in *Resurgence No. 1*, regard must be given to the standard of review this Court would apply on appeal when considering a leave application. The applicant has been unable to point to an error on a question of law, or an overriding and palpable error in the findings of fact, or an error in the learned chambers judge's exercise of discretion.

43 Resurgence submits that serious and arguable grounds surround the following issues: (a) Should Resurgence be treated as an unaffected creditor under the Plan? and (b) Should the Plan have been sanctioned under s. 6 of the *CCAA*? The applicant cannot show that either issue is based on an appealable error.

44 On the second issue, the main argument of the applicant is that the learned chambers judge failed to appreciate that the vote in favour of the Plan was not fair. At bottom, most of the submissions Resurgence made on this issue are directed at the learned chambers judge's conclusion that shareholders and creditors of Canadian would not be better off in bankruptcy than under the Plan. To appeal this conclusion, based on the findings of fact and exercise of discretion, Resurgence must establish that it has a *prima facie* meritorious argument that the learned chambers judge's error was overriding and palpable, or created an unreasonable result. This, it has not done.

45 Resurgence also argues that the acceptance of the valuations given by the Monitor to certain assets, in particular, Canadian Regional Airlines Limited ("CRAL"), the pension surplus and the international routes was in error. The Monitor did not attribute value to these assets when it prepared the liquidation analysis. Resurgence argued that the learned chambers judge erred when she held that the Monitor was justified in making these omissions.

46 Resurgence argued that CRAL was worth as much as \$260 million to Air Canada. The Monitor valued CRAL on a distressed sale basis. It assumed that without CAIL's national and international network to feed traffic and considering the negative publicity which the failure of CAIL would cause, CRAL would immediately stop operations.

47 The learned chambers judge found that there was no evidence of a potential purchaser for CRAL. She held that CRAL had a value to CAIL and could provide value of Air Canada, but this was attributable to CRAL's ability to feed traffic to and take traffic from the national and international service of CAIL. She held that the Monitor properly considered these factors. The \$260 million dollar value was based on CRAL as a going concern which was a completely different scenario than a liquidation analysis. She accepted the liquidation analysis on the basis that if CAIL were to cease operations, CRAL would be obliged to do so as well and that would leave no going concern for Air Canada to acquire.

48 CRAL may have some value, but even assuming that, Resurgence has not shown that it has a *prima facie* meritorious argument that the learned chambers judge committed an overriding and palpable error in finding that the Monitor was justified in concluding CRAL would not have any value assuming a windup of CAIL. She found that there was no evidence of a market for CRAL as a going concern. Her preference for the liquidation analysis was a proper exercise of her discretion and cannot be said to have been unreasonable.

49 Resurgence also argued that the pension plan surplus must be given value and included in the liquidation analysis because the surplus may revert to the company depending upon the terms of the plan. There was some evidence that in the two pension plans, with assets over \$2 billion, there may be a surplus of \$40 million. The Monitor attributed no value because of concerns about contingent liabilities which made the true amount of any available surplus indefinite and also because of the uncertainty of the entitlement of Canadian to any such amount.

50 The learned chambers judge found that no basis had been established for any surplus being available to be withdrawn from an ongoing pension plan. She also found that the evidence showed the potential for significant contingencies. Upon termination of the plan, further reductions for contingent benefits payable in accordance with the plans, any wind up costs, contribution holidays and litigation costs would affect a determination of whether there was a true surplus. The evidence before the learned chambers judge included that of the unionized employees who expected to dispute all the calculations of the pension plan surplus and the entitlement to the surplus. The learned chambers judge observed also that the surplus could quickly disappear with relatively minor changes in the market value of the securities held or in the calculation of liabilities. She concluded that given all variables, the existence of any surplus was doubtful at best and held that ascribing a zero value was reasonable in the circumstances.

51 In addition to the evidence upon which the learned chambers judge based her conclusion, she is also supported by the case law which demonstrates that even if a pension surplus existed and was accessible, entitlement is a complex question: *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.).

