

ENVIRONMENT AND LAND TRIBUNALS ONTARIO
LOCAL PLANNING APPEAL TRIBUNAL

PROCEEDING COMMENCED UNDER subsection 34(19) of the *Planning Act*, RSO
1990, c P. 13

BETWEEN:

HADI SALMASIAN

(Appellant)

and

170 PRESTON LTD.

(Applicant)

BOOK OF AUTHORITIES OF THE CITY OF OTTAWA

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TAB 1

Powers of committee

45 (1) The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained. R.S.O. 1990, c. P.13, s. 45 (1); 2006, c. 23, s. 18 (1); 2009, c. 33, Sched. 21, s. 10 (11).

Criteria

(1.0.1) The committee of adjustment shall authorize a minor variance under subsection (1) only if, in addition to satisfying the requirements of that subsection, the minor variance conforms with,

(a) the prescribed criteria, if any; and

(b) the criteria established by the local municipality by by-law, if any. 2015, c. 26, s. 29 (1).

Same

(1.0.2) For the purposes of subsection (1.0.1), criteria that were not in force on the day the owner made the application do not apply. 2015, c. 26, s. 29 (1).

Criteria by-law

(1.0.3) The council of a local municipality may, by by-law, establish criteria for the purposes of clause (1.0.1) (b) and the following provisions, as they read on the day before section 14 of Schedule 3 to the *Building Better Communities and Conserving Watersheds Act, 2017* comes into force, apply, with necessary modifications, in respect of the by-law:

1. Clause 34 (12) (a).

2. Subsections 34 (13), (14.1) to (15), (17) to (19.0.1), (20) to (20.4), (22) to (25.1) and (25.2) to (26). 2015, c. 26, s. 29 (1); 2017, c. 23, Sched. 3, s. 14.

Coming into force

(1.0.4) A by-law under subsection (1.0.3) comes into force,

- (a) if no notice of appeal is filed in respect of the by-law and the time for filing appeals has expired, on the day after the last day of the time for filing appeals;
- (b) if all appeals in respect of the by-law are withdrawn and the time for filing appeals has expired, on the day after the last day on which an appeal was withdrawn;
- (c) if the Tribunal dismisses all appeals and the time for filing appeals has expired, on the day after the last day on which an appeal was dismissed;
- (d) if the Tribunal allows an appeal in respect of the by-law and amends the by-law, on the day after the last day on which the Tribunal makes a decision disposing of the appeal; or
- (e) if the Tribunal allows an appeal in respect of the by-law and directs the municipality to amend the by-law, on the day after the day the municipality passes the amending by-law. 2015, c. 26, s. 29 (1); 2017, c. 23, Sched. 5, ss. 80, 98 (1).

Restriction

(1.1) Subsection (1) does not allow the committee to authorize a minor variance from conditions imposed under subsection 34 (16) of this Act or under subsection 113 (2) of the *City of Toronto Act, 2006*. 2006, c. 23, s. 18 (2).

Same

(1.1.1) Subsection (1) does not allow the committee to authorize a minor variance from those provisions of a by-law that give effect to policies described in subsection 16 (4). 2016, c. 25, Sched. 4, s. 6.

When subs. (1.3) applies

(1.2) Subsection (1.3) applies when a by-law is amended in response to an application by the owner of any land, building or structure affected by the by-law, or in response to an application by a person authorized in writing by the owner. 2015, c. 26, s. 29 (2).

Two-year period, no application for minor variance

(1.3) Subject to subsection (1.4), no person shall apply for a minor variance from the provisions of the by-law in respect of the land, building or structure before the second anniversary of the day on which the by-law was amended. 2015, c. 26, s. 29 (2).

Exception

(1.4) Subsection (1.3) does not apply in respect of an application if the council has declared by resolution that such an application is permitted, which resolution may be made in respect of a specific application, a class of applications or in respect of such applications generally. 2015, c. 26, s. 29 (2).

Other powers

(2) In addition to its powers under subsection (1), the committee, upon any such application,

(a) where any land, building or structure, on the day the by-law was passed, was lawfully used for a purpose prohibited by the by-law, may permit,

(i) the enlargement or extension of the building or structure, if the use that was made of the building or structure on the day the by-law was passed, or a use permitted under subclause (ii) continued until the date of the application to the committee, but no permission may be given to enlarge or extend the building or structure beyond the limits of the land owned and used in connection therewith on the day the by-law was passed, or

(ii) the use of such land, building or structure for a purpose that, in the opinion of the committee, is similar to the purpose for which it was used on the day the by-law was passed or is more compatible with the uses permitted by the by-law than the purpose for which it was used on the day the by-law was passed, if the use for a purpose prohibited by the by-law or another use for a purpose previously permitted by the committee continued until the date of the application to the committee; or

(b) where the uses of land, buildings or structures permitted in the by-law are defined in general terms, may permit the use of any land, building or structure for any purpose that, in the opinion of the committee, conforms with the uses permitted in the by-law. R.S.O. 1990, c. P.13, s. 45 (2).

Power of committee to grant minor variances

(3) A council that has constituted a committee of adjustment may by by-law empower the committee of adjustment to grant minor variances from the provisions of any by-law of the municipality that implements an official plan, or from such by-laws of the municipality as are specified and that implement an official plan, and when a committee of adjustment is so empowered subsection (1) applies with necessary modifications. R.S.O. 1990, c. P.13, s. 45 (3).

Time for hearing

(4) The hearing on any application shall be held within thirty days after the application is received by the secretary-treasurer. R.S.O. 1990, c. P.13, s. 45 (4).

Notice of hearing

(5) The committee, before hearing an application, shall in the manner and to the persons and public bodies and containing the information prescribed, give notice of the application. R.S.O. 1990, c. P.13, s. 45 (5); 1994, c. 23, s. 26 (1).

Hearing

(6) The hearing of every application shall be held in public, and the committee shall hear the applicant and every other person who desires to be heard in favour of or against the

application, and the committee may adjourn the hearing or reserve its decision. R.S.O. 1990, c. P.13, s. 45 (6).

Oaths

(7) The chair, or in his or her absence the acting chair, may administer oaths. R.S.O. 1990, c. P.13, s. 45 (7).

Decision

(8) No decision of the committee on an application is valid unless it is concurred in by the majority of the members of the committee that heard the application. 2015, c. 26, s. 29 (3).

Same

(8.1) The decision of the committee, whether granting or refusing an application, shall be in writing, shall be signed by the members who concur in the decision and shall,

(a) set out the reasons for the decision; and

(b) contain a brief explanation of the effect, if any, that the written and oral submissions mentioned in subsection (8.2) had on the decision. 2015, c. 26, s. 29 (3).

Written and oral submissions

(8.2) Clause (8.1) (b) applies to,

(a) any written submissions relating to the application that were made to the committee before its decision; and

(b) any oral submissions relating to the application that were made at a hearing. 2015, c. 26, s. 29 (3).

Conditions in decision

(9) Any authority or permission granted by the committee under subsections (1), (2) and (3) may be for such time and subject to such terms and conditions as the committee considers advisable and as are set out in the decision. R.S.O. 1990, c. P.13, s. 45 (9).

Agreement re terms and conditions

(9.1) If the committee imposes terms and conditions under subsection (9), it may also require the owner of the land to enter into one or more agreements with the municipality dealing with some or all of the terms and conditions, and in that case the requirement shall be set out in the decision. 2006, c. 23, s. 18 (3).

Registration of agreement

(9.2) An agreement entered into under subsection (9.1) may be registered against the land to which it applies and the municipality is entitled to enforce the agreement against

the owner and, subject to the *Registry Act* and the *Land Titles Act*, against any and all subsequent owners of the land. 2006, c. 23, s. 18 (3).

Notice of decision

(10) The secretary-treasurer shall not later than ten days from the making of the decision send one copy of the decision, certified by him or her,

(a) to the Minister, if the Minister has notified the committee by registered mail that he or she wishes to receive a copy of all decisions of the committee;

(b) to the applicant; and

(c) to each person who appeared in person or by counsel at the hearing and who filed with the secretary-treasurer a written request for notice of the decision,

together with a notice of the last day for appealing to the Tribunal. R.S.O. 1990, c. P.13, s. 45 (10); 2017, c. 23, Sched. 5, s. 98 (2).

Additional material

(11) Where the secretary-treasurer is required to send a copy of the decision to the Minister under subsection (10), he or she shall also send to the Minister such other information and material as may be prescribed. R.S.O. 1990, c. P.13, s. 45 (11).

Appeal to L.P.A.T.

(12) The applicant, the Minister or any other person or public body who has an interest in the matter may within 20 days of the making of the decision appeal to the Tribunal against the decision of the committee by filing with the secretary-treasurer of the committee a notice of appeal setting out the objection to the decision and the reasons in support of the objection accompanied by payment to the secretary-treasurer of the fee charged by the Tribunal under the *Local Planning Appeal Tribunal Act, 2017* as payable on an appeal from a committee of adjustment to the Tribunal. 2017, c. 23, Sched. 5, s. 98 (3).

Record

(13) On receiving a notice of appeal filed under subsection (12), the secretary-treasurer of the committee shall promptly forward to the Tribunal, by registered mail,

(a) the notice of appeal;

(b) the amount of the fee mentioned in subsection (12);

(c) all documents filed with the committee relating to the matter appealed from;

(d) such other documents as may be required by the Tribunal; and

(e) any other prescribed information and material. 2017, c. 23, Sched. 5, s. 98 (3).

Exception

(13.1) Despite subsection (13), if all appeals under subsection (12) are withdrawn within 15 days after the last day for filing a notice of appeal, the secretary-treasurer is not required to forward the materials described under subsection (13) to the Tribunal. 1999, c. 12, Sched. M, s. 26; 2017, c. 23, Sched. 5, s. 98 (4).

Decision final

(13.2) If all appeals under subsection (12) are withdrawn within 15 days after the last day for filing a notice of appeal, the decision of the committee is final and binding and the secretary-treasurer of the committee shall notify the applicant and file a certified copy of the decision with the clerk of the municipality. 1999, c. 12, Sched. M, s. 26.

Where no appeal

(14) If within such 20 days no notice of appeal is given, the decision of the committee is final and binding, and the secretary-treasurer shall notify the applicant and shall file a certified copy of the decision with the clerk of the municipality. R.S.O. 1990, c. P.13, s. 45 (14); 1994, c. 23, s. 26 (3).

Where appeals withdrawn

(15) Where all appeals to the Tribunal are withdrawn, the decision of the committee is final and binding and the Tribunal shall notify the secretary-treasurer of the committee who in turn shall notify the applicant and file a certified copy of the decision with the clerk of the municipality. 2017, c. 23, Sched. 5, s. 98 (5).

Hearing

(16) On an appeal to the Tribunal, the Tribunal shall, except as provided in subsections (15) and (17), hold a hearing of which notice shall be given to the applicant, the appellant, the secretary-treasurer of the committee and to such other persons or public bodies and in such manner as the Tribunal may determine. 2017, c. 23, Sched. 5, s. 98 (5).

Dismissal without hearing

(17) Despite the *Statutory Powers Procedure Act* and subsection (16), the Tribunal may dismiss all or part of an appeal without holding a hearing, on its own initiative or on the motion of any party, if,

(a) it is of the opinion that,

(i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the Tribunal could allow all or part of the appeal,

(ii) the appeal is not made in good faith or is frivolous or vexatious,

(iii) the appeal is made only for the purpose of delay, or

(iv) the appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of process;

(b) the appellant has not provided written reasons for the appeal;

(c) the appellant has not paid the fee charged under the *Local Planning Appeal Tribunal Act, 2017*; or

(d) the appellant has not responded to a request by the Tribunal for further information within the time specified by the Tribunal. 2017, c. 23, Sched. 5, s. 98 (5).

Representation

(17.1) Before dismissing all or part of an appeal, the Tribunal shall notify the appellant and give the appellant the opportunity to make representation on the proposed dismissal but this subsection does not apply if the appellant has not complied with a request made under clause (17) (d). 2000, c. 26, Sched. K, s. 5 (3); 2017, c. 23, Sched. 5, s. 80.

Dismissal

(17.2) The Tribunal may dismiss all or part of an appeal after holding a hearing or without holding a hearing on the motion under subsection (17), as it considers appropriate. 2017, c. 23, Sched. 5, s. 98 (5).

Powers of L.P.A.T.

(18) The Tribunal may dismiss the appeal and may make any decision that the committee could have made on the original application. R.S.O. 1990, c. P.13, s. 45 (18); 2017, c. 23, Sched. 5, s. 80.

Amended application

(18.1) On an appeal, the Tribunal may make a decision on an application which has been amended from the original application if, before issuing its order, written notice is given to the persons and public bodies who received notice of the original application under subsection (5) and to other persons and agencies prescribed under that subsection. 1993, c. 26, s. 56; 1994, c. 23, s. 26 (7); 2017, c. 23, Sched. 5, s. 80.

Exception

(18.1.1) The Tribunal is not required to give notice under subsection (18.1) if, in its opinion, the amendment to the original application is minor. 2017, c. 23, Sched. 5, s. 98 (5).

Notice of intent

(18.2) Any person or public body who receives notice under subsection (18.1) may, not later than thirty days after the day that written notice was given, notify the Tribunal of an

intention to appear at the hearing or the resumption of the hearing, as the case may be. 1993, c. 26, s. 56; 1994, c. 23, s. 26 (8); 2017, c. 23, Sched. 5, s. 98 (6).

Order

(18.3) If, after the expiry of the time period in subsection (18.2), no notice of intent has been received, the Tribunal may issue its order. 1993, c. 26, s. 56; 2017, c. 23, Sched. 5, s. 98 (6).

Hearing

(18.4) If a notice of intent is received, the Tribunal may hold a hearing or resume the hearing on the amended application or it may issue its order without holding a hearing or resuming the hearing. 1996, c. 4, s. 25 (2); 2017, c. 23, Sched. 5, s. 98 (6).

Notice of decision

(19) When the Tribunal makes an order on an appeal, the Tribunal shall send a copy thereof to the applicant, the appellant and the secretary-treasurer of the committee. 2017, c. 23, Sched. 5, s. 98 (7).

Idem

(20) The secretary-treasurer shall file a copy of the order of the Tribunal with the clerk of the municipality. R.S.O. 1990, c. P.13, s. 45 (20); 2017, c. 23, Sched. 5, s. 98 (8).

TAB 2

1990 CarswellOnt 3627
Ontario Municipal Board

Unger v. Onondaga (Township) Committee of Adjustment

1990 CarswellOnt 3627

In the Matter of Section 52(8) of the Planning Act, 1983

In the Matter of an appeal by Josef Unger and Gerda Unger from the conditions imposed on a decision of the Committee of Adjustment of the Township of Onondaga whereby the Committee granted an application numbered B-8-88

In the Matter of Section 34(11) of the Planning Act, 1983

In the Matter of an appeal to this Board by Josef and Gerda Unger for an order amending Zoning By-law 705, as amended, of the Corporation of The Township of Onondaga to rezone the lands described as Part Lot 24, Concession 2, E.F.C. from Hazard Land to Agricultural II(A2) to permit the development of a single family dwelling

Howden Member

Judgment: November 23, 1990

Docket: C 880390, Z 890215

Counsel: P. Corliss, and B. Finnigan, for Township of Onondaga.
L. Humenik, for J., and G. Unger.

Subject: Public; Municipal

Related Abridgment Classifications

Municipal law

[XIV](#) Subdivision control

[XIV.1](#) Severance of land

[XIV.1.a](#) Consent to sever

[XIV.1.a.iv](#) Conditions

[XIV.1.a.iv.C](#) Miscellaneous

Headnote

Municipal law --- Subdivision control — Severance of land — Consent to sever — Conditions — General

Table of Authorities

Statutes considered:

Planning Act, 1983, S.O. 1983, c. 1

Generally — referred to

s. 34(11) — referred to

s. 50(4)(c) — considered

s. 50(4)(d) — considered

s. 50(4)(g) — referred to

s. 50(4)(h) — considered

Decision of the Board:

1 This matter came to the Board originally as an appeal by the property owners, Josef and Gerda Unger, from one of the conditions imposed by the Committee of Adjustment of the Township of Onondaga. Their successful application for consent allowed the creation of a 1.3 hectare lot containing an existing dwelling at the north west corner of Big Creek Road (the Township Road which is assumed to be on an east-west axis) and County Road 22. According to a sketch (Exhibit 4) filed by Mr. Unger, this will leave a substantial retained lot with frontages on Big Creek Road of 118 metres west of the severed lot and on County Road 22 of 82 metres; and an area (taken from the Ungers' application) of approximately 29 hectares (72 acres). The appellants plan to sell or convey the new lot and build a new dwelling for their own use on the retained lot. The condition of concern to the appellants is one requiring the access point for any driveway serving the new house on the retained lot to be on Big Creek Road rather than County Road 22.

2 The reasons for appeal given by the appellants in their notice are:

(i) the length of the driveway from the proposed site for the new house to the Township road would be over seven hundred feet, whereas the distance to the County road would be one hundred and fifty feet;

(ii) construction of the driveway would necessitate removal of several hundred young trees with resulting damage to the natural environment;

(iii) the longer driveway would be more difficult to maintain than the driveway to the County road; and

(iv) few trees would require removal if access is permitted to the County Road.

3 The hearing of this appeal commenced on April 7, 1989. The appellants were represented by Mr. Humenik at that time, and counsel for the Township was Mr. Finnigan. As the evidence developed, it became clear to all that the proposed house site which was the source of much of the length of access problem, was included by an amendment (By-law 16-83, approved October 14, 1986) to the comprehensive zoning by-law within the westerly edge of a Hazard Lands (HL) zone extending across County Road 22 into the Ungers' land. It was clear that the Ungers' choice of site for the new home, could not be considered without either a zoning amendment by Township council or an appeal to the Board under Section 34(11) if council refused the amendment. The consent condition appeal was rendered academic in these circumstances.

4 The rezoning of this land was also a condition of the Committee's decision. This is a somewhat remarkable disposition in view of the combination of the regard to be given to restrictions required by Section 50(4)(g) of the *Planning Act*, 1983 when a consent is considered and the Committee's express acceptance of the H L land as a building site and its requirement for access only to the Township road. However, neither the matter of the consent itself nor the lack of condition regarding an alternative building site and driveway route are before the Board.

5 Following submissions by counsel, the Board made the following disposition of April 7, 1989:

After the hearing of evidence from the appellant and the Township, counsel for the appellants requested an adjournment to apply for a zoning amendment to the portion of the property proposed as the site of a future home. As the zoning is important to the condition under appeal, and the Township did not oppose this request, the hearing was adjourned sine die. Further notice to the above parties only is required. The continuation of this hearing may be heard together with an appeal under Section 34(11) of the Planning Act. Mr. Humenik is to advise when he is ready to proceed.

6 Subsequently, the Township refused the rezoning application. It should be recorded that the refusal was not based on the merits but for failure of the appellants to file a particular type of site plan requested by council. The appellants brought an appeal under Section 34(11), and that appeal together with the continuation of the appeal of the consent condition were scheduled together for June 18, 1990. The hearing failed to proceed on that date due to the failure to give

the notice required by the Board for the zoning appeal. The hearing of both matters was finally completed on October 11, 1990. Mr. Unger and his son represented the appellants, and Mr. Corliss acted for the Township. The Township does not oppose the rezoning but it, the Ministry of Natural Resources and the County engineer oppose any revision to the consent condition to allow access to the County Road.

7 The Board has considered all of the evidence presented both in April 1989 and October 1990. There are four factors which affect this appeal:

(i) the policies of the Township Official Plan which discourage access to designated collector roads, one being County Road 22;

(ii) the policy of the County to discourage new entrances to County Road 22 and the concerns of its engineer, George Spencer, regarding traffic safety, given the degree of slope of the County Road down to the proposed access point and the increasing use of this road by heavy trucks from Nanticoke;

(iii) the presence of a significant creek running along the entire frontage of the retained lot beside or partly within the County road allowance, any fill, culvert or other construction through which requires the approval of the Grand River Conservation Authority; and

(iv) the presence on the portion where the driveway and home are proposed by the appellants of a high quality stand of hardwoods, and on the rest of the retained lot of a pine plantation whose condition now and into the future was the subject of some dispute between a witness from the Ministry of Natural Resources and Mr. Unger.

8 As to the policies of the County and the Township Official Plan discouraging new private accesses to collector roads like County Road 22, Mr. Unger raised one or two cases where he believed the County had allowed new lots to occur with accesses to County Road 22. The consistency of authorities in executing their policies is a perfectly legitimate issue when the plans of individuals are confronted by government policy on whatever level. The reason is that one can have a policy but if its purpose is being undermined or put into disrepute through lack of support or preferential treatment by the agency with the relevant mandate, the weight to be given such policy by the Board could well be affected. The Board therefore directed counsel for the Township and Mr. Spencer to review recent consent applications along County Road 22 to determine the circumstance of each in relation to access and the position taken by the County.

9 When the hearing resumed, Mr. Spencer gave the results of his review. It was made easier because of the short length of County Road 22 (3 miles) and the apparent low level of residential development pressures along it. Mr. Spencer' review covered the last 10 years, with the following results:

(i) a consent was applied for at the north end of County Road 22 where it meets Regional Road 222 (a Hamilton-Wentworth Road), and the County required access to be via the existing drive off County Road 22 — the consent was granted subject to that condition;

(ii) in 1988, a consent was applied for where access was possible from either a Township or the County road, and the County requested access to be from the Township road — that application was denied in any event;

(iii) in 1987, the County responded to a consent application one-half mile north of the subject land, again objecting to any new access point on County Road 22 in circumstances where an existing access could be utilized; and

(iv) a plan of subdivision was permitted to proceed on land close to the south end of County Road 22, near Provincial Highway 54, in which case six lots were approved none of which has a new separate access - each pair of lots has a mutual access, and two of the three access points were already in existence.

10 In summary, according to the evidence before the Board, over the last 10 years, there has been no new residential lot created on County Road 22 where the County failed to oppose a new access to the collector road, and in fact no such new accesses have been permitted for individual residential lots. The closest to this is one new mutual access point

for two subdivision lots. Mr. Spencer's evidence in that regard was that that access was in a portion of County Road 22 within 500 feet of Highway 54 where vehicles were proceeding at slower speeds due to the proximity of the major intersection and unlike the approach to the proposed access here, the road is flat.

11 In regard to the constraint caused by the creek, Mr. and Mrs. Unger's application to the Conservation Authority for permission to construct a driveway and culvert and place fill within the creek limits was turned down on October 1, 1990 (Exhibit 17). Their earlier permission expired in April 1990. In this instance, the Authority's Executive Committee cited its policies aimed at:

- (i) minimizing unnecessary development of flood plains requiring significant future protective measures;
- (ii) protecting neighbouring landowners from dangers and nuisances caused by increased flood heights and cumulative inroads on channel capacity; and
- (iii) controlling further sedimentation of watercourses.

Mr. Unger stated that he would apply for a bridge over the creek if the access condition were altered by the Board as he requests.

12 As for the forestry issue, the Ministry of Natural Resources prefers a driveway through the pine plantation to the Township road because, in the opinion of its forester, John Irwin, that alternative, though much longer, will mean less environmental damage because of the gaps between the pine trees, their lesser quality, and the less suitable soil conditions and the alkaline PH levels in the pine plantation. He viewed the hardwood stand as being of good quality and less desirable for interference via a driveway to the County Road. Mr. Unger advised the Board that he has spent a lifetime interested in and caring for trees. He cooperated with the Ministry by entering an agreement under the Woodlands Improvement Act whereby, with public assistance, the Ungers' pine plantation west of the new lot was planted in 1972 and he has pruned the trees ever since. That agreement recently expired. In Mr. Unger's view, the tree cankers and reduced growth of some of the pine trees result from the less moist and temporary conditions of the last two years and that some of the pines are doing better now, since Mr. Irwin inspected the plantation.

13 Mr. Unger summed up his reasons for requesting access to County Road 22 by saying that the proposed site is the best location for a home, being at a high point of land north of the severed lot where few hardwoods would require removal and much closer to County Road 22 than to the Township road; the canker problem in the pine plantation has eased and the longer drive from the Township road would mean loss of some of these trees; and a driveway built off the Township road would be next to the new severed lot and would reduce its value.

14 The Board has no hesitation in finding that the portion of the retained lot north of the severed lot, excluding the creek, should be rezoned from HL to A2 to permit a new single family house. No agency or anyone else opposed this proposal at the hearing or in their comments, including the Township. The Ministry of Natural Resources considered this matter but its interest was limited to the access issue and the preference for any driveway to be to the Township road due to the lesser significance of the pine forest. The Ministry expressly did not oppose the rezoning sought to Agriculture 2.

15 In considering consents and the conditions upon which they are granted, the Board is required by the *Planning Act* to have regard to certain matters. The relevant matters here are the following portions of Section 50(4):

- (c) conformity to the Official Plan;
- (d) roads and accesses linking the new-development to the existing road system; and
- (h) conservation of natural resources and flood control.

16 The rezoning disposition now means that the Ungers' request to change the access condition imposed by the Committee can now be decided on its merits rather than a jurisdictional point. After considering and weighing all of the

evidence, the Board finds that the public interest in restricting interference with the collector function of County Road 22 and reducing safety hazards particularly in winter conditions as well as the strong doubts over the feasibility of a private driveway crossing the creek outweigh and negate the desires of the Ungers to have a private access for themselves to County Road 22 simply because they wish to build to the north rather than to the west of the new severed lot. The Board has given weight to their wishes in dealing with the zoning but other matters prevent its doing so in regard to access.

17 The Board accepts Mr. Spencer's evidence and finds that to do otherwise would be to go against the intent of the Official Plan, strongly expressed in Section 6.3c and in the Rural consent policies in Section 8.5c, as well as the trend of implementation of these policies on County Road 22 to prevent increased interference with the road function wherever possible. In addition, the Board notes that the Ungers' new idea of building a bridge over the creek still requires Conservation Authority approval and would require some authority from the County to use its road allowance on the east side of the creek. Lastly, the Board accepts Mr. Irwin's point, which was not challenged, that the pine plantation is noticeably inferior to the hardwood stand, in that there are visible gaps and examples of stunted growth in the former, as opposed to the latter, where a driveway could be located without serious environmental change. The appellants have the option, more expensive though it may be and the assumption of which expense remains their choice due to their desire for a particular building site, to extend or link the existing driveway through to the new home and use it as a partial mutual or joint driveway, or to access to the township road via a driveway which does not have to be located immediately beside the severed lot and which could be screened by existing and newly planted trees.

18 Accordingly, the Board will allow the appeal under Section 34(11), but will not order the amendment in the form proposed. The draft by-law contains conditions relating to Conservation Authority approval and an indemnity to the Township for damages due to activities on the subject land. Apparently, the insertion of conditions in zoning by-laws has been something of a custom in this Township. The *Planning Act* authorizes municipalities to regulate the use of land but not to enact conditional zoning regulation whose efficacy is contingent on matters which should properly be satisfied before the suitability and appropriateness of the zone change are demonstrated. There is nothing wrong with making the decision to rezone contingent on fulfilling certain conditions precedent, and when they are fulfilled, the by-law containing the new zoning regulation can be passed. However, such conditions contained in the body of a zoning by-law itself will probably result in a meaningless hodge-podge of such matters over time and a reduced ability to enforce the by-law if and when it is tested. The Board requests that counsel for the Township file the text of a draft amendment amending the zoning from HL to A2 of the appellants' land north of the severed lot and including a revised zone schedule which will exclude from A2 and retain in HL the creek bed and any land east of the westerly top of bank over to County Road 22. In other words, the creek and its banks should continue within the HL category.

19 As to the condition under appeal, the Board will not accept the appellants' request; instead, the condition will be settled in the following terms proposed by counsel for the Township, so that it can be fulfilled without the need to locate the access physically on the ground before registration of the deed to the severed lot:

The appellants and the Township shall enter an agreement providing for the means of access to the residence to be constructed on the retained parcel to be from the Township road.

20 The Board's order will not issue until the draft amendment in accordance with the above directions is received.

TAB 3

Part III
GENERAL JURISDICTION AND POWERS

Exclusive jurisdiction

11 (1) The Tribunal has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act.

Power to determine law and fact

(2) The Tribunal has authority to hear and determine all questions of law or of fact with respect to all matters within its jurisdiction, unless limited by this Act or any other general or special Act.

TAB 4

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Canada \(Ministre de la Citoyenneté & de l'Immigration\) c. Garcia](#) | 2002 CarswellNat 4309 | (Imm.&ref. Bd.(app. Div.), Nov 27, 2002)

1991 CarswellOnt 976
Supreme Court of Canada

Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)

1991 CarswellOnt 3004, 1991 CarswellOnt 976, [1991] 2 S.C.R. 5, [1991] O.L.R.B. Rep. 790, [1991] S.C.J. No. 42, 122 N.R. 361, 27 A.C.W.S. (3d) 35, 3 O.R. (3d) 128 (note), 3 O.R. (3d) 128, 47 O.A.C. 271, 4 C.R.R. (2d) 1, 50 Admin. L.R. 44, 81 D.L.R. (4th) 121, 91 C.L.L.C. 14,024, J.E. 91-935, EYB 1991-67701

CUDDY CHICKS LIMITED v. ONTARIO LABOUR RELATIONS BOARD and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175; ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL FOR ONTARIO, ATTORNEY GENERAL FOR SASKATCHEWAN, CANADA EMPLOYMENT AND IMMIGRATION COMMISSION and MARCELLE TÉTREAULT-GADOURY (intervenors)

Lamer C.J.C., Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

Heard: November 7, 1990

Judgment: June 6, 1991

Docket: Doc./N[o] 21675

Counsel: *George W. Adams, Q.C.*, *Patrick E. Hurley* and *Ralph N. Nero*, for appellant.

Stephen T. Goudge, Q.C., and *Christopher M. Dassios*, for respondent Ontario Labour Relations Board.

Douglas J. Wray, for respondent United Food and Commercial Workers International Union, Local 175.

Gaspard Côté, Q.C., and *Carole Bureau*, for intervenors Attorney General of Canada and Canada Employment and Immigration Commission.

Robert E. Charney, for intervenor Attorney General for Ontario.

Robert G. Richards and *Ross W. MacNab*, for intervenor Attorney General for Saskatchewan.

Jean-Guy Ouellet and *Gilbert Nadon*, for intervenor Marcelle Tétreault-Gadoury.

Subject: Public; Labour

Related Abridgment Classifications

Constitutional law

[VII](#) Distribution of legislative powers

[VII.4](#) Areas of legislation

[VII.4.f](#) Labour and employment

[VII.4.f.v](#) Miscellaneous

Labour and employment law

[I](#) Labour law

[I.1](#) Labour relations boards

[I.1.b](#) Jurisdiction

[I.1.b.ii](#) Constitutional jurisdiction

[I.1.b.ii.H](#) Miscellaneous

Labour and employment law

I Labour law

I.1 Labour relations boards

I.1.b Jurisdiction

I.1.b.iv Jurisdiction under Charter of Rights and Freedoms

Labour and employment law

I Labour law

I.5 Bargaining rights

I.5.c Certification

I.5.c.i Status under legislation

I.5.c.i.C Employee

I.5.c.i.C.9 Specific exclusions

Headnote

Labour Law --- Labour relations boards — Jurisdiction — Constitutional jurisdiction

Labour Law --- Bargaining rights — Certification — Status under legislation — Employee — Specific exclusions

Jurisdiction — Ontario Labour Relations Board — Authority to consider whether provision in empowering Act contrary to Charter of Rights and Freedoms — Board specifically authorized to decide all questions of law and fact in matters before it — Power sufficiently explicit when combined with practical and functional considerations relating to Board's expertise to justify dealing with Charter issues.

Constitutional law — Charter of Rights and Freedoms — Jurisdiction of Ontario Labour Relations Board to consider whether provision in empowering Act contrary to Charter — Board specifically authorized to decide all questions of law and fact arising in matters before it — Power sufficiently explicit when combined with practical and functional considerations relating to Board's expertise to justify dealing with Charter issues.

Labour law — Jurisdiction of Ontario Labour Relations Board to consider whether provision in empowering Act contrary to Charter of Rights and Freedoms — Board specifically authorized to decide all questions of law and fact arising in matters before it — Power sufficiently explicit when combined with practical and functional considerations relating to Board's expertise to justify dealing with Charter issues.

An application was made to the Ontario Labour Relations Board for certification as the bargaining agent for a unit of employees of CC Ltd. The application was contested on the basis that the employees in question were "employed in agriculture," and therefore excluded from certification by virtue of s. 2(b) of the Ontario *Labour Relations Act* (the "Act"). A panel of the board accepted that the employees were indeed "employed in agriculture," but also ruled that it would deal with the issue of whether s. 2(b) of the Act violated the *Canadian Charter of Rights and Freedoms*. The panel decided that it was a "court of competent jurisdiction" in terms of s. 24(1) of the *Charter*, and also that s. 52(1) of the *Constitution Act, 1982* required it to determine whether the provisions of the Act were consistent with the *Charter*.

CC Ltd. applied to the Ontario Divisional Court for judicial review of this ruling. This application was dismissed, the Court holding that, first, the board was a "court of competent jurisdiction" empowered by s. 24(1) to make this kind of decision as part of the certification process; secondly, it was justified in dealing with such *Charter* arguments by reference to s. 52(1) of the *Constitution Act* and its expression of the supremacy of the *Charter*, and, thirdly, it was obliged to determine the effect of the *Charter* as part of its common law authority to decide upon the applicability of general statutes. CC Ltd. obtained leave to appeal to the Ontario Court of Appeal, but the appeal was dismissed. The Court of Appeal held (Finlayson J.A. dissenting) that, by virtue of s. 52(1) of the *Constitution Act, 1982*, the board had the right and the duty to determine whether or not s. 2(b) was of "no force and effect" by reason of inconsistency with the *Charter*. Under its empowering statute, the board was empowered to decide all questions of fact and law that arose in matters coming before it, and this included the authority to deal with the supreme law, namely the *Constitution Act* and the *Charter*, albeit that Board determination of such questions was not entitled to deference in subsequent judicial review proceedings. However, a majority of the Court ruled (Grange J.A. dissenting) that the board was not a "court of competent jurisdiction" for the purposes of granting a remedy under s. 24(1) of the *Charter*. CC Ltd. obtained leave to appeal to the Supreme Court of Canada.

Held:

The appeal was dismissed.

Per La Forest J. (Lamer C.J.C., Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ. concurring)

Section 52(1) of the *Constitution Act, 1982*, while affirming the primacy of the Constitution including the *Charter*, was not an independent source of authority for statutory bodies to consider *Charter* issues. For a tribunal to have that jurisdiction, it must have been explicitly or impliedly conferred by statute in the sense of the tribunal having jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought.

In the case of the board, this did not arise simply as a result of the fact that there was an application before it for certification. Rather, since the subject matter and remedy sought in this instance were premised on the application of the *Charter*, authority to apply the *Charter* had to be found in the board's enabling statute.

Such authority was, in fact, found in the board's authority to rule on questions of law that arose in matters before it, and by implication from its authority to deal with questions as to the scope of its jurisdiction. Such authority to consider questions of law must perforce encompass the supreme law of Canada, the *Constitution*, including the *Charter*.

Moreover, albeit that the board's ruling on any *Charter* issue was not entitled to curial deference, there were practical and functional considerations supporting this interpretation of the Act and, indeed, justifying the conclusion that the board had not only the right but also the duty to consider such issues when they were raised by parties otherwise competently before it. Labour boards were tribunals of high calibre, combining in their tripartite model experience and expertise with acceptability and credibility. *Charter* issues did not arise in a vacuum but involved, particularly in relation to justifications under s. 1 of the *Charter*, policy issues on which the informed thinking of and compilation of a cogent record by expert tribunals were invaluable. To the extent that the relevant Attorney General intervened in such proceedings, any representational disadvantages of tribunals in comparison to regular courts were further diminished.

In this respect, however, the role of the board was not the impermissible one of issuing a formal declaration of invalidity when it found the *Charter* to have been violated, but the more limited one of treating the impugned provision as invalid in the proceedings before it, an action which did not constitute a binding precedent. Given these considerations, it was unnecessary to consider whether the board was a "court of competent jurisdiction" in terms of s. 24(1) of the *Charter*.

Per Wilson J. (L'Heureux-Dubé J. concurring)

The absence of explicit legislative authority to determine *Charter* questions should not be seen as necessarily determinative of the issue. Rather, such authority might be grounded elsewhere or arise out of s. 24(1) of the *Charter*, and the judicially developed tests for ascertaining whether a body was a "court of competent jurisdiction."

.....

Une demande d'accréditation comme agent négociateur d'une unité d'employés de CC Ltée a été présentée à la Commission des relations de travail de l'Ontario. La demande a été contestée au motif que les employés en question étaient "employés à l'agriculture" et, par conséquent, exclus de l'accréditation en vertu de l'al. 2b) de la *Loi sur les relations de travail* de l'Ontario (la "Loi"). Une formation de la commission a déclaré que les employés étaient effectivement "employés à l'agriculture," mais a aussi déclaré que la commission examinerait la question à savoir si l'al. 2b) de la Loi contrevenait à la *Charte canadienne des droits et libertés*. La formation a enfin conclu que la commission était un "tribunal compétent" au sens du par. 24(1) de la *Charte* et que le par. 52(1) de la *Loi constitutionnelle de 1982* l'obligeait à déterminer si les dispositions de la Loi étaient conformes à la *Charte*.

CC Ltée a présenté une requête en révision judiciaire de cette décision devant la Cour divisionnaire de l'Ontario. Cette requête a été rejetée, la Cour concluant tout d'abord que la commission était un "tribunal compétent" habilité par le par. 24(1) à rendre ce genre de décisions dans le cadre du processus d'accréditation; en second lieu, que la commission avait compétence pour se prononcer sur des questions concernant la *Charte* en vertu du par. 52(1) de la *Loi constitutionnelle* et de sa référence à la suprématie de la *Charte*; troisièmement, que la commission était tenue en vertu de la common law d'interpréter l'effet de la *Charte* pour déterminer l'applicabilité de lois externes.

CC Ltée a obtenu l'autorisation d'interjeter appel devant la Cour d'appel de l'Ontario, mais l'appel a été rejeté. La Cour d'appel (le juge Finlayson, dissident) a jugé qu'en vertu du par. 52(1) de la *Loi Constitutionnelle de 1982*, la commission avait le droit et le devoir de décider si l'al. 2b) était "sans effet" au motif d'incompatibilité avec la *Charte*. En vertu de sa Loi habilitante, la commission avait obtenu le pouvoir d'examiner toutes questions de droit et de faits soulevées dans le cadre de litiges lui étant soumis, incluant le pouvoir de se prononcer sur la loi suprême, soit la *Loi constitutionnelle* et la *Charte*, étant admis que les conclusions de la commission sur de telles questions ne bénéficiaient d'aucune retenue judiciaire en cas de procédures en révision subséquentes. La majorité de la Cour (le juge Grange, dissident) a cependant

conclu que la commission n'était pas un "tribunal compétent" aux fins d'accorder réparation en vertu du par. 24(1) de la *Charte*. CC Ltée a obtenu l'autorisation de se pourvoir devant la Cour suprême du Canada.

Arrêt:

Le pourvoi a été rejeté.

M. le juge La Forest (M. le juge en chef Lamer, MM. les juges Sopinka, Gonthier, Cory et Stevenson, et Mme la juge McLachlin souscrivant)

Le paragraphe 52(1) de la *Loi constitutionnelle de 1982*, en affirmant la primauté de la Constitution, à l'inclusion de la *Charte*, n'était pas une source distincte de compétence permettant aux tribunaux administratifs d'examiner des questions relatives à la *Charte*. Pour qu'un tel tribunal ait cette compétence, elle doit lui avoir été expressément ou implicitement conférée par statut, en ce sens qu'il doit avoir compétence à l'égard de l'ensemble du litige qui lui est soumis, c'est-à-dire à l'égard des parties, de l'objet du litige et de la réparation recherchée.

Dans le cas de la commission, le litige dont elle a été saisie ne découlait pas simplement du fait qu'une demande d'accréditation lui avait été soumise. Au contraire, puisque l'objet du litige et la réparation recherchée en l'espèce étaient fondés sur l'application de la *Charte*, le pouvoir d'appliquer celle-ci devait se trouver dans la loi habilitante de la commission.

Un tel pouvoir se trouvait en fait dans la compétence de la commission à examiner les questions de droit soulevées dans le cadre des litiges lui étant soumis et découlait, par implication, de sa compétence à se prononcer sur les questions relatives à l'étendue de sa juridiction. Un tel pouvoir d'examiner des questions de droit doit nécessairement englober la loi suprême du Canada, soit la *Constitution* et la *Charte* y incluse.

De plus, étant admis que les décisions de la commission sur toute question relative à la *Charte* ne pouvaient bénéficier d'aucune retenue judiciaire, il existait des considérations d'ordre pratique et fonctionnel appuyant cette interprétation de la Loi et justifiant effectivement la conclusion à l'effet que la commission avait non seulement le droit mais aussi le devoir d'examiner de telles questions lorsque soulevées par des parties devant elle en vertu d'une compétence autre. Les commissions des relations de travail sont des tribunaux administratifs de haut calibre, dont le modèle tripartite allie l'expérience et l'expertise avec l'acceptabilité et la crédibilité. Les questions relatives à la *Charte* ne sont pas issues du néant. Elles ont plutôt impliqué, particulièrement en rapport avec la justification en vertu de l'art. 1 de la *Charte*, des questions de politique à l'égard desquelles la réflexion éclairée et la compilation de dossiers convaincants par des tribunaux experts se sont avérées inestimables. Dans la mesure où le Procureur général concerné est intervenu dans de telles procédures, tout désavantage relatif des tribunaux administratifs comparativement aux cours de justice en a été d'autant plus réduit. À cet égard, cependant, le rôle de la commission n'était pas celui, inconcevable en soi, d'émettre une déclaration formelle d'invalidité alors qu'elle concluait que la *Charte* avait été violée, mais plutôt celui, plus restreint, de traiter la disposition attaquée comme n'étant pas valide dans les procédures devant elle, un acte qui ne constituait pas un précédent devant être suivi. Compte tenu de ce qui précède, il n'était pas nécessaire de décider si la commission était un "tribunal compétent" aux termes du par. 24(1) de la *Charte*.

Mme la juge Wilson (Mme la juge L'Heureux-Dubé souscrivant)

L'absence de pouvoir statutaire explicite à examiner des questions concernant la *Charte* ne devrait pas être interprétée comme étant nécessairement déterminante. Au contraire, un tel pouvoir pourrait trouver un fondement autre part ou découler du par. 24(1) de la *Charte*, et des tests élaborés judiciairement pour établir si un organisme est un "tribunal compétent."

Table of Authorities

Cases considered:

Per La Forest J. (Lamer C.J.C., Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ. concurring)

Canada (Labour Relations Bd.) v. Paul L'Anglais Inc., [1983] 1 S.C.R. 147, 47 N.R. 351 — referred to

C.U.P.E., Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 26 N.R. 341, 79 C.L.L.C. 14,209, 97 D.L.R. (3d) 417, N.B.L.L.C. 24,259 — referred to

Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570, 50 Admin. L.R. 69, [1991] 1 W.W.R. 643, 52 B.C.L.R. (2d) 68, 77 D.L.R. (4th) 94, 118 N.R. 340, 13 C.H.R.R. D/403, 2 C.R.R. (2d) 157, 91 C.L.L.C. 17,002 — applied

Four B Manufacturing Ltd. v. U.G.W., [1980] 1 S.C.R. 1031, 80 C.L.L.C. 14,006, 102 D.L.R. (3d) 385, 30 N.R. 421 — referred to

Northern Telecom Canada Ltd. v. C.W.O.C., [1983] 1 S.C.R. 733, 147 D.L.R. (3d) 1, 48 N.R. 161 — referred to
R. v. Mills, [1986] 1 S.C.R. 863, 52 C.R. (3d) 1, 16 O.A.C. 81, 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, 21 C.R.R. 76, 67 N.R. 241, 58 O.R. (2d) 544n — referred to

R. v. Ontario (Labour Relations Board), [1963] 2 O.R. 301, 39 D.L.R. 346, (sub nom. *Northern Electric Co. v. U.E.*) 63 C.L.L.C. 15,484 (H.C.) — referred to

Tétreault-Gadoury v. Canada (Employment & Immigration Commission) (1991), 50 Admin. L.R. 1, 91 C.L.L.C. 14,023, 36 C.C.E.L. 117 (S.C.C.) — referred to

Per *Wilson J. (L'Heureux-Dubé concurring)*

Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570, 50 Admin. L.R. 69, [1991] 1 W.W.R. 643, 52 B.C.L.R. (2d) 68, 77 D.L.R. (4th) 94, 118 N.R. 340, 13 C.H.R.R. D/403, 2 C.R.R. (2d) 157, 91 C.L.L.C. 17,002 — referred to

McLeod v. Egan, [1975] 1 S.C.R. 517, 46 D.L.R. (3d) 150, (sub nom. *Re McLeod*) 2 N.R. 443, (sub nom. *U.S.W.A., Local 2894 v. Galt Metal Industries Ltd.*) 74 C.L.L.C. 14,220 — referred to

R. v. Mills, [1986] 1 S.C.R. 863, 52 C.R. (3d) 1, 16 O.A.C. 81, 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, 21 C.R.R. 76, 67 N.R. 241, 58 O.R. (2d) 544n — referred to

Statutes considered:

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 —

s. 2(d)

s. 15

s. 24(1)

Constitution Act, 1867 (U.K.), [formerly British North America Act, 1867], 30 & 31 Vict., c. 3.

Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 —

s. 52

Labour Code, R.S.B.C. 1979, c. 212.

Labour Relations Act, R.S.O. 1980, c. 228 —

s. 2(b)

s. 106(1)

s. 124

Words and phrases considered:

QUESTION OF LAW

Section 106(1) of the *Labour Relations Act* [R.S.O. 1980. c. 228] stipulates that the board has exclusive jurisdiction "to determine all questions of fact or law that arise in any matter before it". The Legislature expressly, and without reservation, conferred authority on the board to decide points of law. In addition, the Act confers powers on the board to determine questions of law and fact relating to its own jurisdiction. Section 124, for example, gives it authority to decide if a matter is arbitrable. The issue, then, is whether this authority with respect to questions of law can encompass the question of whether a law violates the *Charter*. It is clear to me that a [*Canadian Charter of Rights and Freedoms*] issue must constitute a question of law; indeed, the *Charter* is part of the supreme law of Canada. This comports with

the view expressed in *Douglas College* [(1990), 2 C.R.R. (2d) 157] that the statutory authority of the arbitrator in that case to interpret any "Act" must include the authority to apply the *Charter* and to rule on the constitutionality of s. 2(b) of its enabling statute, in the course of the Union's application for certification.