52 Resurgence argued that the international routes of Canadian should have been treated as valuable assets. The Monitor took the position that the international routes were unassignable licences in control of the Government of Canada and not property rights to be treated as assets by the airlines. Resurgence argues that the Monitor's conclusion was wrong because there was evidence that the international routes had value. In December 1999, CAIL sold its Toronto - Tokyo route to Air Canada for \$25 million. Resurgence also pointed to statements made by Canadian's former president and CEO in mid-1999 that the value of its international routes was \$2 billion. It further noted that in the United States, where the government similarly grants licences to airlines for international routes, many are bought and sold.

53 The learned chambers judge found the evidence indicated that the \$25 million paid for the Toronto-Tokyo route was not an amount derived from a valuation but was the amount CAIL needed for its cash flow requirements at the time of the transaction in order to survive. She found that the statements that CAIL's international routes were worth \$2 billion reflected the amount CAIL needed to sustain liquidity without its international routes and was not the market value of what could realistically be obtained from an arm's length purchaser. She found there was no evidence of the existence of an arm's length purchaser. As the respondents pointed out, the Canadian market cannot be compared to the United States. Here in Canada, there is no other airline which would purchase international routes, except Air Canada. Air Canada argued that it is pure speculation to suggest it would have paid for the routes when it could have obtained the routes in any event if Canadian went into liquidation.

54 Even accepting Resurgence's argument that those assets should have been given some value, the applicant has not established a *prima facie* meritorious argument that the learned chambers judge was unreasonable to have accepted the valuations based on a liquidation analysis rather than a market value or going concern analysis nor that she lacked any evidence upon which to base her conclusions. She found that the evidence was overwhelming that all other options had been exhausted and have resulted in failure. As described above, she had evidence upon which to accept the Monitor's valuations of the disputed assets. It is not the role of this Court to review the evidence and substitute its opinion for that of the learned chambers judge. She properly exercised her discretion and she had evidence upon which to support her conclusions. The applicant, therefore, has not established that its appeal is *prima facie* meritorious.

55 On the first issue, Resurgence argues that it should be an unaffected creditor to pursue its oppression remedy. As discussed above, the oppression remedy cannot be considered outside the context of the *CCAA* proceedings. The learned chambers judge concluded that the complaints of Resurgence were the result of the insolvency of Canadian and not from any oppressive conduct. The applicant has not established any *prima facie* error committed by the learned chambers judge in reaching that conclusion.

56 Thus, were this appeal not moot, leave would not be granted as the applicant has not met the threshold for leave to appeal.

## CONCLUSION

57 The application for leave to appeal is dismissed because it is moot, and in any event, no serious and arguable grounds have been established upon which to found the basis for granting leave.

*Application dismissed.*

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2011 ONSC 4012  
Ontario Superior Court of Justice

Nortel Networks Corp., Re

2011 CarswellOnt 5740, 2011 ONSC 4012

**In the Matter of the Companies' Creditors  
Arrangement Act, R.S.C. 1985, c. C-36, as Amended**

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation,  
Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks  
International Corporation and Nortel Networks Technology Corporation, Applicants

Morawetz J.

Judgment: June 29, 2011

Docket: 09-CL-7950

Proceedings: additional reasons to *Nortel Networks Corp., Re* (2011), 2011 ONSC 3805, 2011 CarswellOnt 5175 (Ont. S.C.J.)

Counsel: Alan Mark, Derrick Tay, Alan Merskey, Jennifer Stam, for Nortel Networks Corporation et al.