[Appeal from a judgment of the Ontario Court of Appeal, reported at 39 Admin. L.R. 48, 70 O.R. \(2d\) 179, \[1989\] O.L.R.B. Rep. 989, 62 D.L.R. \(4th\) 125, 35 O.A.C. 94, 89 C.L.L.C. 14,051, 44 C.R.R. 75](#), dismissing an appeal from a judgment of the Ontario Divisional Court, reported at (1988), 33 [Admin. L.R. 304, 66 O.R. \(2d\) 284, 32 O.A.C. 7, 88 C.L.L.C. 14,053](#), dismissing an application for judicial review

La Forest J. (Lamer C.J.C., Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ. concurring):

1 This appeal concerns the jurisdiction of the Ontario Labour Relations Board to determine the constitutionality of a provision of its enabling statute, the *Labour Relations Act*, R.S.O. 1980, c. 228, in the course of proceedings before it.

Facts

2 In April 1987, the United Food and Commercial Workers International Union, Local 175, filed an application for certification before the Ontario Labour Relations Board ("OLRB") relating to employees at the chicken hatchery of Cuddy Chicks Limited. Section 2(b) of the *Labour Relations Act* states that the Act does not apply "to a person employed in agriculture." On filing the application, the union gave notice that, if the employees were found to be agricultural employees, it would request the board to hold s. 2(b) invalid as being contrary to ss. 2(d) and 15 of the *Canadian Charter of Rights and Freedoms*. The position of Cuddy Chicks was that the employees in question were agricultural employees.

3 Prior to the commencement of the hearing into this matter, Cuddy Chicks disputed the jurisdiction of the board to subject its enabling statute to *Charter* scrutiny. At that point, in February 1988, a separate hearing was convened to determine whether the panel had jurisdiction to entertain the *Charter* issues raised by the union. The decision of this second panel was reserved. The hearing by the first panel proceeded in March and April 1988. At the conclusion of this hearing, the panel unanimously held that the employees at the Cuddy Chicks hatchery were employed in agriculture, and therefore the Act did not apply. A majority of the panel then held that the board had jurisdiction to rule on the *Charter* issue because, in the majority's view, the board is a "court of competent jurisdiction" within the meaning of s. 24(1) of the *Charter*, and because s. 52 of the *Constitution Act, 1982* imposes an obligation on the board to ensure that the law it applies is consistent with the supreme law of Canada. Under s. 106(1) of the Act, the board has jurisdiction to decide questions of law relevant to the proceedings before it:

106. — (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

Judicial History

Divisional Court

4 The Divisional Court held [(1988), 66 O.R. (2d) 284, 32 O.A.C. 7, 88 C.L.L.C. 14,053, (sub nom. *U.F.C.W., Local 175 v. Cuddy Chicks Ltd.*) 33 [Admin. L.R. 304](#)] that the board had jurisdiction to deal with the *Charter* issue, on three grounds. First, the board was a court of competent jurisdiction under s. 24(1) of the *Charter*, since it had jurisdiction over the parties, subject matter and remedy, and thus met the test set out in *R. v. Mills*, [1986] 1 S.C.R. 863, 52 C.R. (3d) 1, 16 O.A.C. 81, 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, 21 C.R.R. 76, 67 N.R. 241, 58 O.R. (2d) 544n. Second, it had jurisdiction to consider *Charter* issues under s. 52(1) of the *Constitution Act, 1982*. The Court noted that prior to the *Charter*, labour boards were held competent to determine constitutional questions, such decisions being subject always to judicial review. The third basis on which the Court found jurisdiction in the board was the common law duty

of labour boards to construe external statutes in the course of rendering decisions on labour matters before them. Court of Appeal (Grange, Finlayson and McKinlay JJ.A.) 39 Admin. L.R. 48, 70 O.R. (2d) 179, [1989] O.L.R.B. Rep. 989, 62 D.L.R. (4th) 125, 35 O.A.C. 94, 89 C.L.L.C. 14,051, 44 C.R.R. 75

5 A majority of the Court of Appeal (Grange and McKinlay JJ.A.) held that s. 52(1) of the *Constitution Act, 1982* conferred jurisdiction on the board to decide the constitutionality of its enabling statute. In construing the *Charter* in favour of the union in the present case, the board would not be issuing a declaration of invalidity, but merely including agricultural workers within its broad jurisdiction under the Act to certify unions. Accordingly, a remedy was available in the ordinary course of proceedings, and resort to s. 24 of the *Charter* was unnecessary. It was also unnecessary to address the issue of common law duty.

6 Finlayson J.A., in dissent, held that the board was not a court of competent jurisdiction under s. 24(1) of the *Charter*. While it had jurisdiction over the union and employer, as well as the remedy of certification, once the board determined that the employees at the Cuddy Chicks hatchery were agricultural employees, it had no jurisdiction over the subject matter of the application and exhausted its jurisdictional competence. McKinlay J.A. agreed that the board was not a court of competent jurisdiction, although in her view, it was unnecessary to decide that issue.

7 As to whether s. 52 of the *Constitution Act, 1982* alone confers authority on the board to apply the *Charter*, Finlayson J.A. held that although that provision does give the board the authority to apply the *Charter*, it does not give it jurisdiction to strike down, ignore or treat as inoperative any provision of its enabling statute by reference to the *Charter*.

8 Following its unsuccessful appeals in the Ontario Courts, Cuddy Chicks obtained leave to appeal to this Court. Interventions were filed by the Attorneys General for Ontario and Saskatchewan. In addition, the parties to *Tétreault-Gadoury v. Canada (Employment & Immigration Commission)* (1991), 50 Admin. L.R. 1, 91 C.L.L.C. 14,023, 36 C.C.E.L. 117 (S.C.C.), an appeal which originally was to be heard together with the present appeal, were permitted to intervene by order of the Chief Justice.

Issues

9 The issues as framed by the parties are as follows:

1. Did the Ontario Court of Appeal err in holding that s. 52 of the *Constitution Act, 1982* conferred the right and duty on an administrative agency such as the OLRB to decide the constitutional validity of its enabling statute?
2. Did the Ontario Court of Appeal err in holding that the OLRB has the jurisdiction to decide the constitutional validity of s. 2(b) of its enabling statute by applying the *Charter* as part of a duty it has to consider statutes bearing on proceedings before it?
3. Was the Ontario Court of Appeal correct in holding that the OLRB was not a "court of competent jurisdiction" under s. 24(1) of the *Charter*?

Discussion

10 The essential issue before this Court is whether and on what basis the board has jurisdiction to determine the constitutional validity of s. 2(b) of the *Labour Relations Act*, its enabling statute. This Court was not called upon to decide the substantive issue of whether s. 2(b) of the Act violates the *Charter*.

11 The power of an administrative tribunal to consider *Charter* issues was addressed recently by this Court in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, 50 Admin. L.R. 69, [1991] 1 W.W.R. 643, 52 B.C.L.R. (2d) 68, 77 D.L.R. (4th) 94, 118 N.R. 340, 13 C.H.R.R. D/403, 2 C.R.R. (2d) 157, 91 C.L.L.C. 17,002. That case concerned the jurisdiction of an arbitration board, appointed by the parties under a collective agreement in conjunction with the British Columbia *Labour Code*, R.S.B.C. 1979, c. 212, to determine the constitutionality of a mandatory retirement provision in the collective agreement. In ruling that the arbitrator did have such jurisdiction, this Court articulated the

basic principle that an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid. This conclusion ensues from the principle of supremacy of the Constitution, which is confirmed by s. 52(1) of the *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.

Distilled to its basics, the rationale for recognizing jurisdiction in the arbitrator in the *Douglas College* case is that the Constitution, as the supreme law, must be respected by an administrative tribunal called upon to interpret law. In addition, the practical advantages of having constitutional issues decided at first instance by an expert tribunal confirm, if not compel, this conclusion. Practical considerations were canvassed at length in *Douglas College* , and I need not repeat that discussion here. I would simply note the relevance of such considerations to the determination of whether, in the end, it makes sense for an administrative tribunal to decide whether a particular law is invalid because it violates the *Charter* .

12 It is essential to appreciate that s. 52(1) does not function as an independent source of an administrative tribunal's jurisdiction to address constitutional issues. Section 52(1) affirms in explicit language the supremacy of the Constitution, but is silent on the jurisdictional point per se. In other words, s. 52(1) does not specify which bodies may consider and rule on *Charter* questions, and cannot be said to confer jurisdiction on an administrative tribunal. Rather, jurisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, a tribunal prepared to address a *Charter* issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought. While this analytical framework mirrors the requirements for a court of competent jurisdiction under s. 24(1) of the *Charter* as outlined in *R. v. Mills* , supra, as was the case in *Douglas College* , it is unnecessary to have recourse to s. 24(1) to determine whether the board has jurisdiction over *Charter* issues. An administrative tribunal need not meet the definition of a court of competent jurisdiction in s. 24(1) of the *Charter* in order to have the necessary authority to subject its enabling statute to *Charter* scrutiny. In the present case, the relevant inquiry is not whether the tribunal is a "court", but whether the Legislature intended to confer on the tribunal the power to interpret and apply the *Charter* .

Application to this Case

13 It first must be determined whether the board has jurisdiction over the whole of the matter before it. It is clear that it has jurisdiction over the employer and the union. The issue here centres on its jurisdiction over the subject matter and remedy. The subject matter before the board cannot be characterized simply as an application for certification, which would certainly fall within the authority of the board. This is an application which requires the board to subject s. 2(b) of the Act to *Charter* scrutiny in order to determine whether the application for certification is properly before it. Similarly, the remedy of certification requires the board to refuse to give effect to s. 2(b) of the Act because of inconsistency with the *Charter* . Since the subject matter and remedy in this case are premises on the application of the *Charter* , the authority to apply the *Charter* must be found in the board's enabling statute.

14 Section 106(1) of the *Labour Relations Act* stipulates that the board has exclusive jurisdiction "to determine all questions of fact or law that arise in any matter before it." The Legislature expressly, and without reservation, conferred authority on the board to decide points of law. In addition, the Act confers powers on the board to determine questions of law and fact relating to its own jurisdiction. Section 124, for example, gives it authority to decide if a matter is arbitrable. The issue, then, is whether this authority with respect to questions of law can encompass the question of whether a law violates the *Charter* . It is clear to me that a *Charter* issue must constitute a question of law; indeed, the *Charter* is part of the supreme law of Canada. This comports with the view expressed in *Douglas College* , supra, that the statutory authority of the arbitrator in that case to interpret any "Act" must include the authority to interpret the *Charter* . In the result, the board has the authority to apply the *Charter* and to rule on the constitutionality of s. 2(b) of its enabling statute, in the course of the union's application for certification.

Practical Considerations

15 The discussion of practical considerations in the *Douglas College* decision entailed an analysis of the institutional characteristics of administrative tribunals, such as their narrow range of expertise and the speed with which they deal with matters, in relation to the fundamental and often complex nature of *Charter* issues. This analysis concerned administrative tribunals in general, and the ultimate conclusion that practical concerns favour the finding of jurisdiction in administrative tribunals holds in the present case. My purpose here is not to rehearse that comprehensive discussion, but simply to identify those considerations which are more pronounced in the particular case of the board.

16 The overarching consideration is that labour boards are administrative bodies of a high calibre. The tripartite model which has been adopted almost uniformly across the country combines the values of expertise and broad experience with acceptability and credibility. In *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237, 51 A.P.R. 237, 26 N.R. 341, 79 C.L.L.C. 14,209, 97 D.L.R. (3d) 417, N.B.L.L.C. 24,259, at pp. 235-236 [S.C.R.], Dickson J. (as he then was) characterized the particular competence of labour boards as follows:

The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

It must be emphasized that the process of *Charter* decision-making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision-maker to analyze competing policy concerns is critical. Therefore, while board members need not have formal legal training, it remains that they have a very meaningful role to play in the resolution of constitutional issues. The informed view of the board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance. This is evidenced clearly by the weight which the judiciary has given the factual record provided by labour boards in division of powers cases; see, for example, *Northern Telecom Canada Ltd. v. C.W.O.C.*, [1983] 1 S.C.R. 733, 147 D.L.R. (3d) 1, 48 N.R. 161 .

17 That having been said, the jurisdiction of the board is limited in at least one crucial respect: it can expect no curial deference with respect to constitutional decisions. Furthermore, a formal declaration of invalidity is not a remedy which is available to the board. Instead, the board simply treats any impugned provision as invalid for the purposes of the matter before it. Given that this is not tantamount to a formal declaration of invalidity, a remedy exercisable only by the superior Courts, the ruling of the board on a *Charter* issue does not constitute a binding legal precedent, but is limited in its applicability to the matter in which it arises.

18 An additional practical consideration which bears mention here is whether the Attorney General of the province will participate in proceedings before an administrative tribunal. Before the Courts, a provision to obtain this participation exists. Finlayson J.A. commented that this sort of participation may be inappropriate in the case of tribunals established by government, but at the same time the lack of participation of the Attorney General unfairly places the burden of defending legislation on the parties. However, the Attorney General for Ontario expressed a willingness to intervene and make submissions in appropriate cases, and has in the past done so before the board on issues of federalism under the *Constitution Act, 1867* . To the extent that the Attorney General will intervene, the relative disadvantage of administrative tribunals versus courts is lessened.

19 It is apparent, then, that an expert tribunal of the calibre of the board can bring its specialized expertise to bear in a very functional and productive way in the determination of *Charter* issues which make demands on such expertise. In the present case, the experience of the board is highly relevant to the *Charter* challenge to its enabling statute, particularly at the s. 1 stage, where policy concerns prevail. At the end of the day, the legal process will be better served where the board makes an initial determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the board not only has the authority but a duty to ascertain the constitutional validity of s. 2(b) of the *Labour Relations Act* .

20 This view also makes sense within the larger context of Canadian constitutional jurisprudence. The capacity of labour boards to consider constitutional questions relating to their own jurisdiction has long been recognized. An early expression of this principle is found in *R. v. Ontario (Labour Relations Board)*, [1963] 2 O.R. 301, 39 D.L.R. (2d) 346, (sub nom. *Northern Electric Co. v. U.E.*) 63 C.L.L.C. 15,484 (H.C.), a case which was cited by Estey J. in *Northern Telecom Canada Ltd. v. C.W.O.C.*, supra, at p. 756 [S.C.R.], in support of the jurisdictional competence of labour boards in constitutional matters:

McRuer C.J.H.C., in giving judgment, made reference at p. 307 to the limited but important role to be played by the administrative agency in the determination of the constitutional questions:

The Board cannot judicially determine constitutional questions but it has power to entertain an objection to its jurisdiction on constitutional grounds and to have the grounds of the objection stated.

See also *Canada (Labour Relations Bd.) v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147, 47 N.R. 351, and *Four B Manufacturing Ltd. v. U.G.W.*, [1980] 1 S.C.R. 1031, 80 C.L.L.C. 14,006, 102 D.L.R. (3d) 385, 30 N.R. 421.

21 What these cases speak to is not only the fundamental nature of the Constitution, but also the legal competence of labour boards and the value of their expertise at the initial stages of complex constitutional deliberations. These practical considerations have compelled the Courts to recognize a power, albeit a carefully limited one, in labour tribunals to deal with constitutional issues involving their own jurisdiction. Such considerations are as compelling in the case of *Charter* challenges to a tribunal's enabling statute. Therefore, to extend this "limited but important role" of labour boards to the realm of the *Charter* is simply a natural progression of a well established principle.

Disposition

22 In the application for certification brought by the union, the board had jurisdiction over the parties, subject matter and remedy. In the exercise of this jurisdiction, it was required to respect the supremacy of the Constitution as expressed in s. 52(1) of the *Constitution Act, 1982*, and had a duty to subject its enabling statute to *Charter* scrutiny. It is unnecessary to consider whether the board is a court of competent jurisdiction within the meaning of s. 24(1) of the *Charter*.

23 I would dismiss the appeal with costs

Wilson J. (L'Heureux-Dubé J. concurring):

24 In my concurring reasons in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, 50 Admin. L.R. 69, [1991] 1 W.W.R. 643, 52 B.C.L.R. (2d) 68, 77 D.L.R. (4th) 94, 118 N.R. 340, 13 C.H.R.R. D/403, 2 C.R.R. (2d) 157, 91 C.L.L.C. 17,002, I agreed with my colleague Justice La Forest that an arbitration board appointed by the parties under the *Labour Code*, R.S.B.C. 1979, c. 212, had jurisdiction, by virtue of s. 52(1) of the *Constitution Act, 1982*, to determine the *Charter* issue raised by the grievance, and that it was not necessary in that case to determine whether the board was a "court of competent jurisdiction" within the meaning of s. 24(1) of the *Canadian Charter of Rights and Freedoms*. I added the following qualification to my concurrence at p. 606 [S.C.R.]:

I would, however, prefer to leave open the question whether a tribunal may have such jurisdiction even in the absence of specific provisions in the governing legislation and in the collective agreement such as those heavily relied on by my colleague.

25 In the present appeal, my colleague has restated the position he took in *Douglas College* that the authority to apply the *Charter* must be found in the tribunal's enabling statute, and he has found once again that its jurisdiction is found there, that the broad jurisdiction conferred on the board by s. 106(1) of the *Labour Relations Act*, R.S.O. 1980, c. 228, includes the authority to interpret the *Charter*.

26 In concurring with my colleague in the present appeal, I would accordingly wish once again to add the qualification which I added to my concurrence in *Douglas College*. The absence of legislative authority to deal with the *Charter* issue in the governing statute is not, in my view, necessarily determinative of a tribunal's jurisdiction, since the authority and obligation to apply the law may be grounded elsewhere: *McLeod v. Egan*, [1975] 1 S.C.R. 517, 46 D.L.R. (3d) 150, (sub nom. *Re McLeod*) 2 N.R. 443, (sub nom. *U.S.W.A., Local 2894 v. Galt Metal Industries Ltd.*) 74 C.L.L.C. 14,220. Additionally, it may be necessary to proceed to s. 24(1) of the *Charter* and decide whether, on the basis of the tests set out in *R. v. Mills*, [1986] 1 S.C.R. 863, 52 C.R. (3d) 1, 16 O.A.C. 81, 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, 21 C.R.R. 76, 67 N.R. 241, 58 O.R. (2d) 544n, the tribunal is a court of competent jurisdiction to decide a *Charter* issue arising in the context of the relief claimed.

Appeal dismissed.

TAB 5

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Oliver v. Canada \(Attorney General\)](#) | 2010 ONSC 3976, 2010 CarswellOnt 5183, 89 W.C.B. (2d) 162, [2010] O.J. No. 3016 | (Ont. S.C.J., Jul 13, 2010)

2010 SCC 22
Supreme Court of Canada

R. v. Conway

2010 CarswellOnt 3847, 2010 CarswellOnt 3848, 2010 SCC 22, [2010] 1 S.C.R. 765, [2010] S.C.J. No. 22, 103 O.R. (3d) 320 (note), 1 Admin. L.R. (5th) 163, 211 C.R.R. (2d) 326, 255 C.C.C. (3d) 506, 263 O.A.C. 61, 320 D.L.R. (4th) 25, 402 N.R. 255, 75 C.R. (6th) 201, 88 W.C.B. (2d) 441, J.E. 2010-1051

Paul Conway, Appellant and Her Majesty The Queen and Person in charge of the Centre for Addiction and Mental Health, Respondents and Attorney General of Canada, Ontario Review Board, Mental Health Legal Committee and Mental Health Legal Advocacy Coalition, British Columbia Review Board, Criminal Lawyers' Association and David Asper Centre for Constitutional Rights, and Community Legal Assistance Society, Interveners

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

Heard: October 22, 2009

Judgment: June 11, 2010

Docket: 32662

Proceedings: affirming *R. v. Conway* (2008), 90 O.R. (3d) 335, (sub nom. *C. (P.) v. Ontario*) 231 C.C.C. (3d) 429, 2008 ONCA 326, 235 O.A.C. 341, (sub nom. *C. (P.) v. Ontario*) 293 D.L.R. (4th) 729, 169 C.R.R. (2d) 314, 2008 CarswellOnt 2352 (Ont. C.A.)

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Stephen J. Moreau, Elichai Shaffir, for Intervener, Ontario Review Board
Paul Burstein, Anita Szigeti, for Interveners, Mental Health Legal Committee, Mental Health Legal Advocacy Coalition
Joseph J. Arvay, Q.C., Mark G. Underhill, Alison Latimer, for Intervener, British Columbia Review Board
Cheryl Milne, for Interveners, Criminal Lawyers' Association, David Asper Centre for Constitutional Rights
David W. Mossop, Q.C., Diane Nielsen, for Intervener, Community Legal Assistance Society

Subject: Occupational Health and Safety; Criminal; Constitutional; Human Rights

Related Abridgment Classifications

Constitutional law

[XI](#) Charter of Rights and Freedoms

[XI.4](#) Nature of remedies under Charter

[XI.4.a](#) General principles

Criminal law

[IV](#) Charter of Rights and Freedoms

[IV.2](#) Court of competent jurisdiction

Criminal law

XXII Sentencing procedure and principles**XXII.11** Custody of persons with mental disorder**XXII.11.d** Review of custody order**Headnote**

Criminal law --- Charter of Rights and Freedoms — Jurisdiction — Court of competent jurisdiction

Accused was found not guilty by reason of insanity of sexual assault with weapon in 1984 — Accused was detained in various mental health facilities for 24 years and was diagnosed with several mental disorders — At review hearing before Ontario Review Board (ORB) in 2006, accused applied for absolute discharge under s. 24(1) of Canadian Charter of Rights and Freedoms on basis that conditions under which he was being detained infringed his Charter rights — ORB concluded it was not "court of competent jurisdiction" under s. 24(1) and dismissed application — Appeal by accused on issue of ORB's remedial jurisdiction under Charter was dismissed — Accused appealed — Appeal dismissed — Tribunal which has jurisdiction to grant Charter remedies is court of competent jurisdiction — In accordance with new approach developed to consolidate three distinct constitutional streams flowing from jurisprudence, proper inquiry is whether tribunal has jurisdiction to grant Charter remedies generally, and then whether it can grant particular remedy sought — ORB is quasi-judicial body that is authorized to decide questions of law — Accordingly, ORB is court of competent jurisdiction that can grant Charter remedies under s. 24(1) — However, considering scope and nature of ORB's statutory mandate and functions, accused was not entitled to Charter remedies he sought — Parliament did not intend to permit dangerous not criminally responsible patients to have access to absolute discharges as remedy — Finding that ORB was entitled to grant accused absolute discharge despite its conclusion that he was significant threat to public safety would be clear contradiction of Parliament's intent.

Criminal law --- Post-trial procedure — Detention and release after trial — Custody of persons with mental disorder — Review of disposition

Remedial jurisdiction — Accused was found not guilty by reason of insanity of sexual assault with weapon in 1984 — Accused was detained in various mental health facilities for 24 years and was diagnosed with several mental disorders — At review hearing before Ontario Review Board (ORB) in 2006, accused applied for absolute discharge under s. 24(1) of Canadian Charter of Rights and Freedoms on basis that conditions under which he was being detained infringed his Charter rights — ORB concluded it was not "court of competent jurisdiction" under s. 24(1) and dismissed application — Appeal by accused on issue of ORB's remedial jurisdiction under Charter was dismissed — Accused appealed — Appeal dismissed — Administrative tribunals with authority to apply law generally have jurisdiction to apply Charter to issues that arise in proper exercise of their statutory functions — In accordance with new approach developed to consolidate three distinct constitutional streams flowing from jurisprudence, proper inquiry is whether tribunal has jurisdiction to grant Charter remedies generally, and then whether it can grant particular remedy sought — ORB is quasi-judicial body that is authorized to decide questions of law — Accordingly, ORB is court of competent jurisdiction that can grant Charter remedies under s. 24(1) — However, considering scope and nature of ORB's statutory mandate and functions, accused was not entitled to Charter remedies he sought — Parliament did not intend to permit dangerous not criminally responsible patients to have access to absolute discharges as remedy — Finding that ORB was entitled to grant accused absolute discharge despite its conclusion that he was significant threat to public safety would be clear contradiction of Parliament's intent.

Constitutional law --- Charter of Rights and Freedoms — Nature of remedies under Charter — General principles

Tribunals — Accused was found not guilty by reason of insanity of sexual assault with weapon in 1984 — Accused was detained in various mental health facilities for 24 years and was diagnosed with several mental disorders — At review hearing before Ontario Review Board (ORB) in 2006, accused applied for absolute discharge under s. 24(1) of Canadian Charter of Rights and Freedoms on basis that conditions under which he was being detained infringed his Charter rights — ORB concluded it was not "court of competent jurisdiction" under s. 24(1) and dismissed application — Appeal by accused on issue of ORB's remedial jurisdiction under Charter was dismissed — Accused appealed — Appeal dismissed — Administrative tribunals with authority to apply law generally have jurisdiction to apply Charter to issues that arise in proper exercise of their statutory functions — In accordance with new approach developed to consolidate three distinct constitutional streams flowing from jurisprudence, proper inquiry is whether tribunal has jurisdiction to grant Charter remedies generally, and then whether it can grant particular remedy sought — ORB is quasi-judicial body

that is authorized to decide questions of law — Accordingly, ORB is court of competent jurisdiction that can grant Charter remedies under s. 24(1) — However, considering scope and nature of ORB's statutory mandate and functions, accused was not entitled to Charter remedies he sought — Parliament did not intend to permit dangerous not criminally responsible patients to have access to absolute discharges as remedy — Finding that ORB was entitled to grant accused absolute discharge despite its conclusion that he was significant threat to public safety would be clear contradiction of Parliament's intent.

Droit criminel --- Charte des droits et libertés — Compétence — Tribunal compétent

En 1984, l'accusé a été déclaré non coupable d'agression sexuelle armée pour cause d'aliénation mentale — Accusé a été détenu dans des établissements psychiatriques pendant 24 ans et on lui a diagnostiqué plusieurs problèmes psychiatriques — Lors de son examen annuel obligatoire devant la Commission ontarienne d'examen (COE) en 2006, l'accusé a déposé une requête visant à obtenir une libération inconditionnelle en application de l'art. 24(1) de la Charte canadienne des droits et libertés, faisant valoir que les conditions de sa détention violaient ses droits garantis en vertu de la Charte — COE a conclu qu'elle n'était pas un « tribunal compétent » au sens de l'art. 24(1) et a rejeté la requête — Appel interjeté par l'accusé relativement à la question de la compétence de la COE pour accorder une réparation en vertu de la Charte a été rejeté — Accusé a formé un pourvoi — Pourvoi rejeté — Tribunal doté du pouvoir d'accorder réparation sur le fondement de la Charte est un tribunal compétent — Conformément à la nouvelle approche mise de l'avant afin de concilier trois courants jurisprudentiels distincts en matière constitutionnelle, il s'agit de déterminer si le tribunal peut accorder des réparations sur le fondement de la Charte en général et ensuite si le tribunal peut accorder la réparation précise demandée — COE est un organisme quasi judiciaire et est admise à trancher des questions de droit — Aussi, la COE est un tribunal ayant compétence au sens de l'art. 24(1) pour accorder des réparations en vertu de la Charte — Toutefois, compte tenu de l'étendue et de la nature du mandat et des attributions de la COE, l'accusé n'était pas en droit d'obtenir les réparations qu'il recherchait en vertu de la Charte — Il n'était pas dans l'intention du législateur de permettre qu'un patient non responsable criminellement, mais dangereux, bénéficie d'une libération inconditionnelle à titre de réparation — Conclure que la COE pouvait accorder à l'accusé une libération inconditionnelle même si elle estimait qu'il représentait un risque important pour la sécurité du public irait manifestement à l'encontre de l'intention du législateur.

Droit criminel --- Procédure après le procès — Détention et libération après le procès — Garde des personnes souffrant de troubles mentaux — Révision de la décision

Compétence pour accorder réparation — En 1984, l'accusé a été déclaré non coupable d'agression sexuelle armée pour cause d'aliénation mentale — Accusé a été détenu dans des établissements psychiatriques pendant 24 ans et on lui a diagnostiqué plusieurs problèmes psychiatriques — Lors de son examen annuel obligatoire devant la Commission ontarienne d'examen (COE) en 2006, l'accusé a déposé une requête visant à obtenir une libération inconditionnelle en application de l'art. 24(1) de la Charte canadienne des droits et libertés, faisant valoir que les conditions de sa détention violaient ses droits garantis en vertu de la Charte — COE a conclu qu'elle n'était pas un « tribunal compétent » au sens de l'art. 24(1) et a rejeté la requête — Appel interjeté par l'accusé relativement à la question de la compétence de la COE pour accorder une réparation en vertu de la Charte a été rejeté — Accusé a formé un pourvoi — Pourvoi rejeté — Tribunaux administratifs investis du pouvoir d'appliquer la loi ont généralement compétence pour appliquer la Charte aux questions soulevées dans le cadre de l'exercice approprié de leurs attributions légales — Conformément à la nouvelle approche mise de l'avant afin de concilier trois courants jurisprudentiels distincts en matière constitutionnelle, il s'agit de déterminer si le tribunal peut accorder des réparations sur le fondement de la Charte en général et ensuite si le tribunal peut accorder la réparation précise demandée — COE est un organisme quasi judiciaire et est admise à trancher des questions de droit — Aussi, la COE est un tribunal ayant compétence au sens de l'art. 24(1) pour accorder des réparations en vertu de la Charte — Toutefois, compte tenu de l'étendue et de la nature du mandat et des attributions de la COE, l'accusé n'était pas en droit d'obtenir les réparations qu'il recherchait en vertu de la Charte — Il n'était pas dans l'intention du législateur de permettre qu'un patient non responsable criminellement, mais dangereux, bénéficie d'une libération inconditionnelle à titre de réparation — Conclure que la COE pouvait accorder à l'accusé une libération inconditionnelle même si elle estimait qu'il représentait un risque important pour la sécurité du public irait manifestement à l'encontre de l'intention du législateur.

Droit constitutionnel --- Charte des droits et libertés — Nature des réparations en vertu de la Charte — Principes généraux

Tribunaux — En 1984, l'accusé a été déclaré non coupable d'agression sexuelle armée pour cause d'aliénation mentale — Accusé a été détenu dans des établissements psychiatriques pendant 24 ans et on lui a diagnostiqué plusieurs problèmes psychiatriques — Lors de son examen annuel obligatoire devant la Commission ontarienne d'examen (COE) en 2006, l'accusé a déposé une requête visant à obtenir une libération inconditionnelle en application de l'art. 24(1) de la Charte canadienne des droits et libertés, faisant valoir que les conditions de sa détention violaient ses droits garantis en vertu de la Charte — COE a conclu qu'elle n'était pas un « tribunal compétent » au sens de l'art. 24(1) et a rejeté la requête — Appel interjeté par l'accusé relativement à la question de la compétence de la COE pour accorder une réparation en vertu de la Charte a été rejeté — Accusé a formé un pourvoi — Pourvoi rejeté — Tribunaux administratifs investis du pouvoir d'appliquer la loi ont généralement compétence pour appliquer la Charte aux questions soulevées dans le cadre de l'exercice approprié de leurs attributions légales — Conformément à la nouvelle approche mise de l'avant afin de concilier trois courants jurisprudentiels distincts en matière constitutionnelle, il s'agit de déterminer si le tribunal peut accorder des réparations sur le fondement de la Charte en général et ensuite si le tribunal peut accorder la réparation précise demandée — COE est un organisme quasi judiciaire et est admise à trancher des questions de droit — Aussi, la COE est un tribunal ayant compétence au sens de l'art. 24(1) pour accorder des réparations en vertu de la Charte — Toutefois, compte tenu de l'étendue et de la nature du mandat et des attributions de la COE, l'accusé n'était pas en droit d'obtenir les réparations qu'il recherchait en vertu de la Charte — Il n'était pas dans l'intention du législateur de permettre qu'un patient non responsable criminellement, mais dangereux, bénéficie d'une libération inconditionnelle à titre de réparation — Conclure que la COE pouvait accorder à l'accusé une libération inconditionnelle même si elle estimait qu'il représentait un risque important pour la sécurité du public irait manifestement à l'encontre de l'intention du législateur.

In 1984, the accused was found not guilty by reason of insanity of sexual assault with a weapon. Since then, he had been detained in various mental health facilities and been diagnosed with several mental disorders. At his annual review hearing before the Ontario Review Board (ORB) in 2006, the accused applied for an absolute discharge under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, claiming that the living and disciplinary conditions under which he was being detained infringed his rights under ss. 2(b), 2(d), 7, 8, 9, and 15(1) of the *Charter*. The ORB concluded that the accused was an unsuitable candidate for an absolute discharge since he was a threat to public safety, and ordered his continued detention at the Centre for Addiction and Mental Health (CAMH). The ORB further found it was not a "court of competent jurisdiction" under s. 24(1). The application was dismissed. The Court of Appeal upheld the ORB's finding that it lacked jurisdiction to grant an absolute discharge as a *Charter* remedy since granting such a remedy to a patient who was a "significant threat to the safety of the public" would frustrate parliamentary intent under s. 672.54(a) of the *Criminal Code*. However, the court also held that it was unreasonable for the ORB not to address the treatment impasse plaguing the accused's detention and remitted that issue back to the ORB. The accused appealed the finding with respect to the issue of the ORB's remedial jurisdiction under the *Charter*. On appeal, for the first time, he also sought an order directing CAMH to provide him with access to psychotherapy, and an order prohibiting him from being housed near a construction site.

Held: The appeal was dismissed.

Per Abella J. (McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Charron, Rothstein, Cromwell JJ. concurring): Over the past 25 years, three distinct constitutional streams have flowed from this Court's jurisprudence regarding the *Charter* and its relationship with administrative tribunals. The first wave of relevant cases started in 1986 with *R. v. Mills*, [1986] 1 S.C.R. 863, which established that a court or administrative tribunal was a "court of competent jurisdiction" under s. 24(1) of the *Charter* if it was a "court" with jurisdiction over the person, the subject matter, and the particular remedy sought. The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, which concluded that any exercise of statutory discretion is subject to the *Charter* and its values. The third and final wave started in 1990 with *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, followed in 1991 by *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 and *Tétreault-Gadoury v. Canada (Employment & Immigration Commission)*, [1991] 2 S.C.R. 22. The *Cuddy Chicks* trilogy established that specialized tribunals with both

the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates.

This jurisprudential evolution has cemented the direct relationship between the *Charter*, its remedial provisions, and administrative tribunals. The principles governing remedial jurisdiction under the *Charter* apply to both courts and administrative tribunals. With rare exceptions, administrative tribunals with the authority to apply the law have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions. In addition, expert tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction, and in exercising their statutory discretion, they must comply with the *Charter*.

In light of the gradual expansion of the approach to the scope of the *Charter* and its relationship with administrative tribunals, it is no longer helpful to limit the inquiry to whether a court or tribunal is a "court of competent jurisdiction" to grant a particular remedy within the meaning of s. 24(1). The question instead should be whether a particular tribunal has the jurisdiction to grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, it is a court of competent jurisdiction and can consider and apply the *Charter* and *Charter* remedies when resolving the matters properly before it. The question then is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, the issue will always be whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. This approach has the benefit of attributing *Charter* jurisdiction to the tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether it is a court of competent jurisdiction. Further, there are practical advantages and a constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals.

As a quasi-judicial body with significant authority over a vulnerable population, the ORB is authorized to decide questions of law and is a court of competent jurisdiction. It operates under Pt. XX.1 of the *Code* as a specialized statutory tribunal with ongoing supervisory jurisdiction over the treatment, assessment, detention, and discharge of accused persons who have been found not criminally responsible (NCR) by reason of mental disorder. The language of Pt. XX.1 is indicative of the ORB's power to decide legal questions, and there is nothing to suggest that Parliament intended to withdraw *Charter* jurisdiction from the scope of the ORB's mandate. It follows that the ORB is entitled to decide *Charter* questions that arise in the course of its proceedings.

However, considering the scope and nature of the ORB's statutory mandate and functions, the particular remedies the accused sought did not fit within the ORB's statutory scheme. The review board regime is intended to reconcile the "twin goals" of protecting the public from dangerous offenders, and treating NCR patients fairly and appropriately. Public safety is the paramount concern. While Pt. XX.1 of the *Code* provides the ORB with "wide latitude" in the exercise of its powers, Parliament did not imbue it with free remedial rein. Part XX.1 precludes it from granting either an absolute discharge to an NCR patient found to be dangerous or an order directing that a hospital authority provide an NCR patient with particular treatment. The ORB's duty to protect public safety, its statutory authority to grant absolute discharges only to non-dangerous NCR patients, and its mandate to assess and treat NCR patients with a view to reintegration rather than recidivism, all point to Parliament's intent not to permit dangerous NCR patients to have access to absolute discharges as a remedy. These factors led to the conclusion that it would not be appropriate and just in the circumstances for the ORB to grant the accused an absolute discharge. The same was true of his request for a treatment order. Allowing the ORB to prescribe or impose treatment is expressly prohibited by s. 672.55 of the *Code* and inconsistent with the constitutional division of powers. A finding that the ORB was entitled to grant the accused an absolute discharge despite its conclusion that he was a significant threat to public safety, or to direct CAMH to provide him with a particular treatment, would be a clear contradiction of Parliament's intent. Given the statutory scheme and the constitutional considerations, the ORB could not grant these remedies. Finally, neither the validity of the accused's complaint about where his room was located, nor the propriety of any redress, had been determined by the ORB.

En 1984, l'accusé a été déclaré non coupable d'agression sexuelle armée pour cause d'aliénation mentale. Depuis lors, l'accusé a été détenu dans des établissements psychiatriques et on lui a diagnostiqué plusieurs problèmes psychiatriques.

Lors de son examen annuel obligatoire devant la Commission ontarienne d'examen (COE) en 2006, l'accusé a déposé une requête visant à obtenir une libération inconditionnelle en application de l'art. 24(1) de la *Charte canadienne des droits et libertés*, faisant valoir que les conditions de vie et l'encadrement disciplinaire dans le cadre de sa détention violaient ses droits garantis en vertu des art. 2b), 2d), 7, 8, 9 et 15(1) de la *Charte*. La COE a conclu que l'accusé n'était pas un candidat admissible à une libération inconditionnelle puisqu'il constituait un risque pour la sécurité du public et a ordonné qu'il demeure détenu au Centre de toxicomanie et de santé mentale (CTSM). La COE a de plus conclu qu'elle n'était pas un « tribunal compétent » au sens de l'art. 24(1). La requête a été rejetée. La Cour d'appel a confirmé la décision de la COE à l'effet que celle-ci n'avait pas compétence pour accorder une libération inconditionnelle à titre de réparation fondée sur la *Charte* car le fait d'accorder une telle mesure de réparation à un patient représentant un « risque important pour la sécurité du public » irait à l'encontre de l'intention du législateur exprimée à l'art. 672.54a) du *Code criminel*. En revanche, la cour a ajouté que la COE s'était déraisonnablement abstenue de se prononcer sur l'impasse thérapeutique qui persistait dans le cadre de la détention de l'accusé et cette question a été renvoyée à la COE. L'accusé a formé un pourvoi à l'encontre de la décision concernant la question de la compétence de la COE d'accorder une mesure de réparation fondée sur la *Charte*. Dans son pourvoi, l'accusé a également sollicité pour la première fois une ordonnance enjoignant au CTSM de lui permettre de bénéficier d'une psychothérapie, et une autre ordonnance interdisant à l'établissement de le loger près d'un chantier de construction.

Arrêt: Le pourvoi a été rejeté.

Abella, J. (McLachlin, J.C.C., Binnie, LeBel, Deschamps, Fish, Charron, Rothstein, Cromwell, J.J., souscrivant à son opinion): Au cours des 25 dernières années, trois courants distincts ressortaient de la jurisprudence de la Cour en matière constitutionnelle relativement à la *Charte* et son interaction avec les tribunaux administratifs. La première vague jurisprudentielle s'est amorcée en 1986 avec l'arrêt *Mills c. La Reine*, [1986] 1 R.C.S. 863, lequel a établi qu'une cour de justice ou un tribunal administratif était un « tribunal compétent » au sens de l'art. 24(1) de la *Charte* dans la mesure où il s'agit d'un « tribunal » ayant compétence à l'égard des parties, de l'objet du litige et de la réparation demandée. L'arrêt *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, a marqué le début de la deuxième vague en 1989 en concluant que tout pouvoir discrétionnaire doit être exercé dans le respect de la *Charte* et des valeurs qui la sous-tendent. La troisième et dernière vague a vu le jour en 1990 avec l'arrêt *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570, suivi en 1991 de *Cuddy Chicks Ltd. c. Ontario (Commission des relations de travail)*, [1991] 2 R.C.S. 5, et de *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22. L'enseignement transmis par ces arrêts — la trilogie *Cuddy Chicks* — est qu'un tribunal spécialisé jouissant à la fois de l'expertise et du pouvoir requis pour trancher une question de droit est le mieux placé pour trancher une question constitutionnelle se rapportant à son mandat légal.

Cette évolution de la jurisprudence a affermi la relation directe entre la *Charte*, ses dispositions réparatrices et les tribunaux administratifs. Les principes régissant le pouvoir de réparation conféré par la *Charte* s'appliquent aux cours de justice et aux tribunaux administratifs. Sauf rares exceptions, les tribunaux administratifs investis du pouvoir d'appliquer la loi ont compétence pour appliquer la *Charte* aux questions soulevées dans le cadre de l'exercice approprié de leurs attributions légales. De plus, les tribunaux spécialisés devraient non seulement jouer un rôle de premier plan dans le règlement des questions liées à la *Charte* et relevant de leur compétence particulière, mais également se conformer à la *Charte* dans l'exercice de leur pouvoir discrétionnaire.

En tenant compte de cet élargissement progressif de la portée de la *Charte* et de son interaction avec les tribunaux administratifs, il ne paraît plus utile que l'analyse vise uniquement à déterminer si une cour de justice ou un tribunal administratif est un « tribunal compétent » seulement pour les besoins d'une réparation donnée fondée sur l'art. 24(1). Il s'agit plutôt de déterminer si le tribunal en cause peut accorder des réparations sur le fondement de la *Charte* en général. À cette fin, il faut d'abord se demander si le tribunal administratif a le pouvoir exprès ou tacite de trancher une question de droit. Si tel est le cas et qu'il n'est pas clairement établi que le législateur a voulu soustraire l'application de la *Charte* à la compétence du tribunal en cause, ce dernier est un tribunal compétent et peut examiner et appliquer la *Charte*, y compris les réparations qu'elle prévoit, lorsqu'il statue dans une affaire dont il est régulièrement saisi. Il reste alors à déterminer si le tribunal peut accorder la réparation précise demandée eu égard au régime législatif applicable. Il est alors nécessaire de cerner l'intention du législateur. Dès lors, la question qui se pose toujours est celle de savoir si la réparation demandée est de celles que le législateur a voulu que le tribunal administratif en cause puisse accorder eu égard au cadre législatif établi.

Cette démarche présente l'avantage de reconnaître la compétence que confère la *Charte* au tribunal administratif en tant qu'institution au lieu d'exiger que les parties fassent déterminer à chaque fois s'il est un tribunal compétent. De plus, il existe des avantages pratiques et un fondement constitutionnel à la solution qui consiste à permettre aux Canadiens de faire valoir les droits et les libertés que leur garantit la *Charte* devant le tribunal qui est le plus à leur portée sans qu'ils aient à fractionner leur recours et saisir à la fois une cour supérieure et un tribunal administratif.

La COE est un organisme quasi judiciaire exerçant un grand pouvoir sur des gens vulnérables et, à ce titre, elle est admise à trancher des questions de droit et elle est un tribunal compétent. Constituée et régie par la partie XX.1 du *Code*, la COE est un tribunal spécialisé d'origine législative possédant un pouvoir de surveillance continu à l'égard du traitement, de l'évaluation, de la détention et de la libération des accusés qui ont été déclarés non responsables criminellement (NRC) pour cause de troubles mentaux. Le libellé de la partie XX.1 permet de conclure que la COE a le pouvoir de trancher des questions juridiques, et aucune disposition ne permet de conclure que le législateur a voulu soustraire l'application de la *Charte* à la compétence de la COE. Il s'ensuit que la COE peut statuer sur les questions soulevées devant elle liées à l'application de la *Charte*.

Toutefois, compte tenu de l'étendue et la nature du mandat et des attributions de la COE, les réparations précises demandées par l'accusé n'étaient pas de celles que la COE pouvait accorder eu égard à son régime législatif. Le système des commissions d'examen vise à concilier le double objectif de protéger le public face aux personnes dangereuses et de traiter de façon juste et appropriée les patients NRC. La sécurité du public est la considération primordiale. Bien que la partie XX.1 du *Code* confère à la COE une « grande latitude » dans l'exercice de ses pouvoirs, le législateur ne lui a pas donné carte blanche en ce qui concerne les réparations. La partie XX.1 empêche la COE d'accorder une libération inconditionnelle à un patient NRC jugé dangereux ou d'ordonner au responsable de l'hôpital de soumettre un tel patient à un traitement particulier. L'obligation de la COE de protéger le public, son pouvoir légal d'accorder une libération inconditionnelle, mais uniquement à un patient NRC non dangereux, et son mandat consistant à évaluer et à traiter les patients NRC dans la perspective d'une réinsertion, et non d'une récidive, témoignent de l'intention du législateur d'empêcher qu'un patient NRC, mais dangereux, bénéficie d'une libération inconditionnelle à titre de réparation. Ces éléments menaient à la conclusion qu'il ne saurait être convenable et juste, eu égard à la situation actuelle de l'accusé, que la COE le libère inconditionnellement. Il en était de même pour sa demande visant à obtenir une ordonnance de traitement. Permettre à la COE de prescrire ou d'imposer un traitement était non seulement expressément interdit par l'art. 672.55 du *Code*, mais aussi incompatible avec le partage constitutionnel des compétences. Conclure que la COE pouvait accorder à l'accusé une libération inconditionnelle même si elle estimait qu'il représentait un risque important pour la sécurité du public, ou ordonner au CTSM de lui prodiguer un traitement particulier, irait manifestement à l'encontre de l'intention du législateur. Compte tenu du régime législatif et des considérations d'ordre constitutionnel, la COE ne pouvait accorder pareilles réparations. Enfin, la COE ne s'était prononcée ni sur la validité du grief de l'accusé portant sur l'emplacement de sa chambre ni sur l'opportunité de cette réparation.