F. Myers, J. Pasquariello, C. Armstrong, for Monitor, Ernst & Young Inc.

Mark Zigler, Andrea McKinnon, for Former & Disabled Employees

G. Finlayson, R. Orzy, R. Swan, for Noteholder Group

Lily Harmer, Max Starnino, for Superintendent

S. Seigel, for Bank of New York Mellon

Alex MacFarlane, Abid Quereshi, for Official Committee of Unsecured Creditors

R. Paul Steep, Elder C. Marques, for Morneau Shepell

Barry Wadsworth, for CAW-Canada

M.P. Gotlieb, R. Schwill, S. Campbell, for Joint Administrators

Bill Burden, for U.K. Penson Trustee

Lyndon Barnes, for Board of Directors of Nortel

Andrew Gray, Scott Bomhof, for U.S. Debtors

Arthur O. Jacques, for Nortel NCCE

Subject: Insolvency; Corporate and Commercial; International

ADDITIONAL REASONS to judgment reported at *Nortel Networks Corp., Re* (2011), 2011 ONSC 3805, 2011 CarswellOnt 5175 (Ont. S.C.J.), respecting terms of mediation.

***Morawetz J.:***

1 This Endorsement relates to my Endorsement of June 17, 2011. The following directions take precedence over the directions provided on June 17, 2011.

2 On June 7, 2011, Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation (collectively, the "Canadian Debtors") brought a motion requesting approval of a proposed protocol for the allocation of the proceeds of the sale of their assets, the assets of the U.S. Debtors (defined below) and those of Nortel Networks U.K.

Limited (NNUK") and certain of its affiliates located in Europe, the Middle East and Africa (collectively, the "EMEA Debtors") (the "Allocation Protocol").

3 A similar motion was also brought at that time by Nortel Networks Inc. ("NNI") and certain of its U.S. affiliates (the "U.S. Debtors") in the Chapter 11 Proceedings before the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") (the "Chapter 11 Proceedings").

4 The hearing was conducted by video conference with the companion motion being heard in the U.S. Court before His Honor Judge Gross. The joint hearing was conducted in accordance with the provisions of the Cross-Border Protocol which was previously approved by both the U.S. Court and by this Court.

5 Both motions had the support of all parties appearing, save for the joint administrators of NNUK.

6 Allocation issues have arisen out of the Interim Funding and Settlement Agreement ("IFSA"), which was entered into in June 2009, between the Canadian Debtors, certain of the U.S. Debtors and certain of the EMEA Debtors. The IFSA provides amongst other things, for the parties cooperation in the global sales of Nortel's business units as well as for the parties to attempt to negotiate the terms of an Interim Sales Protocol ("Protocol").

7 To date, the parties have been unable to resolve these allocation issues on a consensual basis. This has resulted in a most unfortunate situation.

8 Nortel's insolvency is somewhat unique. The sale of its business units has created a sizeable asset pool. With the exception of the IP Transaction, the auction for which commenced on June 27, 2011, the Canadian Debtors, the U.S. Debtors, the EMEA Debtors and their affiliates have now divested substantially all of Nortel's material worldwide assets. The proceeds of these divestitures — some \$3 billion currently with a minimum of a further \$900 million expected to be added upon consummation of the patent portfolio and related asset transactions — now sit in escrow awaiting the resolution of allocation.

9 This allocation issue, together with the resolution of the EMEA claims and the U.K. pension claims, lies at the heart not only of these CCAA proceedings, but also the Chapter 11 Proceedings and proceedings in the United Kingdom. As the Monitor noted in its 67<sup>th</sup> Report: "Simply put, they are matters that must be resolved before any creditor of an applicant (and likely any other Nortel debtor) can expect to receive a meaningful distribution on account of amounts that have now been outstanding in most cases since January 2009.

10 The Canadian Debtors have no significant secured creditors. The Canadian Debtors do, however, have significant unsecured creditors, most of whom are individuals who are employed or were formerly employed by Nortel. Many of these former employees are pensioners and this group have unsecured claims for both pension and medical benefits.

11 There are also significant employee and former employee claims against the U.S. Debtors and the EMEA Debtors.

12 For many of these individuals, the delay in receiving a meaningful distribution can be significant. It is not just a question of calculating the time value of money. For this group of creditors, time is not on their side.

13 This issue is international in scope. It is also a public-interest issue. A protracted delay in resolving the impasse surrounding allocation is highly prejudicial to this group.