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s. 2(d) — referred to

s. 7 — referred to

s. 8 — referred to

s. 9 — referred to

s. 11(b) — referred to

s. 12 — referred to

s. 15 — referred to

s. 15(1) — referred to

s. 24 — referred to

s. 24(1) — considered

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s. 672.4(1) [en. 1991, c. 43, s. 4] — referred to

s. 672.54 [en. 1991, c. 43, s. 4] — considered

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Generally — referred to

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Generally — referred to

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s. 31 — referred to

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Generally — referred to

s. 10B — referred to

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Generally — referred to

Words and phrases considered:

court of competent jurisdiction

[Per Abella J. (McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Charron, Rothstein, Cromwell JJ. concurring):] A tribunal which has the jurisdiction to grant [*Canadian Charter of Rights and Freedoms*] remedies is a court of competent jurisdiction.

Termes et locutions cités :

tribunal compétent

[Abella, J. (McLachlin, J.C.C., Binnie, LeBel, Deschamps, Fish, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) :] Le tribunal doté du pouvoir d'accorder réparation sur le fondement de la [*Charte canadienne des droits et libertés*] est un tribunal compétent.

APPEAL by accused from judgment, reported at *R. v. Conway* (2008), 90 O.R. (3d) 335, (sub nom. *C. (P.) v. Ontario*) 231 C.C.C. (3d) 429, 2008 ONCA 326, 235 O.A.C. 341, (sub nom. *C. (P.) v. Ontario*) 293 D.L.R. (4th) 729, 169 C.R.R. (2d) 314, 2008 CarswellOnt 2352 (Ont. C.A.), dismissing his appeal from decision of Ontario Review Board with respect to Board's remedial jurisdiction under *Canadian Charter of Rights and Freedoms*.

POURVOI de l'accusé à l'encontre d'un jugement publié à *R. v. Conway* (2008), 90 O.R. (3d) 335, (sub nom. *C. (P.) v. Ontario*) 231 C.C.C. (3d) 429, 2008 ONCA 326, 235 O.A.C. 341, (sub nom. *C. (P.) v. Ontario*) 293 D.L.R. (4th) 729, 169 C.R.R. (2d) 314, 2008 CarswellOnt 2352 (Ont. C.A.), ayant rejeté l'appel qu'il a interjeté à l'encontre de la décision de la Commission ontarienne d'examen relativement au pouvoir de la Commission d'accorder réparation en vertu de la *Charte canadienne des droits et libertés*.

Abella J.:

1 The specific issue in this appeal is the remedial jurisdiction of the Ontario Review Board under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. The wider issue is the relationship between the *Charter*, its remedial provisions and administrative tribunals generally.

2 There are two provisions in the *Charter* dealing with remedies: s. 24(1) and s. 24(2). Section 24(1) states that anyone whose *Charter* rights or freedoms have been infringed or denied may apply to a "court of competent jurisdiction" to obtain a remedy that is "appropriate and just in the circumstances". Section 24(2) states that in those proceedings, a court can exclude evidence obtained in violation of the *Charter* if its admission would bring the administration of justice into disrepute. A constitutional remedy is also available under s. 52(1) of the *Constitution Act, 1982*, which states that

the Constitution is the supreme law of Canada, and that any law inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.

3 When the *Charter* was proclaimed in 1982, its relationship with administrative tribunals was a *tabula rasa*. It was not long, however, before various dimensions of the relationship found their way to this Court.

4 The first relevant wave of cases started in 1986 with *R. v. Mills*, [1986] 1 S.C.R. 863 (S.C.C.). The philosophical legacy of *Mills* was in its conclusion that for the purposes of s. 24(1) of the *Charter*, a "court of competent jurisdiction" was a "court" with jurisdiction over the person, the subject matter, and the remedy sought. For the next 25 years, this three-part test served as the grid for determining whether a court or administrative tribunal was a "court of competent jurisdiction" under s. 24(1) of the *Charter* (*British Columbia (Attorney General) v. Craig*, [1986] 1 S.C.R. 981 (S.C.C.) [hereinafter "*Carter*"; *Argentina (Republic) v. Mellino*, [1987] 1 S.C.R. 536 (S.C.C.); *United States v. Allard*, [1987] 1 S.C.R. 564 (S.C.C.); *R. v. Rahey*, [1987] 1 S.C.R. 588 (S.C.C.); *R. v. Gamble*, [1988] 2 S.C.R. 595 (S.C.C.); *R. v. Smith*, [1989] 2 S.C.R. 1120 (S.C.C.); *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.); *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75 (S.C.C.); *Ontario v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 (S.C.C.) ("*Dunedin*"); *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623 (S.C.C.); *R. v. Menard*, 2008 BCCA 521, 240 C.C.C. (3d) 1 (B.C. C.A.); *British Columbia (Director of Child, Family & Community Service) v. L. (T.)*, 2009 BCPC 293, 73 R.F.L. (6th) 455 (B.C. Prov. Ct.), aff'd 2010 BCSC 105 (B.C. S.C.)).

5 The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.). Although *Slaight* did not — and does not — offer any direct guidance on what constitutes a "court of competent jurisdiction", its legacy was in its conclusion that any exercise of statutory discretion is subject to the *Charter* and its values (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), at p. 875; *Eaton v. Brant (County) Board of Education* (1996), [1997] 1 S.C.R. 241 (S.C.C.); *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.); *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at paras. 53-56; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 (S.C.C.), at paras. 38-40; *Multani c. Marguerite-Bourgeois (Commission scolaire)*, 2006 SCC 6, [2006] 1 S.C.R. 256 (S.C.C.), at para. 22; *Société des Acadiens & Acadiennes du Nouveau-Brunswick c. R.*, 2008 SCC 15, [2008] 1 S.C.R. 383 (S.C.C.), at paras. 20-24).

6 The third and final wave started in 1990 with *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 (S.C.C.), followed in 1991 by *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 (S.C.C.), and *Tétreault-Gadoury v. Canada (Employment & Immigration Commission)*, [1991] 2 S.C.R. 22 (S.C.C.). The legacy of these cases — the *Cuddy Chicks* trilogy — is in their conclusion that specialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates (*Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54, [2003] 2 S.C.R. 504 (S.C.C.); *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585 (S.C.C.); *Québec (Procureure générale) c. Québec (Tribunal des droits de la personne)*, 2004 SCC 40, [2004] 2 S.C.R. 223 (S.C.C.) [hereinafter Québec (Human Rights Tribunal)]; *Okwuobi c. Lester B. Pearson (Commission scolaire)*, 2005 SCC 16, [2005] 1 S.C.R. 257 (S.C.C.)).

7 The impact of these three jurisprudential waves has been to confine constitutional issues for administrative tribunals to three discrete universes. It seems to me that after 25 years of parallel evolution, it is time to consider whether the universes can appropriately be merged.

Background

8 Paul Conway is 56 years old. As a child, he was physically and sexually abused by close relatives. During his twenties, Mr. Conway was twice convicted of assault.

9 In September 1983, at the age of 29, Mr. Conway threatened his aunt at knife point and forced her to have sexual intercourse with him repeatedly over the course of a few hours. On February 27, 1984, Mr. Conway was found not guilty by reason of insanity on a charge of sexual assault with a weapon.

10 Since the verdict, Mr. Conway has been detained in mental health facilities across Ontario, primarily the Penetanguishene Mental Health Centre's maximum security unit. He has been diagnosed with an unspecified psychotic disorder, a mixed personality disorder with paranoid, borderline and narcissistic features, potential post traumatic stress disorder and potential paraphilia.

11 In 2005, following Mr. Conway's mandatory annual review hearing before the Ontario Review Board, the Board transferred Mr. Conway from Penetanguishene to Toronto's Centre for Addiction and Mental Health ("CAMH"), a medium security facility. The Board observed that although Mr. Conway was "unconvinced that he suffers from a mental illness" and was "uncured", his treatment required that he have hope of eventually being integrated into the community.

12 Prior to his annual review hearing in 2006, Mr. Conway sent a Notice of Constitutional Question to the Board, CAMH, and the Attorneys General of Ontario and Canada, alleging breaches of ss. 2(b), 2(d), 7, 8, 9, 12 and 15(1) of the *Charter*. He listed the following grounds as the basis of the claim that his constitutional rights had been violated and that he was therefore entitled to an absolute discharge under s. 24(1):

Mr. Conway states that there is little regard for the living conditions under which he is detained and that these factors have a negative impact on his mental and physical health. These conditions include:

- a. Construction noise, fumes and dust associated with the renovation of the unit directly below him which affect his peace, tranquillity and convalescence;
- b. Failure to respect his rights, individuality, and expressions of same;
- c. Interruptions by staff of his telephone calls and unnecessary and improper implementation of call restrictions including when he is speaking with legal counsel;
- d. Unfair treatment by staff which manifests in differential treatment towards him compared with other NCR accused individuals detained on the unit; and
- e. Failure to provide for his needs and advocacy for his expressed needs;

.....

Mr. Conway is currently incarcerated and is subject to infringements on his liberty, safety, dignity and security of his person without due process of the law, including:

- a) environmental pollution;
- b) noise pollution;
- c) arbitrary actions by staff;
- d) threats of attack and attacks by inpatients;
- e) hostility by staff against him;
- f) threats of the use of chemical and mechanical restraints;
- g) failure to provide emotional counselling for the abuse suffered by Mr. Conway as a child (including emotional, physical, sexual and domestic abuse) which is the real source of Mr. Conway's mental health problems and emotional distress;
- h) failure to provide an environment which allows him to feel safe on a daily basis;
- i) failure to provide an environment where the Rule of Law prevails;

- j) failure to provide an environment where Mr. Conway is afforded procedural fairness in respect of any restriction of his liberties;
- k) failure to provide an environment which is free of racism;
- l) failure to provide [an] environment which is cross-culturally sensitive; and
- m) such other and further infringements and violations as counsel may advise and the Board may permit;

These violations on Mr. Conway's rights have affected Mr. Conway such that he no longer can benefit therapeutically from the environment.

13 After an eight-day hearing, the five-member panel of the Ontario Review Board unanimously concluded that Mr. Conway was "an egocentric, impulsive bully with a poor to absent ability to control his own behaviour", had continued paranoid and delusional ideation, and had a persistent habit of threatening and intimidating others, high actuarial scores for violent recidivism and an untreated clinical condition.

14 He was consequently found to be a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute discharge under the statute, which states that an absolute discharge is unavailable to any patient who is a "significant threat to the safety of the public" (*Criminal Code*, R.S.C. 1985, c. C-46, s. 672.54). Accordingly, Mr. Conway was ordered to remain at CAMH. The Board suggested, but did not formally order, that CAMH establish a "renewed treating team" for Mr. Conway, enrol him in anger management and sexual assault prevention programs, and investigate whether he had sustained brain damage in a car accident more than 30 years ago.

15 As for Mr. Conway's application for a remedy under s. 24(1) of the *Charter*, the Board concluded that it had no *Charter* jurisdiction in light of its statutory structure and function, its own past rulings, and those of other Canadian review boards denying s. 24(1) jurisdiction. It therefore had no jurisdiction to consider Mr. Conway's *Charter* claims.

16 Mr. Conway appealed to the Ontario Court of Appeal, which unanimously found that an absolute discharge was not an available remedy for Mr. Conway under s. 24(1) (2008 ONCA 326, 90 O.R. (3d) 335 (Ont. C.A.)). Armstrong J.A. for the majority concluded that the Board lacked jurisdiction to grant an absolute discharge as a *Charter* remedy because granting such a remedy to a patient who, like Mr. Conway, was a significant threat to the public, would frustrate Parliamentary intent. The Board was therefore not a court of competent jurisdiction pursuant to the test set out in *Mills* since it lacked jurisdiction over the particular remedy sought. Lang J.A. agreed that an absolute discharge was unavailable to Mr. Conway, but she was of the view that the Board was competent to make other orders that would be appropriate remedies for a breach of a patient's *Charter* rights.

17 Notably, the Court of Appeal also unanimously concluded that it was unreasonable for the Board not to make a formal order setting out conditions addressing the treatment impasse plaguing Mr. Conway's detention. This issue was remitted back to the Board.

18 This Court, in order to decide whether Mr. Conway is entitled to the *Charter* remedies he is seeking, must first determine whether the Ontario Review Board is a court of competent jurisdiction which can grant *Charter* remedies under s. 24(1). In accordance with the new approach developed in these reasons, I am of the view that it is. On the other hand, I am not persuaded that Mr. Conway is entitled to the particular *Charter* remedies he seeks and would therefore dismiss the appeal.

Analysis

19 Section 24(1) states:

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.

20 We do not have one *Charter* for the courts and another for administrative tribunals (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 (S.C.C.), per McLachlin J. (in dissent), at para. 70; *Dunedin; Douglas College; Martin*). This truism is reflected in this Court's recognition that the principles governing remedial jurisdiction under the *Charter* apply to both courts and administrative tribunals. It is also reflected in the jurisprudence flowing from *Mills* and the *Cuddy Chicks* trilogy according to which, with rare exceptions, administrative tribunals with the authority to apply the law have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions.

21 The jurisprudential evolution has resulted in this Court's acceptance not only of the proposition that expert tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction, but also that in exercising their statutory discretion, they must comply with the *Charter*.

22 All of these developments serve to cement the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. In light of this evolution, it seems to me to be no longer helpful to limit the inquiry to whether a court or tribunal is a court of competent jurisdiction only for the purposes of a particular remedy. The question instead should be institutional: does this particular tribunal have the jurisdiction to grant *Charter* remedies generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If it does, and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate (*Cuddy Chicks* trilogy; *Martin*). A tribunal which has the jurisdiction to grant *Charter* remedies is a court of competent jurisdiction. The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought based on its statutory mandate. The answer to this question will depend on legislative intent, as discerned from the tribunal's statutory mandate (the *Mills* cases).

23 This approach has the benefit of attributing *Charter* jurisdiction to the tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether it is a court of competent jurisdiction. It is also an approach which emerges from a review of the three distinct constitutional streams flowing from this Court's jurisprudence. As the following review shows, this Court has gradually expanded the approach to the scope of the *Charter* and its relationship with administrative tribunals. These reasons are an attempt to consolidate the results of that expansion.

The Mills Cases

24 In *Mills*, it was decided that relief is available under s. 24(1) of the *Charter* if the "court" from which relief is sought has jurisdiction over the parties, the subject matter and the remedy sought. Since 1986, the *Mills* test has been consistently applied to determine whether courts and tribunals acting under specific statutory schemes are courts of competent jurisdiction to grant particular remedies under s. 24(1).

25 The early cases considered the remedial jurisdiction of statutory and superior courts. In *Mills* and *Carter*, this Court held that a provincial court judge sitting as a preliminary inquiry court was not a court of competent jurisdiction for the purpose of ordering a stay of proceedings for an alleged s. 11(b) violation. The following year, this Court concluded that extradition judges had the same institutional features as preliminary inquiry judges, and could therefore not order a stay in the event of a *Charter* breach (*Mellino; Allard*). Further, in *Mellino*, the Court observed that since extradition proceedings were reviewable by superior courts by way of *habeas corpus*, those superior courts were the courts of competent jurisdiction to grant a stay under s. 24(1), not the extradition judge.

26 In 1988, in *Gamble*, the Court held that a superior court in the province where an individual is in custody is a court of competent jurisdiction to hear an application for *habeas corpus*, stating:

Where the courts of Ontario have jurisdiction over the subject matter and the person, it seems to me that they may, under the broad provisions of s. 24(1) of the *Charter*, grant such relief as it is within their jurisdiction to grant and as they consider appropriate and just in the circumstances. [p. 631]

27 In 1995, in *Weber*, the Court expanded the scope of the *Mills* inquiry to cover administrative tribunals. The issue was whether a labour arbitrator appointed under the *Labour Relations Act*, R.S.O. 1990, c. L.2, was a court of competent jurisdiction for the purpose of granting damages and a declaration under s. 24(1) in relation to disputes which in their essential character arose out of the collective agreement between the parties. Weber had sought relief for what he alleged were breaches of ss. 7 and 8 of the *Charter* committed by his employer, Ontario Hydro, who had gathered surveillance evidence about him during his extended sick leave. The Court had to determine whether Weber was required to raise his *Charter* claims before a labour arbitrator or before the superior court.

28 For the majority, McLachlin J. rejected an approach that would bifurcate the proceedings between the arbitrator and the courts. In her view, the "essential character" of Weber's claim was unfair treatment by the employer. The collective agreement expressly stated that the grievance procedure applied to "[a]ny allegation that an employee has been subjected to unfair treatment". Weber's *Charter* claims were therefore found to be within the arbitrator's exclusive jurisdiction:

[W]hile the informal processes of such tribunals might not be entirely suited to dealing with constitutional issues, clear advantages to the practice exist. Citizens are permitted to assert their *Charter* rights in a prompt, inexpensive, informal way. The parties are not required to duplicate submissions on the case in two different fora, for determination of two different legal issues. A specialized tribunal can quickly sift the facts and compile a record for the reviewing court. And the specialized competence of the tribunal may provide assistance to the reviewing court.

.....

... it is not the name of the tribunal that determines the matter, but its powers. ... The practical import of fitting *Charter* remedies into the existing system of tribunals, as McIntyre J. notes, [*in Mills*] is that litigants have "direct" access to *Charter* remedies in the tribunal charged with deciding their case. [paras. 60 and 65]

29 Foreshadowing the debate that is before us in this case, Iacobucci J. in dissent, expressed the view that the arbitrator was neither a "court" nor of "competent jurisdiction" for the purpose of granting *Charter* remedies under s. 24(1). In his view, Weber was entitled to seek labour remedies from the arbitrator, but not those under the *Charter*.

30 The *Weber* "exclusive jurisdiction model" enunciated by McLachlin J., which directed that an administrative tribunal should decide *all* matters whose essential character falls within the tribunal's specialized statutory jurisdiction, is now a well-established principle of administrative law (*Regina Police Assn. v. Regina (City) Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360 (S.C.C.); *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Québec (Procureure générale)*, 2004 SCC 39, [2004] 2 S.C.R. 185 (S.C.C.); *Québec (Human Rights Tribunal)*; *Vaughan v. R.*, 2005 SCC 11, [2005] 1 S.C.R. 146 (S.C.C.); *Okwuobi*; Andrew K. Lokan and Christopher M. Dassios, *Constitutional Litigation in Canada* (2006), at p. 4-15).

31 The next year, this Court decided *Mooring*. The issue was whether the National Parole Board was a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the *Charter*. Sopinka J., writing for the majority, considered only the third step of the *Mills* test since he found it to be determinative. In his view, it followed from the Parole Board's structure and function, as well as the language of its enabling statute, that the Board could not exclude evidence under s. 24(2) of the *Charter*. Pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, the Board was not bound by the traditional rules of evidence and was obliged to consider all available, relevant information when rendering its decisions. The ability to exclude evidence would have been, in Sopinka J.'s view, inconsistent with the intent and specific provisions of the Parole Board's statutory scheme. Since the *Mills* test was ultimately a means of discerning Parliamentary intent, this inconsistency precluded the Board from being a court of competent jurisdiction for the purpose of granting the particular remedy sought. Sopinka J. concluded instead that the Parole Board's "duty of fairness" obligations offered sufficient protection to those appearing before the Board.

32 Major J. (McLachlin J. concurring), in a vigorous dissent, criticized the majority's implicit resurrection of the idea, rejected in *Weber*, that only courts could be "courts of competent jurisdiction" for the purpose of s. 24(1). Major J. was of the view that the policy considerations animating the Court's reasoning under s. 52 in the *Cuddy Chicks* trilogy applied equally in cases arising under s. 24(1). He felt that "[o]f primary importance is the ability of the citizen to rely upon and assert *Charter* rights in a direct manner in the normal procedural context in which the issue arises" (para. 61). As he explained:

There is no reason in principle why any of the practical advantages enunciated by La Forest J. in the trilogy should apply with any less force to a tribunal granting a remedy under s. 24 than to a tribunal declining to enforce a constitutionally invalid statutory provision. If anything, tailoring a specific *Charter* remedy for a specific applicant before a tribunal is more suited to a tribunal's special role in determining rights on a case by case basis in the tribunal's area of expertise. It has less serious ramifications than determining that a statutory provision will not be applied on *Charter* grounds. [para. 64]

33 Turning to the *Mills* test, Major J. concluded that the only real question before the Court was whether the Parole Board was a court of competent jurisdiction for the purpose of awarding the specific remedy sought by the applicant, namely the exclusion of evidence. While the Parole Board was not bound by formal rules of evidence, it was nonetheless obliged to exclude information that was irrelevant, unreliable or inaccurate. Accordingly, the Board had the jurisdiction to exclude evidence and it therefore met the third *Mills* criterion. Major J. expressly disagreed with Sopinka J.'s conclusion that the doctrine of procedural fairness provided sufficient protection of constitutional rights in the context of the Board's proceedings.

34 More recently, the Court has had two further opportunities to consider the *Mills* test. In *Dunedin*, the issue was whether a provincial court judge with jurisdiction under Ontario's *Provincial Offences Act*, R.S.O. 1990, c. P.33, was a court of competent jurisdiction for the purpose of ordering costs against the Crown for failure to comply with the *Charter*. McLachlin C.J., writing for a unanimous Court, again confirmed that applying the *Mills* test is, first and foremost, a matter of discerning legislative intent. The question in each case is whether the legislature intended to give the court or tribunal the power to apply the *Charter*:

[W]here a legislature confers on a court or tribunal a function that involves the determination of matters where *Charter* rights may be affected, and furnishes it with processes and powers capable of fairly and justly resolving those incidental *Charter* issues, then it must be inferred, in the absence of a contrary intention, that the legislature intended to empower the tribunal to apply the *Charter*. [para. 75]

35 This approach "promotes direct and early access to *Charter* remedies in forums competent to issue such relief" (para. 75). Applying it to the issue before her, McLachlin C.J. concluded that both the structure and function of the provincial offences court supported the view that it could and should apply the *Charter*. Looking first to function, McLachlin C.J. concluded that the provincial offences court's role as a quasi-criminal court of first instance weighed strongly in favour of expansive remedial jurisdiction under s. 24 of the *Charter*. Such jurisdiction would promote the resolution of *Charter* issues in the forum best situated to resolve them:

Provincial offences courts, like other criminal trial courts, are the preferred forum for issuing *Charter* remedies in the cases originating before them, where they will have the 'fullest account of the facts available'....This role commends a full complement of criminal law remedies at the disposal of provincial offences courts. This broad remedial jurisdiction is necessary to prevent frequent resort to superior courts to fill gaps in statutory jurisdiction, and to ensure that the remedy that ultimately flows is in fact both appropriate and just. [para. 79]

36 McLachlin C.J. also sought, as she had in *Weber*, to avoid the unnecessary bifurcation of avenues of relief:

[F]racturing the availability of *Charter* remedies between provincial offences courts and superior courts could, in some circumstances, effectively deny the accused access to a remedy and a court of competent jurisdiction. It may

be unrealistic to expect criminal accused, who often rely on legal aid to mount a defence against the state, to bring a separate action in the provincial superior court to recover the costs arising from the breach of their *Charter* rights. This option, while available in theory, may far too often prove illusory in practice. [para. 82]

37 McLachlin C.J. then considered the structure of the provincial offences court. She concluded that since criminal and quasi-criminal proceedings are structurally indistinguishable, the criminal courts' jurisdiction to grant costs in the event of a *Charter* breach extends to the quasi-criminal courts. The *Provincial Offences Act* disclosed no contrary intention. McLachlin C.J. ultimately concluded that since the legislature gave the provincial offences court functions destined to attract *Charter* issues and *Charter* remedies, the legislature must have intended that it be able to deal with related *Charter* issues.

38 In the companion case of *Hynes*, the issue was whether a preliminary inquiry court was a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the *Charter*. Again, only the third step of the *Mills* test was considered, and again the tension on display in *Weber* and *Mooring* was exhibited. McLachlin C.J., for the majority, reiterated the principles set out in *Dunedin* and explained that in all cases the question is

whether Parliament or the legislature intended to empower the court or tribunal to make rulings on *Charter* violations that arise incidentally to their proceedings, and to grant the remedy sought as a remedy for such violations. [para. 26]

She went on to conclude that a preliminary inquiry court was not a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2). A preliminary inquiry's primary function was, in her view, to determine whether the Crown has sufficient evidence to warrant committing the accused to trial. Empowering a preliminary inquiry judge to exclude evidence under the *Charter* would jeopardize the inquiry's expeditious nature. The criminal trial courts were better suited to the task of determining whether to exclude evidence.

39 Major J., writing in dissent for four judges, agreed that only the third step of the *Mills* test was at issue but disagreed with the majority as to the result. He noted that preliminary inquiry judges were authorized to exclude evidence under the common law confessions rule. It was not, therefore, supportable by "logic or efficiency to permit a preliminary inquiry justice to determine the admissibility of statements for common law purposes, but not for *Charter* purposes, when it is recognized that preliminary inquiry justices are armed with all the facts. Parliament could not have intended such waste" (para. 96). Accordingly, in his view, a preliminary inquiry judge was competent to exclude evidence under s. 24(2).

40 This review of *Mills*' progeny gives rise to three observations. First, this Court has accepted that the *Mills* test applies to courts as well as to administrative tribunals. Second, although *Mills* set out a three-pronged definition of "court of competent jurisdiction", the first two steps have almost never been relied on. Twenty-five years later, "jurisdiction over the parties" and "jurisdiction over the subject matter" remain undefined for the purposes of the test. The inquiry has almost always turned on whether the court or tribunal had jurisdiction to award the *particular* remedy sought under s. 24(1). In other words, the inquiry is less into whether the adjudicative body is institutionally a court of competent jurisdiction, and more into whether it is a court of competent jurisdiction *for the purposes of granting a particular remedy*. Third, while there appears to be agreement that s. 24(1) jurisdiction is a function of legislative intent, the authoritative comments of the majorities in *Weber* and *Dunedin* eschewing bifurcated proceedings and heralding early and accessible adjudication of *Charter* applications, may have been slightly unmoored by the majority in *Mooring*.

The Slight cases

41 The cases flowing from *Slight*, while of no direct assistance on what constitutes a court of competent jurisdiction, are of interest as they too show how the Court increasingly came to expand the application of the *Charter* in the administrative sphere. In 1989, *Slight* established that any exercise of statutory discretion must comply with the *Charter* and its values. The issue was whether an adjudicator appointed under the *Canada Labour Code*, R.S.C. 1970, c. L-1, had the authority to order an employer to write a content-restricted reference letter for an employee and to limit the

employer's response to any inquiries about the employee to the comments in the letter. The employer argued that such an order violated s. 2(b) of the *Charter*. This Court agreed that the employer's s. 2(b) rights were violated, but a majority concluded that the arbitrator's order was justified under s. 1 of the *Charter*.

42 Lamer J. explained that it was "not ... open to question" that the adjudicator's orders were subject to the *Charter*:

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*, and he exceeds his jurisdiction if he does so.

[Emphasis in original; pp. 1077-78.]

43 *Slaight* was applied in 1994 in *Dagenais*, where Lamer C.J. (for the majority on this issue) said that a judge's discretion to order a publication ban was subject to the *Slaight* principle. He concluded that the judge's discretion could not be open-ended or exercised arbitrarily, and had to be "exercised within the boundaries set by the principles of the *Charter*" (p. 875). Exceeding those boundaries would result in a reversible error of law (see also *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 (S.C.C.), and *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 (S.C.C.)).

44 In the 1997 case of *Eaton*, the Ontario Special Education Tribunal, acting pursuant to the *Education Act*, R.S.O. 1990, c. E.2, had ordered that Emily Eaton, a child with cerebral palsy, be placed in a special classroom for students with disabilities. The Eatons alleged discrimination, arguing that their daughter's education should take place in the mainstream schools. Lamer C.J. wrote brief reasons to clarify what he had said in *Slaight*:

[S]tatutory 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 ... *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*. [para. 3]

45 In the 1997 case of *Eldridge*, the Court was asked to assess the constitutionality of certain aspects of British Columbia's health care delivery scheme. The issue was whether the *Charter* applied to the Medical Services Commission's decision not to provide sign language interpreters for the deaf as part of a publicly funded scheme for the provision of medical care. La Forest J., writing for a unanimous Court, said that the basic principle derived from *Slaight* was that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so (para. 35). The provincial government had delegated to the Medical Services Commission the power to decide whether a service was a "benefit" under the *Medical and Health Care Services Act*, S.B.C. 1992, c. 76, and to define what constitutes a "medically required" service for the purpose of the provincial health insurance program. When exercising this discretion, the Commission was acting in a governmental capacity and was therefore subject to the *Charter*.

46 In 1999, the Court decided *Baker*, a judicial review of the exercise of statutory discretion by an immigration officer pursuant to the *Immigration Act*, R.S.C. 1985, c. I-2. L'Heureux-Dubé J., relying on *Slaight* and *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.) among others, concluded that statutory discretion must be exercised in accordance with the boundaries imposed by the statute, the principles of the rule of law and of administrative law, the fundamental values of Canadian society, and the principles of the *Charter* (paras. 53 and 56).

47 The following year, in *Blencoe*, the Court was asked to determine whether the provincial Human Rights Commission was subject to the *Charter*. Bastarache J., writing for the majority, explained that *Slaight* guaranteed that statutory

bodies like the Commission are bound by the *Charter* even if they are independent of the government and/or exercising adjudicatory functions:

The facts in *Slaight* and the case at bar share at least one salient feature: the labour arbitrator (in *Slaight*) and the Commission (in the case at bar) each exercise governmental powers conferred upon them by a legislative body. The ultimate source of authority in each of these cases is government. All of the Commission's powers are derived from the statute. The Commission is carrying out the legislative scheme of the *Human Rights Code*. It is putting into place a government program or a specific statutory scheme established by government to implement government policy.... The Commission must act within the limits of its enabling statute. There is clearly a "governmental quality" to the functions of a human rights commission which is created by government to promote equality in society generally.

Thus, notwithstanding that the Commission may have adjudicatory characteristics, it is a statutory creature and its actions fall under the authority of the *Human Rights Code*. The state has instituted an administrative structure, through a legislative scheme, to effectuate a governmental program to provide redress against discrimination. It is the administration of a governmental program that calls for *Charter* scrutiny. Once a complaint is brought before the Commission, the subsequent administrative proceedings must comply with the *Charter*. These entities are subject to *Charter* scrutiny in the performance of their functions just as government would be in like circumstances. To hold otherwise would allow the legislative branch to circumvent the *Charter* by establishing statutory bodies that are immune to *Charter* scrutiny. The above analysis leads inexorably to the conclusion that the *Charter* applies to the actions of the Commission. [paras. 39-40]

The majority ultimately concluded that Blencoe's *Charter* rights had not been infringed.

48 Finally, in 2006, in *Multani*, the Court considered whether a decision of a school board's council of commissioners prohibiting one of its students from wearing a kirpan at school infringed the student's freedom of religion. Charron J., writing for the majority and relying on *Slaight*, explained:

The council is a creature of statute and derives all its powers from statute. Since the legislature cannot pass a statute that infringes the *Canadian Charter*, it cannot, through enabling legislation, do the same thing by delegating a power to act to an administrative decision maker. [para. 22]

The Cuddy Chicks Trilogy

49 While the courts and tribunals were preoccupied with the proper application of the principles in *Mills* and *Slaight*, another line of authority regarding the constitutional jurisdiction of statutory tribunals was emerging. These cases dealt with whether administrative tribunals could decide the constitutionality of the provisions of their own statutory schemes and decline to apply them because they are "of no force or effect" under s. 52(1) of the *Constitution Act, 1982*. The first case was *Douglas College*, in which two Douglas College employees challenged the mandatory retirement provision in their collective agreement, claiming that it was contrary to s. 15(1) of the *Charter*. The primary issue was whether a labour arbitrator, governed by the *Industrial Relations Act*, R.S.B.C. 1979, c. 212, and appointed under the parties' collective agreement, had the jurisdiction to determine the collective agreement's constitutionality.

50 La Forest J., writing for the Court on this issue, concluded that the jurisdiction lay with the arbitrator. Under the *Industrial Relations Act*, the arbitrator had express authority to "provide a final and conclusive settlement of a dispute". To fulfill this mandate, arbitrators acting under the Act could interpret and apply any statute that regulated employment. This included the *Charter*. La Forest J. noted that arbitrators were bound by the same Constitution as the courts. Accordingly, if a collective agreement was illegal or unconstitutional, an arbitrator must decline to apply it just as a court would.

51 La Forest J. rejected the College's argument that the informal arbitration process was unsuited to litigating a *Charter* issue, concluding that any disadvantages of allowing administrative tribunals to decide constitutional questions were outweighed by the "clear advantages" of granting them this jurisdiction. In his view, such jurisdiction promotes

respect for the Constitution because "[t]he citizen, when appearing before decision-making bodies set up to determine his or her rights and duties, should be entitled to assert the rights and freedoms guaranteed by the Constitution" (p. 604). Constitutional issues should be raised at an early stage in the context in which they arise, without the claimant having to first resort to an application in superior court, which is more expensive and time-consuming than the administrative process. In addition, a "specialized competence can be of invaluable assistance in constitutional interpretation" (p. 605). Specialized arbitrators and agencies can sift through the facts and quickly compile a record for the benefit of a reviewing court. In this way, the parties (and the reviewing courts) benefit from the arbitrators' expertise. This practice also allows for all related aspects of a matter to be dealt with by the most appropriate decision maker. As La Forest J. pointed out, "it would be anomalous if tribunals responsible for interpreting the law on the issue were unable to deal with the issue in its entirety, subject to judicial review" (p. 599).

52 In 1991, *Cuddy Chicks* established that the Ontario Labour Relations Board could determine the constitutionality of a provision which excluded agricultural workers from the protections of Ontario's *Labour Relations Act*, R.S.O. 1980, c. 228. The issue arose out of an application by the union for the certification of Cuddy Chicks' hatchery employees. The union challenged the constitutional validity of this exclusion, arguing that it violated ss. 2(d) and 15 of the *Charter*, and sought to have it declared to be of no force and effect pursuant to s. 52(1).

53 In rejecting the employer's argument that the superior court, not the Labour Board, should deal with the constitutional question, and drawing on his reasons in *Douglas College*, La Forest J.'s "overarching consideration" was that where administrative bodies like the Labour Board have specialized expertise, that expertise makes them the appropriate forum for assessing *Charter* compliance:

It is apparent, then, that an expert tribunal of the calibre of the Board can bring its specialized expertise to bear in a very functional and productive way in the determination of *Charter* issues which make demands on such expertise. In the present case, the experience of the Board is highly relevant to the *Charter* challenge to its enabling statute, particularly at the s. 1 stage where policy concerns prevail. At the end of the day, the legal process will be better served where the Board makes an initial determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the Board not only has the authority but a duty to ascertain the constitutional validity of s. 2(b) of the *Labour Relations Act*.

[Emphasis added; p. 18.]

54 After citing a number of cases in which labour boards were found to have the jurisdiction to consider constitutional questions relating to their own jurisdiction, such as *Four B Manufacturing Ltd. v. U.G.W.* (1979), [1980] 1 S.C.R. 1031 (S.C.C.), La Forest J. observed:

What these cases speak to is not only the fundamental nature of the Constitution, but also the legal competence of labour boards and the value of their expertise at the initial stages of complex constitutional deliberations. These practical considerations have compelled the courts to recognize a power, albeit a carefully limited one, in labour tribunals to deal with constitutional issues involving their own jurisdiction. Such considerations are as compelling in the case of *Charter* challenges to a tribunal's enabling statute. Therefore, to extend this "limited but important role" of labour boards to the realm of the *Charter* is simply a natural progression of a well established principle.

[Emphasis added; p.19.]

55 La Forest J. ultimately concluded that it was within the Board's jurisdiction to consider the constitutionality of its enabling statute since it had the express authority to consider questions of law under the statute.

56 In *Tétreault-Gadoury*, Ms. Tétreault-Gadoury lost her job shortly after her 65th birthday and applied for unemployment insurance benefits. The Employment and Immigration Commission denied her application because, under s. 31 of the *Unemployment Insurance Act, 1971, S.C. 1970-71-72*, c. 48, a person over 65 was only entitled to a lump sum retirement benefit. Ms. Tétreault-Gadoury appealed the Commission's decision to a Board of Referees, arguing that

s. 31 of the Act offended s. 15(1) of the *Charter*. The Board declined to rule on the constitutional question. Rather than appeal to an umpire as directed by the Act, Ms. Tétreault-Gadoury appealed to the Federal Court of Appeal, which concluded that s. 31 of the *Unemployment Insurance Act, 1971* was contrary to s. 15 of the *Charter*.

57 On appeal, La Forest J., again writing for the Court on the jurisdictional issue, reiterated the principle that an administrative tribunal with the authority to interpret or apply the law is entitled to determine whether a particular statutory provision is unconstitutional. The *Unemployment Insurance Act, 1971* expressly conferred the jurisdiction to consider questions of law on the umpires, not the Board of Referees. This meant that under the legislative scheme, umpires, not the Referees, were authorized to resolve constitutional issues.

58 In 1996, the constitutional jurisdiction of another statutory body — the Canadian Human Rights Commission — came under scrutiny in *Cooper*. Two airline pilots filed a human rights complaint with the Commission alleging that the mandatory retirement provision in their collective agreement was discriminatory. Section 15(c) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, permitted the imposition of mandatory retirement if the age set was the "normal age of retirement for employees ... in [similar] positions". The complainants challenged the constitutionality of s. 15(c). The issue before the Court was whether the Commission and, in turn, a tribunal appointed by the Commission to hear a complaint, had the power to assess the constitutionality of a provision of the *Canadian Human Rights Act*.

59 *Cooper*, decided in the same year as *Mooring*, highlighted the conceptual debate in this Court as to the constitutional jurisdiction of administrative tribunals. La Forest J., writing for the majority, again confirmed that if a tribunal has the power to consider questions of law, then it "must be able to address constitutional issues" (para. 46). The Commission, however, lacked statutory authority to decide questions of law. While it was entitled to interpret and apply its enabling statute, this limited legal jurisdiction was insufficient to establish that the Commission could consider general questions of law.

60 La Forest J. reached the same conclusion with respect to a human rights tribunal. While a tribunal could consider general legal and constitutional questions, "logic" demanded that it lacked the ability to assess the constitutionality of the *Canadian Human Rights Act* (para. 66). The tribunals lacked expertise; any gain in efficiency would be lost through the inevitable judicial review of a tribunal's constitutional determinations; the tribunals' loose evidentiary rules were unsuited to constitutional litigation; and constitutional matters would bog down the human rights system, which was intended to provide for efficient and timely adjudication of complaints.

61 Lamer C.J. concurred with La Forest J., but wrote separate reasons urging the Court to abandon the principles set out in the *Cuddy Chicks* trilogy. In his view, the principles enunciated in those cases were contrary to the separation of powers and Parliamentary democracy, two fundamental principles of the Canadian Constitution.

62 In dissent, McLachlin J. (L'Heureux-Dubé J. concurring) concluded that both the Human Rights Commission and a human rights tribunal were empowered to assess the constitutionality of the *Canadian Human Rights Act*. This result, according to McLachlin J., "best achieves the economical and effective resolution of human rights disputes and best serves the values entrenched in the *Canadian Human Rights Act* and the *Charter*" (para. 73). Like La Forest J., McLachlin J. reinforced the view expressed in the trilogy that "administrative tribunals empowered to decide questions of law may consider *Charter* questions" (para. 81), and once again confirmed that in light of the doctrine of constitutional supremacy,

[c]itizens have the same right to expect that [the *Charter*] will be followed and applied by the administrative arm of government as by legislators, bureaucrats and the police. If the state sets up an institution to exercise power over people, then the people may properly expect that that institution will apply the *Charter*. [para. 78]

In her view, both the Commission and the tribunals could consider whether the *Charter* renders invalid the "'normal age of retirement' defence", since both bodies were empowered to decide questions of law.

63 In *Martin*, in 2003, the Court sought to resolve the debate over the *Charter* jurisdiction of tribunals. The issue was whether s. 10B of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, and the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96, which precluded individuals suffering from chronic pain from receiving workers' compensation benefits, were contrary to s. 15(1) of the *Charter*. As a threshold issue, it was necessary to decide whether the Nova Scotia Workers' Compensation Appeals Tribunal had the jurisdiction to consider whether the benefits provisions of its enabling statute were constitutional.

64 Gonthier J., writing for a unanimous Court, expressly rejected the 1996 *ratio* in *Cooper*, particularly insofar as it distinguished between limited and general questions of law and insofar as it suggested that an adjudicative function was a prerequisite for a tribunal's constitutional jurisdiction. He also expressly rejected Lamer C.J.'s contention that the *Cuddy Chicks* trilogy was inconsistent with the separation of powers and Parliamentary democracy.

65 Instead, Gonthier J. affirmed and synthesized the main principles emerging from the trilogy. The first was the principle of constitutional supremacy, which provides that any law that is inconsistent with the Constitution is, to the extent of the inconsistency, of no force and effect. No government actor can apply an unconstitutional law, he observed, and, subject to an express contrary intention, a government agency given statutory authority to consider questions of law is presumed to have the jurisdiction to assess related constitutional questions.

66 As a further corollary, Gonthier J. echoed the views expressed over the years by McLachlin J., Major J., La Forest J., and McIntyre J. confirming that "Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts". Explaining that this "accessibility concern" was "particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling legislation", Gonthier J. concluded that "forcing litigants to refer *Charter* issues to the courts would result in costly and time-consuming bifurcation of proceedings" (para. 29).

67 In his view, a tribunal's factual findings and the record it compiles when considering a constitutional question are of invaluable assistance in constitutional determinations. The tribunal provides the reviewing court with the most well-informed, expert view of the issues at stake:

It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical....The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance. [para. 30, citing *Cuddy Chicks*, at pp. 16-17]

68 Based on these principles, Gonthier J. concluded that the following determines whether it is within an administrative tribunal's jurisdiction to subject a legislative provision to *Charter* scrutiny:

- Under the tribunal's enabling statute, does the administrative tribunal have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision? If so, the tribunal is presumed to have the jurisdiction to determine the constitutional validity of that provision under the *Charter*.
- Does the tribunal's enabling statute clearly demonstrate that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction? If so, the presumption in favour of *Charter* jurisdiction is rebutted.

69 Applying this approach, Gonthier J. noted that the Workers' Compensation Appeals Tribunal was explicitly authorized to "determine all questions of fact and law". Further, the Tribunal's decisions could be appealed "on any question of law". This confirmed that the Tribunal was entitled to decide legal questions which triggered the presumption that the Tribunal was authorized to decide *Charter* questions.

70 The adjudicative nature of the Tribunal was also relevant. It was independent of the Workers' Compensation Board, could establish its own procedural rules, consider all relevant evidence, record any oral evidence for future reference, exercise powers under the *Public Inquiries Act*, R.S.N.S. 1989, c. 372, and extend time limits for decisions when necessary. In addition, its members had been called to the bar and the Attorney General could intervene in proceedings involving constitutional questions. In his view, therefore, even if the Tribunal had lacked express authority to decide questions of law, an implied grant of authority would have been found. The legislature clearly intended to create a comprehensive scheme for resolving workers' compensation disputes. Nothing in the *Workers' Compensation Act* rebutted the presumption.

71 Moreover, allowing the Tribunal to apply the *Charter* furthered the policy objectives of allowing courts to "benefit from a full record established by a specialized tribunal fully apprised of the policy and practical issues relevant to the *Charter* claim". It also permitted workers to "have their *Charter* rights recognized within the relatively fast and inexpensive adjudicative scheme created by the Act" rather than having to pursue separate proceedings in the courts in addition to a compensation claim before the administrative tribunal (para. 56).

72 Gonthier J. concluded that the Workers' Compensation Board too, like the Appeals Tribunal, had the jurisdiction to review the constitutional validity of its enabling statute, since both statutory bodies had the same authority to decide questions of law.

73 *Martin* was released with *Paul v. British Columbia (Forest Appeals Commission)*. Paul was charged with a breach of s. 96 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, which was a general prohibition against cutting Crown timber. Paul conceded that he cut the prohibited timber, but asserted that as an aboriginal person, he had a right to do so under s. 35 of the *Constitution Act, 1982*. The issue on appeal was whether the provincial Forest Appeals Commission had the authority to entertain Paul's constitutional argument.

74 Bastarache J., writing for the Court, applied the methodology in *Martin* to determine whether the Commission was authorized to consider and apply s. 35 of the *Constitution Act, 1982*. The issue therefore was whether the enabling statute either expressly or by implication granted the Commission the jurisdiction to interpret or decide questions of law.

75 The *Forest Practices Code* stated that any party to a proceeding before the Commission could make submissions as to fact, law and jurisdiction and could appeal a Commission's decision on a question of law or jurisdiction. These provisions made it impossible to conclude that the Commission's mandate was limited to purely factual matters, and the Court accordingly concluded that the Forest Appeals Commission was empowered to decide questions of law, including whether s. 35 of the *Constitution Act, 1982* applied.

76 In the case of *Okwuobi*, the issue was the jurisdiction of the Administrative Tribunal of Québec to hear rights claims for minority language education under the *Charter of the French Language*, R.S.Q., c. C-41, and the *Canadian Charter*. Based on *Martin* and *Paul*, the Court concluded:

As will become clear, the fact that the ATQ is vested with the ability to decide questions of law is crucial, and is determinative of its jurisdiction to apply the *Canadian Charter* in this appeal. The quasi-judicial structure of the ATQ, discussed briefly above, may be indicative of a legislative intention that constitutional questions be considered and decided by the ATQ, but the structure of the ATQ is not determinative. This is evidenced by the recent decisions of this Court in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, and *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. [para. 28]

In *Okwuobi*, the Administrative Tribunal of Québec was found to have the jurisdiction to decide questions of law. The presumption in favour of constitutional jurisdiction was therefore triggered and was not rebutted.

77 These cases confirm that administrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority — and duty — to consider and apply the Constitution, including the *Charter*, when answering those legal questions. As McLachlin J. observed in *Cooper*:

[E]very tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the effect of the *Charter* does not change the matter. The *Charter* is not some holy grail which only judicial initiatives of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals. [para. 70]

The Merger

78 The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly, they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a *Charter* remedy is sought to an inquiry asking whether it is "competent" to grant a particular remedy within the meaning of s. 24(1).