14 In making these comments, I do not mean to suggest that the claims of other creditor groups are not of equal significance. The reality is, however, that the timing of a receipt of a distribution may be less critical for a financial player as opposed to an individual.

15 The difficulty in resolving the allocation issue that is before both the U.S. Court and this Court is, of course, complicated by the fact that it is a multi-jurisdictional issue. There is no simple solution to the legal predicament that faces all parties.

16 Decisions in respect of both motions are currently under reserve. The nature and length of the arguments presented at the motion will necessitate careful drafting and separate rulings by the U.S. Court and this Court. Both Courts are concerned that this delay will also delay allocation proceedings and therefore distributions to creditors. Moreover, the risk of inconsistent decisions and the uncertainty of the appellate process (with further risk of inconsistent decisions) may further delay the progress of the cases.

17 A protracted delay in the progress of the cases will only exacerbate an already unfortunate situation for the many individual creditors. With extended delay comes uncertainty. For many, uncertainty brings considerable stress and a bad situation becomes even worse. Clearly, the consequences of extended litigation are not desirable.

18 Both Courts concluded that the parties could benefit from the appointment of a mediator so that they can continue to make progress towards the ultimate resolution of Nortel matters. Consequently, both the U.S. Court and this Court directed that the parties, who participated in the hearing on June 7, 2011, engage in mediation pending the release of decisions in both motions. The mediator will have the authority to include such other parties as he deems appropriate, in his discretion.

19 The mediator has the authority, in consultation with the parties, to determine the scope of the mediation, as he deems appropriate, including, without limitation, the allocation issue in its entirety and global issues relating to allocation and claims.

20 The mediator is authorized to select advisors of his choosing. The reasonable fees and expenses of the advisors shall be reimbursed by the Canadian Debtors, the U.S. Debtors and the EMEA Debtors.

21 The particulars of the mediation are as follows:

Mediator:	The Honourable Warren K. Winkler Chief Justice of Ontario Court of Appeal for Ontario Osgoode Hall 130 Queen Street West Toronto, ON M5H 2N5
Timing:	To be arranged by the mediator

22 Participation in this mediation is mandatory. Any agreements reached as a result of mediation will be binding on the parties.

23 A settlement of the dispute being mediated shall also be subject to the approval of the U.S. Court and this Court, on notice to parties in interest.

24 The parties shall recognize that mediation proceedings are settlement negotiations, and that all offers, promises, conduct and statements, whether written or oral, made in the course of the proceedings, are inadmissible in any arbitration or court proceeding, to the extent allowed by law. The parties shall not subpoena or otherwise require the mediator or any advisor to the mediator, to testify or produce records, notes or work product in any future proceedings, and no recording will be made of the mediation session. Evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation session. In the event that the parties do reach a settlement agreement, the terms of that settlement will be admissible in any court or arbitration proceedings required to enforce it, unless the parties agree otherwise. Information disclosed to the mediator at a private caucus shall remain confidential unless the party authorizes disclosure.

25 The mediator has the right, prior to the commencement of the mediation only, to communicate with Judge Gross and me, for the purposes of obtaining background information.

26 The mediation process shall be terminated under any of the following circumstances:

(a) by a declaration by the mediator that a settlement has been reached;

(b) a declaration by the mediator that further efforts at mediation are no longer considered to be worthwhile; or

(c) for any other reason as determined by the mediator.

27 The Monitor is directed to circulate a copy of this endorsement to all parties who attended on the return of the motion on June 7, 2011.

*Order accordingly.*

IN THE MATTER OF THE *COMPANIES' CREDITORS*  
*ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED  
AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF NORTEL NETWORKS CORPORATION *et al.*

Court of Appeal File No. M47511  
Court File No. 09-CL-7950

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**COURT OF APPEAL FOR ONTARIO**

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**RESPONDING BOOK OF AUTHORITIES OF  
THE MONITOR AND CANADIAN DEBTORS  
(Response to Motion for Leave to Appeal)**

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