79 Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals (*Douglas College*, at pp. 603-604; *Weber*, at para. 60; *Cooper*, at para. 70; *Martin*, at para. 29). The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in *Mills*, at p. 891. And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction (*Weber*; *Regina Police Assn.*; *Québec (Commission des droits de la personne & des droits de la jeunesse)*; *Québec (Human Rights Tribunal)*; *Vaughan*; *Okwuobi*. See also *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 49).

80 If, as in the *Cuddy Chicks* trilogy, expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when a remedy is sought under s. 52 of the *Constitution Act, 1982*, there is no reason why such tribunals are not also in the best position to assess constitutional questions when a remedy is sought under s. 24(1) of the *Charter*. As McLachlin J. said in *Weber*, "[i]f an arbitrator can find a law violative of the *Charter*, it would seem he or she can determine whether conduct in the administration of the collective agreement violates the *Charter* and likewise grant remedies" (para. 61). I agree with the submission of both the Ontario Review Board and the British Columbia Review Board that in both types of cases, the analysis is the same.

81 Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* — and *Charter* remedies — when resolving the matters properly before it.

82 Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular

tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin*).

Application to this Case

83 The question before the Court is whether the Ontario Review Board is authorized to provide certain remedies to Mr. Conway under s. 24(1) of the *Charter*. Before the Board, Mr. Conway sought an absolute discharge. At the hearing before this Court, and for the first time, he requested additional remedies dealing with his conditions of detention: an order directing CAMH to provide him with access to psychotherapy, and an order prohibiting CAMH from housing him near a construction site.

84 The first inquiry is whether the Board is a court of competent jurisdiction. In my view, it is. The Board is a quasi-judicial body with significant authority over a vulnerable population. It is unquestionably authorized to decide questions of law. It was established by, and operates under, Part XX.1 of the *Criminal Code* as a specialized statutory tribunal with ongoing supervisory jurisdiction over the treatment, assessment, detention and discharge of those accused who have been found not criminally responsible by reason of mental disorder ("NCR patient"). Section 672.72(1) provides that any party may appeal a board's disposition on any ground of appeal that raises a question of law, fact or mixed fact and law. Further, s. 672.78(1) authorizes an appellate court to allow an appeal against a review board's disposition where the court is of the opinion that the board's disposition was based on a wrong decision on a question of law. I agree with the conclusion of Lang J.A. and the submission of the British Columbia Review Board that, as in *Martin* and *Paul*, this language is indicative of the Board's power to decide legal questions. And there is nothing in Part XX.1 of the *Criminal Code* — the Board's statutory scheme — which permits us to conclude that Parliament intended to withdraw *Charter* jurisdiction from the scope of the Board's mandate. It follows that the Board is entitled to decide constitutional questions, including *Charter* questions, that arise in the course of its proceedings.

85 The question for the Court to decide therefore is whether the particular remedies sought by Mr. Conway are the kinds of remedies that Parliament appeared to have anticipated would fit within the statutory scheme governing the Ontario Review Board. This requires us to consider the scope and nature of the Board's statutory mandate and functions.

86 Part XX.1 of the *Criminal Code* was enacted after this Court struck down the traditional regime for dealing with mentally ill offenders as contrary to s. 7 of the *Charter* in *R. v. Swain*, [1991] 1 S.C.R. 933 (S.C.C.). The traditional system subjected offenders with mental illness to automatic and indefinite detention at the pleasure of the Lieutenant Governor in Council (*Criminal Code*, s. 614(2) (formerly s. 542.2(2)) (repealed S.C. 1991, c. 43, s. 3); *Winko v. Forensic Psychiatric Institute*, [1999] 2 S.C.R. 625 (S.C.C.)). Part XX.1 was designed to address the concerns raised in *Swain* and was intended to highlight that offenders with a mental illness must be "treated with the utmost dignity and afforded the utmost liberty compatible with [their] situation" (*Winko*, at para. 42; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498 (S.C.C.), at para. 22).

87 Part XX.1 introduced a new verdict — "not criminally responsible on account of mental disorder" — into the traditional guilt/innocence dichotomy. This verdict is neither an acquittal nor a conviction; rather, it diverts offenders to a special stream that provides individualized assessment and treatment for those found to be a significant danger to the public (*Winko*, at para. 21; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779 (S.C.C.), at para. 90; *Penetanguishene*, at para. 21). Those NCR patients who are not a significant danger to the public must be unconditionally released.

88 The Ontario Board manages and supervises the assessment and treatment of each NCR patient in Ontario by holding annual hearings and making dispositions for each patient (ss. 672.38(1), 672.54, 672.81(1) and 672.83(1); *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326 (S.C.C.), at para. 29). It is well established that the review board regime is intended to reconcile the "twin goals" of protecting the public from dangerous offenders, and treating NCR patients fairly and appropriately (*Winko*, at para. 20; House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, No. 7, 3rd Sess., 34th Parl., October 9, 1991, at p. 6). While public safety is the paramount concern, an NCR patient's liberty interest has

been held to be the Board's "major preoccupation" within the fence posts staked by public safety (*Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528 (S.C.C.), at para. 19). The Board fulfills its "primary purpose" therefore by protecting the public while minimizing incursions on patients' liberty and treating patients fairly (*Mazzei*, at para. 32; *Winko*, at paras. 64-71; *Penetanguishene*, at para. 51).

89 Section 672.54 of the *Criminal Code* sets out the remedial jurisdiction of review boards, stating:

Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

(a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;

(b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or

(c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

Accordingly, at a disposition hearing regarding an NCR patient, the Ontario Review Board is authorized to make one of three dispositions: an absolute discharge, a conditional discharge or a detention order. When making its disposition, the Board must consider the four statutory criteria: the need to protect the public from dangerous persons, the patient's mental condition, the reintegration of the patient into society and the patient's other needs.

90 The Board has a "necessarily broad" discretion to consider a large range of evidence in order to fulfill this mandate (*Winko*, at para. 61). The Board's assessment of the evidence must "take place in an environment respectful of the NCR accused's constitutional rights, free from the negative stereotypes that have too often in the past prejudiced the mentally ill who come into contact with the justice system" (*Winko*, at para. 61). Upon considering the evidence, if the Board is not of the opinion that the patient is a significant threat to public safety, it must direct that the patient be discharged absolutely (s. 672.54(a); *Winko*, at para. 62). On the other hand, if the Board finds that the patient is, as in Mr. Conway's case, a significant threat to public safety, an absolute discharge is not statutorily available as a disposition (s. 672.54; *Winko*, at para. 62).

91 A patient is not a significant threat to public safety unless he or she is a "real risk of physical or psychological harm to members of the public that is serious in the sense of going beyond the merely trivial or annoying" (*Winko*, at para. 62). The conduct giving rise to the harm must be criminal in nature (*Winko*, at paras. 57 and 62).

92 Once a patient is absolutely discharged, he or she is no longer subject to the criminal justice system or to the Board's jurisdiction (*Mazzei*, at para. 34). However, pending an absolute discharge, NCR patients are subject to a detention or conditional discharge order. The Board is entitled to include appropriate conditions in its orders (s. 672.54(b) and (c)). The appropriateness of conditions is tied, at least in part, to the framework for making the least onerous and least restrictive disposition consistent with public safety, the patient's mental condition and other needs, and the patient's reintegration into the community (s. 672.54(b), (c); *Penetanguishene*, at paras. 51 and 56).

93 The Board is not entitled to include any conditions that prescribe or impose treatment on an NCR patient (s. 672.55; *Mazzei*) and any conditions must withstand *Charter* scrutiny (*Slaight*). In addition, disposition orders, including any conditions, are subject to appeal. The Court of Appeal is entitled to allow an appeal against a disposition if it is unreasonable, cannot be supported by the evidence, is based on a wrong decision on a question of law, or gives rise to a miscarriage of justice (s. 672.78(1); *Owen*).

94 Subject to these limits, the content of the conditions included in a disposition is at the Board's discretion. In this way, the Board has the statutory tools to supervise the treatment and detention of dangerous NCR patients in a responsive, *Charter*-compliant fashion and has a broad power to attach flexible, individualized, creative conditions to the discharge and detention orders it devises for dangerous NCR patients.

95 The Board's task calls for "significant expertise" (*Owen*, at paras. 29-30) and the Board's membership, which sits in five-member panels comprised of the chairperson (a judge or a person qualified for or retired from appointment to the bench), a second legal member, a psychiatrist, a second psychiatrist or psychologist and one public member (ss. 672.39 and 672.4(1)), guarantees that the requisite experts perform the Board's challenging task (*Owen*, at para. 29; s. 672.39). Further, as almost one-quarter of NCR patients and accused found unfit to stand trial spend at least 10 years in the review board system, with some, like Mr. Conway, spending significantly longer (Jeff Latimer and Austin Lawrence, *Research Report — The Review Board Systems in Canada: Overview of Results from the Mentally Disordered Accused Data Collection Study* (Department of Justice Canada, January 2006, at p. v), review boards become intimately familiar with the patients under their supervision. In light of this expertise, the appellate courts are "not to be too quick to overturn" a review board's "expert opinion" on how best to manage a patient's risk to the public (*Owen*, at para. 69; *Winko*, at para. 61).

96 Mr. Conway submits that, pursuant to s. 24(1) of the *Charter*, and notwithstanding the Board's finding that he is a significant threat to public safety, he is entitled to an absolute discharge or, in the absence of a discharge, an order directing CAMH to provide him with alternative treatment and/or an order directing CAMH to ensure that he can access psychotherapy. Mr. Conway admits that these remedies are outside the Board's statutory jurisdiction, but asserts that s. 24(1) of the *Charter* frees the Board from statutory limits on its jurisdiction.

97 I disagree. Part XX.1 of the *Code* provides the Board with "wide latitude" in the exercise of its powers (*Winko*, at para. 27; *Mazzei*, at para. 43). However, Parliament did not imbue the Board with free remedial rein, and in fact withdrew certain remedies from the Board's statutory arsenal. As noted above, Part XX.1 of the *Code* precludes the Board from granting either an absolute discharge to an NCR patient found to be dangerous or an order directing that a hospital authority provide an NCR patient with particular treatment (ss. 672.54(a) and 672.55; *Winko*; *Mazzei*). Parliament was entitled to withdraw these powers from the Board and, barring a constitutional challenge to the legislation, no judicial fiat can overrule Parliament's clear expression of intent.

98 Granting the Board the jurisdiction to unconditionally release a dangerous patient without the requisite treatment to resolve the dangerousness would frustrate the Board's mandate to supervise the special needs of those who are found to require the treatment/assessment regime (*Winko*, at paras. 39-42). It would also undermine the balance required by s. 672.54: it not only threatens public safety, it jeopardizes the interests of the NCR patient by failing to adequately prepare him or her for reintegration and, as a result, creating a substantial risk of re-offending and re-entry into the Part XX.1 regime (*Winko*, at paras. 39-41). As McLachlin J. wrote in *Winko*, at paras. 39-41:

Treatment ... is necessary to stabilize the mental condition of a dangerous NCR accused and reduce the threat to public safety created by that condition....

Part XX.1 protects society. If society is to be protected on a long-term basis, it must address the cause of the offending behaviour — the mental illness....

Part XX.1 also protects the NCR offender. The assessment-treatment model introduced by Part XX.1 of the *Criminal Code* is fairer to the NCR offender than the traditional common law model. The NCR offender is not criminally responsible, but ill. Providing opportunities to receive treatment, not imposing punishment, is the just and appropriate response.

99 The Board's duty to protect public safety, its statutory authority to grant absolute discharges only to non-dangerous NCR patients, and its mandate to assess and treat NCR patients with a view to reintegration rather than recidivism, all

point to Parliament's intent not to permit NCR patients who are dangerous to have access to absolute discharges as a remedy. These factors are determinative in this case and lead to the conclusion that it would not be appropriate and just in Mr. Conway's current circumstances for the Board to grant him an absolute discharge.

100 The same is true of Mr. Conway's request for a treatment order. Allowing the Board to prescribe or impose treatment is not only expressly prohibited by the *Criminal Code* (s. 672.55); it is also inconsistent with the constitutional division of powers (*Mazzei*). The authority to make treatment decisions lies exclusively within the mandate of provincial health authorities in charge of the hospital where an NCR patient is detained, pursuant to various provincial laws governing the provision of medical services. "It would be an inappropriate interference with provincial legislative authority (and with hospitals' treatment plans and practices) for Review Boards to require hospital authorities to administer particular courses of medical treatment for the benefit of an NCR accused" (*Mazzei*, at para. 31).

101 A finding that the Board is entitled to grant Mr. Conway an absolute discharge despite its conclusion that he is a significant threat to public safety, or to direct CAMH to provide him with a particular treatment, would be a clear contradiction of Parliament's intent. Given the statutory scheme and the constitutional considerations, the Board cannot grant these remedies to Mr. Conway.

102 Finally, Mr. Conway complains about where his room is located and seeks an order under s. 24(1) prohibiting CAMH from housing him near a construction site. Neither the validity of this complaint, nor, obviously, the propriety of any redress, has yet been determined by the Board.

103 Remedies granted to redress *Charter* wrongs are intended to meaningfully vindicate a claimant's rights and freedoms (*Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.), at para. 55; *Khadr v. Canada (Prime Minister)*, 2010 SCC 3 (S.C.C.), [2010] 1 S.C.R. 44, at para. 30). Yet, it is not the case that effective, vindicatory remedies for harm flowing from unconstitutional conduct are available only through separate and distinct *Charter* applications (*R. v. Nasogaluak*, 2010 SCC 6 (S.C.C.), [2010] 1 S.C.R. 206, at para. 2). *Charter* rights can be effectively vindicated through the exercise of statutory powers and processes (*Nasogaluak*; *Dagenais*; *Okwuobi*). In this case, it may well be that the substance of Mr. Conway's complaint about where his room is located can be fully addressed within the framework of the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values. If that is what the Board ultimately concludes to be the case, resort to s. 24(1) of the *Charter* may not add either to the Board's capacity to address the substance of the complaint or to provide appropriate redress.

104 I would dismiss the appeal. In accordance with the request of the parties, there will be no order for costs.

Appeal dismissed.

Pourvoi rejeté.

TAB 6



Canadian
Heritage

Patrimoine
canadien

***The
Canadian
Charter of
Rights and
Freedoms***

Canada

The Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

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.

Fundamental Freedoms

Fundamental freedoms

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.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4.(1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

- | | |
|------------------------------------|--|
| Mobility of citizens | 6.(1) Every citizen of Canada has the right to enter, remain in and leave Canada. |
| Rights to move and gain livelihood | (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right <ul style="list-style-type: none"> (a) to move to and take up residence in any province; and (b) to pursue the gaining of a livelihood in any province. |
| Limitation | (3) The rights specified in subsection (2) are subject to <ul style="list-style-type: none"> (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services. |
| Affirmative action programs | (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada. |

Legal Rights

- | | |
|---|---|
| Life, liberty and security of person | 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. |
| Search or seizure | 8. Everyone has the right to be secure against unreasonable search or seizure. |
| Detention or imprisonment | 9. Everyone has the right not to be arbitrarily detained or imprisoned. |
| Arrest or detention | 10. Everyone has the right on arrest or detention <ul style="list-style-type: none"> (a) to be informed promptly of the reasons therefor; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of <i>habeas corpus</i> and to be released if the detention is not lawful. |
| Proceedings in criminal and penal matters | 11. Any persons charged with an offence has the right <ul style="list-style-type: none"> (a) to be informed without unreasonable delay of the specific offence; (b) to be tried within a reasonable time; (c) not to be compelled to be a witness in proceedings against that person in respect of the offence; (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; |

- (e) not to be denied reasonable bail without just cause;
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment	12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
Self-crimination	13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.
Interpreter	14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law	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.
Affirmative action programs	(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.

Official Languages of Canada

Official languages of Canada	16.(1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.
Official languages of New Brunswick	(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.
Advancement of status and use	(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.
English and French linguistic communities in New Brunswick	16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.
Role of the legislature and government of New Brunswick	(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.
Proceedings of Parliament	17.(1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.
Proceedings of New Brunswick legislature	(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.
Parliamentary statutes and records	18.(1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.
New Brunswick statutes and records	(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.
Proceedings in courts established by Parliament	19.(1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.
Proceedings in New Brunswick courts	(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Communications by public with federal institutions	<p>20.(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where</p> <p>(a) there is a significant demand for communications with and services from that office in such language; or</p> <p>(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.</p>
Communications by public with New Brunswick institutions	<p>(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.</p>
Continuation of existing constitutional provisions	<p>21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.</p>
Rights and privileges preserved	<p>22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.</p>
<i>Minority Language Educational Rights</i>	
Language of instruction	<p>23.(1) Citizens of Canada</p> <p>(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or</p> <p>(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,</p> <p>have the right to have their children receive primary and secondary school instruction in that language in that province.</p>
Continuity of language instruction	<p>(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.</p>

Application where numbers warrant (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

Enforcement of guaranteed rights and freedoms 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.

Exclusion of evidence bringing administration of justice into disrepute (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights and freedoms not affected by Charter 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Other rights and freedoms not affected by Charter 26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved 29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

Application to territories and territorial authorities 30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative powers not extended 31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter 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.

Exception (2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration 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.

Operation of exception (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation (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.

Re-enactment (4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

Citation 34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

More information about the Canadian Charter of Rights and Freedoms is available on Canada.ca at:

<http://canada.pch.gc.ca/eng/1448633332438>

This webpage includes a link to the Human Rights Program Online Order Form.

You can order printed copies of the Charter in certificate (28 cm x 34 cm) and/or poster (46 cm x 58 cm) formats by completing and submitting the order form.

Updated March 3, 2017

TAB 7

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Carter v. Canada \(Attorney General\)](#) | 2012 BCCA 336, 2012 CarswellBC 2366, 327 B.C.A.C. 10, 556 W.A.C. 10, [2012] B.C.J. No. 1672, 266 C.R.R. (2d) 341, 291 C.C.C. (3d) 373, 103 W.C.B. (2d) 607, [2012] B.C.W.L.D. 6906, [2012] B.C.W.L.D. 6918, [2012] B.C.W.L.D. 6958, [2012] B.C.W.L.D. 7015 | (B.C. C.A. [in Chambers], Aug 10, 2012)

1995 CarswellOnt 93
Supreme Court of Canada

Miron v. Trudel

1995 CarswellOnt 526, 1995 CarswellOnt 93, 1995 C.E.B. & P.G.R. 8217 (headnote only), [1995] 2 S.C.R. 418, [1995] I.L.R. 1-3185, [1995] S.C.J. No. 44, 10 M.V.R. (3d) 151, 124 D.L.R. (4th) 693, 13 R.F.L. (4th) 1, 181 N.R. 253, 23 O.R. (3d) 160 (note), 29 C.R.R. (2d) 189, 55 A.C.W.S. (3d) 630, 81 O.A.C. 253, J.E. 95-1089, EYB 1995-67430

JOHN O. MIRON and JOCELYNE VALLIERE v. RICHARD TRUDEL, WILLIAM JAMES McISAAC and ECONOMICAL MUTUAL INSURANCE COMPANY

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL FOR ONTARIO, ATTORNEY GENERAL OF QUEBEC and ATTORNEY GENERAL OF MANITOBA (intervenor)

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: June 2, 1994
Judgment: May 25, 1995
Docket: Doc. No 22744

Counsel: *Giovanna Roccamo* and *Mark Edwards*, for appellants.

Catherine L. Jones and *R. Cooligan*, for respondents.

Graham R. Garton, Q.C., and *James Hendry*, for intervenor Attorney General of Canada.

Rebecca Regenstreif, for intervenor Attorney General for Ontario.

Madeleine Aubé and *Kathleen McNicoll*, for intervenor Attorney General of Quebec.

Shawn Greenberg, for intervenor Attorney General of Manitoba.

W. Ian Binnie, Q.C., and *Lisa A. Clarkson*, for amicus curiae.

Subject: Family; Public; Insurance

Related Abridgment Classifications

Insurance

XII Automobile insurance

XII.7 Uninsured automobile coverage

XII.7.c "Person insured under the contract"

Headnote

Insurance --- Principles applicable to specific types of insurance — Uninsured automobile coverage — "Person insured under the contract"

Constitutional law — Charter of Rights and Freedoms — Equality rights — Standard automobile insurance policy prescribed by provincial legislation extending accident benefits to "spouse" of policy holder — Term "spouse" in legislation not including unmarried partner — Limitation of benefits to married persons violating s. 15(1) of Charter — Violation not justifiable under s. 1 of Charter — Court entitled to "read in" more inclusive definition of "spouse" under s. 24 of Charter — Insurance Act, R.S.O. 1980, c. 218 — Canadian Charter of Rights and Freedoms, ss. 1, 15(1), 24. .

The man and woman lived together with their children outside marriage in a "common law" relationship. In 1987, the man was injured in a motor vehicle accident by an uninsured driver. He claimed accident benefits for loss of income against his partner's insurance policy, which extended benefits to the "spouse" of the policy holder. The insurer denied the claim on the ground that the man and woman were not married and, hence, the man was not the "spouse" of the policy holder under the policy and the *Insurance Act* (Ont.). The couple sued the insurer and as a preliminary issue, the motions judge held that "spouse" meant a person who was legally married. The Court of Appeal dismissed the couple's appeal. The couple appealed to the Supreme Court of Canada alleging that the definition of "spouse" in the legislation violated s. 15 of the *Charter*.

Held:

The appeal was allowed.

Per McLachlin J. (Sopinka, Cory and Iacobucci JJ. concurring):

The analysis under s. 15(1) of the *Charter* involves two steps. First, the claimant must show a denial of equal protection or equal benefit of the law and second, he or she must show that the denial constitutes discrimination. Once a violation of s. 15(1) is established, the onus shifts to the party seeking to uphold the law to justify the discrimination under s. 1 of the *Charter*. In the case at bar, exclusion of unmarried partners from accident benefits available to married partners under the policy violated s. 15(1) of the *Charter*. Denial of equal benefit on the basis of marital status was established. Marital status was an analogous ground of discrimination for the purposes of s. 15(1). The state failed to demonstrate that the exclusion of unmarried members of family units from motor vehicle accident benefits was demonstrably justified in a free and democratic society. The new definition of "spouse" adopted in the *Insurance Act* in 1990, which includes heterosexual couples who have cohabited for three years or who have lived in a permanent relationship with a child, should be "read in" to the legislation.

Per L'Heureux-Dubé J.:

The exclusion of unmarried opposite-sex partners from the definition of "spouse" in the legislation was discriminatory at a social and financial level. The impugned distinction could not be saved under s. 1 of the *Charter*. The impugned distinction between married and unmarried opposite-sex couples was not rationally connected to the objective of the legislation. The new definition of "spouse", which includes opposite-sex cohabitantes, should be "read in" to the legislation.

Per Gonthier J. (dissenting) (Lamer C.J.; La Forest and Major JJ. concurring):

The insurance policy limitation of accident benefits to married couples did not infringe s. 15 of the *Charter*. The insurance policy drew a distinction between married and unmarried couples; however, the distinction was not prejudicial when considered in the larger context of the rights and obligations uniquely and appropriately attached to marriage. Further, since the functional values underlying the legislation were relevant to marital status, marital status was not a personal characteristic which qualified as an analogous ground. In contemporary society, unmarried couples do not constitute a distinct group suffering from stereotypes or prejudices, although they have been the subject of such prejudices in the past. The fostering of marriage as a social institution does not stigmatize unmarried couples nor subject them to stereotypes. The legislature is not obliged to extend all of the attributes of marriage to unmarried couples. The courts should be wary of second-guessing legislative social policy choices relating to the status, rights and obligations of marriage, a basic institution in our society intimately related to its fundamental values.

Table of Authorities**Cases considered:**

By Gonthier J. (dissenting) (Lamer C.J.C., La Forest and Major JJ. concurring):

Andrews v. Law Society (British Columbia), [1989] 1 S.C.R. 143, [1989] 2 W.W.R. 289, 25 C.C.E.L. 255, 91 N.R. 255, 34 B.C.L.R. (2d) 273, 10 C.H.R.R. D/5719, 36 C.R.R. 193, 56 D.L.R. (4th) 1 — considered

Beaty v. Truck Insurance Exchange, 8 Cal. Rptr. 2d 593 (Ct. App. 3 Dist. 1992) — referred to

Becker v. Pettkus, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 834 — referred to

Bliss v. Canada (Attorney General), [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711, 23 N.R. 527, 92 D.L.R. (3d) 417, 78 C.L.L.C. 14,175 — considered

Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed.2d 113 (1971) — referred to

- Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 26 C.C.E.L. 1, [1989] 4 W.W.R. 193, 89 C.L.L.C. 17,012, 94 N.R. 373, 59 D.L.R. (4th) 321, 10 C.H.R.R. D/6183, 58 Man. R. (2d) 161, 45 C.R.R. 115 — *considered*
- Cleveland Board of Education v. Lafleur*, 414 U.S. 632 (1974) — *referred to*
- Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988) — *referred to*
- Geiger v. London Monenco Consultants Ltd.* (1992), 43 C.C.E.L. 291, (sub nom. *Ontario (Human Rights Commission) v. London Monenco Consultants Ltd.*) 9 O.R. (3d) 509, 92 C.L.L.C. 17,038, 94 D.L.R. (4th) 233, 18 C.H.R.R. D/118, 57 O.A.C. 222 (C.A.) — *considered*
- Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) — *referred to*
- Hendrix v. General Motors Corp.*, 193 Cal. Rptr. 922 (Ct. App. 1 Dist. 1983) *referred to*
- Leroux v. Co-operators General Insurance Co.*, 32 M.V.R. (2d) 263, 4 O.R. (3d) 609, [1991] I.L.R. 1-2769, 83 D.L.R. (4th) 694, 50 O.A.C. 220, 7 C.C.L.I. (2d) 300, 8 C.R.R. (2d) 364 (C.A.) — *considered*
- Loving v. Virginia (Commonwealth)*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) — *referred to*
- Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) — *referred to*
- Maynard v. Hill*, 125 U.S. 190 (1888) — *referred to*
- McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 91 C.L.L.C. 17,004, 76 D.L.R. (4th) 545, 118 N.R. 1, 13 C.H.R.R. D/171, 45 O.A.C. 1, 2 C.R.R. (2d) 1 — *considered*
- Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923) — *referred to*
- Moore v. East Cleveland*, 431 U.S. 494 (1977) — *referred to*
- Norman v. Unemployment Insurance Appeals Board*, 663 P.2d 904 (Cal. 1983) — *referred to*
- R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 58 N.R. 81, 13 C.R.R. 64, 18 C.C.C. (3d) 385, 60 A.R. 161, 18 D.L.R. (4th) 321, 85 C.L.L.C. 14,023 — *considered*
- R. v. Généreux*, [1992] 1 S.C.R. 259, 133 N.R. 241, 70 C.C.C. (3d) 1, 88 D.L.R. (4th) 110, 8 C.R.R. (2d) 89 — *considered*
- R. v. Nguyen*, (sub nom. *R. v. Hess*; *R. v. Nguyen*) [1990] 2 S.C.R. 906, [1990] 6 W.W.R. 289, 79 C.R. (3d) 332, 50 C.R.R. 71, 119 N.R. 353, 46 O.A.C. 13, 73 Man. R. (2d) 1, 3 W.A.C. 1, 59 C.C.C. (3d) 161 — *considered*
- R. v. Turpin*, [1989] 1 S.C.R. 1296, 69 C.R. (3d) 97, 48 C.C.C. (3d) 8, 96 N.R. 115, 34 O.A.C. 115, 39 C.R.R. 306 — *considered*
- Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 87 C.L.L.C. 14,021, 38 D.L.R. (4th) 161, 51 Alta. L.R. (2d) 97, [1987] 3 W.W.R. 577, [1987] D.L.Q. 225, (sub nom. *A.U.P.E. v. Alberta (A.G.)*) 28 C.R.R. 305, (sub nom. *Reference re Compulsory Arbitration*) 74 N.R. 99, 78 A.R. 1 — *referred to*
- Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) — *considered*
- Soroohan v. Soroohan*, [1986] 2 S.C.R. 38, 2 R.F.L. (3d) 225, [1986] 5 W.W.R. 289, 46 Alta. L.R. (2d) 97, 29 D.L.R. (4th) 1, 69 N.R. 81, 23 E.T.R. 143, [1986] R.D.I. 448, [1986] R.D.F. 501, 74 A.R. 67 — *referred to*
- Symes v. R.*, (sub nom. *Symes v. Canada*) [1993] 4 S.C.R. 695, 94 D.T.C. 6001, (sub nom. *Symes v. Minister of National Revenue*) 161 N.R. 243, [1994] 1 C.T.C. 40, 19 C.R.R. (2d) 1, 110 D.L.R. (4th) 470 — *referred to*
- University of Alberta v. Alberta (Human Rights Commission)*, [1992] 2 S.C.R. 1103, 17 C.H.R.R. D/87, (sub nom. *Dickason v. University of Alberta*) [1992] 6 W.W.R. 385, 92 C.L.L.C. 17,033, 4 Alta. L.R. (3d) 193, 141 N.R. 1, 11 C.R.R. (2d) 1, 95 D.L.R. (4th) 439, 127 A.R. 241, 20 W.A.C. 241 — *referred to*
- Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872, 23 C.R. (4th) 1, 105 D.L.R. (4th) 210, 16 C.R.R. (2d) 256, (sub nom. *Conway v. Canada*) 154 N.R. 392, (sub nom. *Conway v. Canada (Attorney General)*) 83 C.C.C. (3d) 1 — *considered*
- Zablocki v. Redhail*, 434 U.S. 374 (1978) — *referred to*
- Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, 39 M.V.R. (2d) 1, 93 D.L.R. (4th) 346, 16 C.H.R.R. D/255, 12 C.C.L.I. (2d) 206, [1992] I.L.R. 1-2848, 138 N.R. 1, 55 O.A.C. 81 — *referred to*
- By *L'Heureux-Dubé J.*:
- Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143, [1989] 2 W.W.R. 289, 25 C.C.E.L. 255, 91 N.R. 255, 34 B.C.L.R. (2d) 273, 10 C.H.R.R. D/5719, 36 C.R.R. 193, 56 D.L.R. (4th) 1 — *considered*
- Becker v. Pettkus*, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 834 — *considered*

Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, 93 C.L.L.C. 17,006, 46 C.C.E.L. 1, 13 Admin. L.R. (2d) 1, 149 N.R. 1, 100 D.L.R. (4th) 658, 17 C.H.R.R. D/349 — referred to
Egan v. Canada (1995), 12 R.F.L. (4th) 201, 95 C.L.L.C. 210-025 (S.C.C.) — referred to
Moge v. Moge, [1992] 3 S.C.R. 813, 43 R.F.L. (3d) 345, [1993] 1 W.W.R. 481, 145 N.R. 1, 81 Man. R. (2d) 161, 30 W.A.C. 161, 99 D.L.R. (4th) 456 — considered
Sorochan v. Sorochan, [1986] 2 S.C.R. 38, 2 R.F.L. (3d) 225, [1986] 5 W.W.R. 289, 46 Alta. L.R. (2d) 97, 29 D.L.R. (4th) 1, 69 N.R. 81, 23 E.T.R. 143, [1986] R.D.I. 448, [1986] R.D.F. 501, 74 A.R. 67 — considered

By *McLachlin J. (Sopinka, Cory and Iacobucci JJ. concurring)*:

Andrews v. Law Society (British Columbia), [1986] 4 W.W.R. 242, 2 B.C.L.R. (2d) 305, 27 D.L.R. (4th) 600, 23 C.R.R. 273 (C.A.), affirmed [1989] 1 S.C.R. 143, [1989] 2 W.W.R. 289, 25 C.C.E.L. 255, 91 N.R. 255, 34 B.C.L.R. (2d) 273, 10 C.H.R.R. D/5719, 36 C.R.R. 193, 56 D.L.R. (4th) 1 — considered
Becker v. Pettkus, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 834 — referred to
Bliss v. Canada (Attorney General), [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711, 23 N.R. 527, 92 D.L.R. (3d) 417, 78 C.L.L.C. 14,175 — referred to
Boronovsky v. Chief Rabbis of Israel, P.D. CH [25] (1), 7 — referred to
Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219, 26 C.C.E.L. 1, [1989] 4 W.W.R. 193, 89 C.L.L.C. 17,012, 94 N.R. 373, 59 D.L.R. (4th) 321, 10 C.H.R.R. D/6183, 58 Man. R. (2d) 161, 45 C.R.R. 115 — applied
Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, 93 C.L.L.C. 17,006, 46 C.C.E.L. 1, 13 Admin. L.R. (2d) 1, 149 N.R. 1, 100 D.L.R. (4th) 658, 17 C.H.R.R. D/349 — referred to
Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc., [1984] 2 S.C.R. 145, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, [1984] 6 W.W.R. 577, 27 B.L.R. 297, 84 D.T.C. 6467, (sub nom. *Hunter v. Southam Inc.*) 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 55 A.R. 291, 55 N.R. 241, 9 C.R.R. 355, 11 D.L.R. (4th) 641 — referred to
Cotroni c. Centre de prévention de Montréal, (sub nom. *United States v. Cotroni*) [1989] 1 S.C.R. 1469, 48 C.C.C. (3d) 193, (sub nom. *United States v. Cotroni; United States v. El Zein*) 96 N.R. 321, 23 Q.A.C. 182, 42 C.R.R. 101 — referred to
Egan v. Canada (1995), 12 R.F.L. (4th) 201, 95 C.L.L.C. 210-025 (S.C.C.) — referred to
McKinney v. University of Guelph, [1990] 3 S.C.R. 229, 91 C.L.L.C. 17,004, 76 D.L.R. (4th) 545, 118 N.R. 1, 13 C.H.R.R. D/171, 45 O.A.C. 1, 2 C.R.R. (2d) 1 — considered
Peter v. Beblow, [1993] 1 S.C.R. 980, 44 R.F.L. (3d) 329, [1993] 3 W.W.R. 337, 77 B.C.L.R. (2d) 1, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621 — referred to
R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 58 N.R. 81, 13 C.R.R. 64, 18 C.C.C. (3d) 385, 60 A.R. 161, 18 D.L.R. (4th) 321, 85 C.L.L.C. 14,023 — referred to
R. v. Oakes, [1986] 1 S.C.R. 103, 65 N.R. 87, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 14 O.A.C. 335, 26 D.L.R. (4th) 200, 19 C.R.R. 308 — referred to
R. v. Swain, [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481, 5 C.R. (4th) 253, 125 N.R. 1, 3 C.R.R. (2d) 1, 47 O.A.C. 81 — referred to
R. v. Turpin, [1989] 1 S.C.R. 1296, 69 C.R. (3d) 97, 48 C.C.C. (3d) 8, 96 N.R. 115, 34 O.A.C. 115, 39 C.R.R. 306 — considered
R. v. Videoflicks Ltd., (sub nom. *R. v. Edwards Books & Art Ltd.*) [1986] 2 S.C.R. 713, 87 C.L.L.C. 14,001, 28 C.R.R. 1, 55 C.R. (3d) 193, 19 O.A.C. 239, 71 N.R. 161, 30 C.C.C. (3d) 385, (sub nom. *R. v. Nortown Foods*) 35 D.L.R. (4th) 1 — referred to
Reference re s. 94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 48 C.R. (3d) 289, 63 N.R. 266, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30 — referred to
Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada), [1990] 1 S.C.R. 1123, 77 C.R. (3d) 1, 56 C.C.C. (3d) 65, [1990] 4 W.W.R. 481, 109 N.R. 81, 68 Man. R. (2d) 1, 48 C.R.R. 1 — referred to
Rocket v. Royal College of Dental Surgeons (Ontario), [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68, 47 C.R.R. 193, 111 N.R. 161, 40 O.A.C. 241 — referred to

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, 82 B.C.L.R. (2d) 273, [1993] 7 W.W.R. 641, 24 C.R. (4th) 281, 158 N.R. 1, 34 B.C.A.C. 1, 56 W.A.C. 1, 85 C.C.C. (3d) 15, 107 D.L.R. (4th) 342, 17 C.R.R. (2d) 193 — *considered*

Schachter v. Canada, [1992] 2 S.C.R. 679, 92 C.L.L.C. 14,036, 139 N.R. 1, 93 D.L.R. (4th) 1, 10 C.R.R. (2d) 1 — *referred to*

Symes v. R., (sub nom. *Symes v. Canada*) [1993] 4 S.C.R. 695, 94 D.T.C. 6001, (sub nom. *Symes v. Minister of National Revenue*) 161 N.R. 243, [1994] 1 C.T.C. 40, 19 C.R.R. (2d) 1, 110 D.L.R. (4th) 470 — *referred to*

Weatherall v. Canada (Attorney General), [1993] 2 S.C.R. 872, 23 C.R. (4th) 1, 105 D.L.R. (4th) 210, 16 C.R.R. (2d) 256, (sub nom. *Conway v. Canada*) 154 N.R. 392, (sub nom. *Conway v. Canada (Attorney General)*) 83 C.C.C. (3d) 1 — *referred to*

Statutes considered:

Canadian Bill of Rights, S.C. 1960, c. 44 (reprinted in R.S.C. 1985, App. III).

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 —

s. 1

s. 3

s. 8

s. 11(b)

s. 15

s. 15(1)

s. 24(1)

Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11 —

s. 52

Criminal Code, R.S.C. 1970, c. C-34 [R.S.C. 1985, c. C-46] —

s. 146(1) [R.S.C. 1985, c. C-46, s. 153(1)]

Family Law Act, 1986, S.O. 1986, c. 4 [R.S.O. 1990, c. F.3] —

s. 53 [R.S.O. 1990, c. F.3, s. 53]

Family Law Act, R.S.O. 1990, c. F.3 —

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s. 29

s. 30

s. 53

Family Law Reform Act, 1978, The, S.O. 1978, c. 2 —

s. 14

Human Rights Code, 1981, S.O. 1981, c. 53 [R.S.O. 1990, c. H.19] —

s. 4(1) [R.S.O. 1990, c. H.19, s. 5(1)]

s. 9(j) [R.S.O. 1990, c. H.19, s. 10(1)]

Insurance Act, R.S.O. 1980, c. 218 [R.S.O. 1990, c. I.8] —

s. 231 [R.S.O. 1990, c. I.8, s. 265]

s. 233

Sched. C

Motor Vehicle Accident Claims Act, R.S.O. 1990, c. M.41.

Old Age Security Act, R.S.C. 1985, c. O-9/9.

Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48 [R.S.C. 1985, c. U-1]].

Treaties and conventions considered:

European Convention on Human Rights, 1950, 213 U.N.T.S. 221 —

art. 12

United Nations General Assembly, 1948, Universal Declaration of Human Rights, Res. 217 (III) A —

art. 16

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8 —

Uninsured Automobile Coverage Regulation,

R.R.O. 1980, Reg. 535.

Appeal from judgment reported at 4 O.R. (3d) 623, [1991] I.L.R. 1-2770, 83 D.L.R. (4th) 766, 7 C.C.L.I. (2d) 317 (C.A.) affirming judgment reported at 65 D.L.R. (4th) 670, 71 O.R. (2d) 662, 45 C.C.L.I. 296, (sub nom. *Miron v. Economical Mutual Insurance*) [1990] I.L.R. 1-2551 (H.C.) dismissing preliminary motion

Gonthier J. (dissenting) (Lamer C.J.C., La Forest and Major JJ. concurring):

1 I have had the benefit of the reasons of Madame Justice L'Heureux-Dubé and Madam Justice McLachlin. I agree that the statutory interpretation of the word "spouse" in the insurance policy limits accident benefits to married couples and does not extend to unmarried couples living together. With regard to the question of whether this limitation infringes s. 15 of the *Canadian Charter of Rights and Freedoms*, I respectfully disagree with their conclusion that these provisions are discriminatory. I would dismiss the appeal.

2 It is my position that marital status may constitute an analogous ground of discrimination under s. 15 of the *Charter*. However, in examining whether a law conforms to s. 15 in any given case, regard must be had to the nature of the analogous ground and its relevancy to the distinction that is being drawn by the legislation. Marriage is an institution entered into by choice which carries with it certain benefits and burdens. Among these is the obligation of mutual support. As I will explain below, the benefits at issue in this case are most appropriately characterized as coming within the scope of the support obligations which the law attaches to marriage. Where the legislature draws a distinction premised on a characteristic relevant to the institution of marriage, such as these support obligations, then the distinction

is not discriminatory and is therefore permissible. In the case at bar, I find that the distinction drawn by the impugned provisions of the *Insurance Act* is relevant to the institution of marriage. Accordingly, the legislation does not infringe s. 15(1) of the *Charter*, and s. 1 need not be addressed.

I — Facts And Proceedings

3 At the outset, it should be noted that the merits of this case have not yet been heard by the lower court. The issue in this appeal as to the meaning of "spouse" under the *Insurance Act*, R.S.O. 1980, c. 218, was raised by preliminary motion on an agreed statement of facts.

4 The appellants John Miron and Jocelyne Valliere have resided together in a common law relationship since May 1983. Miron is the father of two of the three children who have been born to Valliere. These children were born in 1981 and 1984. The respondent, the Economical Mutual Insurance Company, issued a policy of motor vehicle insurance to Valliere for the period December 12, 1986 to December 12, 1987. The terms of this policy were set by the Ontario Standard Automobile Policy as provided by the *Insurance Act*, ss. 231, 233, Schedule C, and R.R.O. 1980, Reg. 535.

5 In August 1987, Miron sustained injuries while a passenger in a motor vehicle owned by the respondent William James McIsaac, and which was driven by the respondent Richard Trudel. Neither McIsaac nor Trudel was insured. As a result, Miron claimed accident benefits for loss of income pursuant to Section B, Subsection 2, Part II of the Ontario Standard Automobile Policy incorporated in the policy issued by the respondent to Valliere. He also claimed damages pursuant to the Uninsured Motorist coverage under Section B, Subsection 3 of the same policy.

6 The respondent, the Economical Mutual Insurance Company, brought a motion to determine a question of law prior to trial, namely whether Miron was the "spouse" of Valliere for the purposes of the Section B, Subsection 2, Part II or Section B, Subsection 3 of the Ontario Standard Automobile Policy. Chilcott J., the motion judge, found that, for the purposes of the applicable portions of the policy, "spouse" meant a person who is legally married [reported at (1990), 65 D.L.R. (4th) 670 (Ont. H.C.)]. Accordingly, Miron was found not to be a "spouse" within the meaning of those provisions of the policy, and therefore not insured under the policy.

7 The appellants appealed the decision to the Ontario Court of Appeal and based their argument solely upon s. 15 of the *Charter*. That argument had not been raised before the motion judge. The Court of Appeal dismissed the appeal [reported at (1991), 4 O.R. (3d) 623] for reasons given by the court on the same day in *Leroux v. Co-operators General Insurance Co.* (1991), 4 O.R. (3d) 609. In *Leroux*, the Court of Appeal held that there was no violation of s. 15 of the *Charter*, as marital status was not a ground of discrimination analogous to those specifically enumerated in s. 15. The Court of Appeal concluded that unmarried couples were not members of a "disadvantaged group", nor did they constitute a "discrete and insular minority" which had suffered "social, political and legal disadvantage in our society". The Court of Appeal also stated that the characteristic of being an "unmarried partner" did not constitute an "immutable" characteristic (pp. 620-621).

II — Relevant Statutory Provisions

Canadian Charter of Rights and Freedoms

8

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.

Ontario Standard Automobile Policy (S.P.F. No. 1) [emphasis added]

Section B, Subsection 2, Part II — Loss of Income

Subject to the provisions of this Part, a weekly payment for the loss of income from employment for the period during which the *insured person* suffers substantial inability to perform the essential duties of his occupation or employment ...

Section B, Special Provisions, Definitions, and Exclusions of Section B

(1) "INSURED PERSON" DEFINED

In this section, the words "insured person" mean,

.....

(b) the insured and, if residing in the same dwelling premises as the insured, *his or her spouse* and any dependent relative of either while an occupant of any other automobile; provided that,

(i) the insured is an individual *or are husband and wife*;

Section B, Subsection 3 — Uninsured Motorist Cover

All sums that

(a) a *person insured under the contract* is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile;

(b) any person is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as *damages for bodily injury to or the death of a person insured under the contract* resulting from an accident involving an automobile; and

(c) a *person insured under the contract* is legally entitled to recover from the identified owner or driver of an uninsured automobile as damages for accidental damage to the insured automobile or its contents, or to both the insured automobile and its contents, resulting from an accident involving an automobile.

1. Definitions:

For the purposes of this subsection,

.....

(b) "person insured under the contract" means,

.....

(iii) in respect of a claim for bodily injuries or death,

.....

b. the insured and, *if residing in the same dwelling premises* as the insured, *his or her spouse* and any dependent relative of either,

(1) while an occupant of an uninsured automobile ...

III — Issues

9 Two issues are presented in this appeal.

1. Is Miron, as a person living in a conjugal relationship outside of marriage, a "spouse" of Valliere and therefore an insured person within the meaning of Section B, Subsection 2, Part II or Section B, Subsection 3 of the Ontario Standard Automobile Policy?

2. In the alternative, do the provisions of Section B, Subsection 2, Part II or Section B, Subsection 3 of the Ontario Standard Automobile Policy infringe s. 15 of the *Canadian Charter of Rights and Freedoms*, and if so, are the provisions justified under s. 1 of the *Charter*?

10 As I indicated above, I agree with my colleague McLachlin J.'s reasons with regard to the statutory interpretation of the word "spouse" as being limited to married couples. Therefore, my analysis will focus on the second question.

11 The application of the *Charter* to this private contract is not contested by the parties. It is common ground that the *Charter* applies to the insurance policy since the terms of the policy are prescribed by the *Insurance Act*, ss. 231 and 233 and Schedule C.

12 Needless to say, the interpretation that will be given to s. 15 of the *Charter* by this court will not simply add judicial gloss to what is the equivalent of ordinary legislation subject to amendment by the Legislature, but rather, will establish what the Legislature can or must do under the Constitution thereby constraining its powers. As McIntyre J. stated in *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143, at p. 175 [emphasis added]:

Both the enumerated grounds themselves and other possible grounds of discrimination recognized under s. 15(1) must be interpreted in a broad and generous manner, reflecting the fact that *they are constitutional provisions not easily repealed or amended but intended to provide a "continuing framework for the legitimate exercise of governmental power" and, at the same time, for "the unremitting protection" of equality rights ...*

I stress this obvious fact, however, because as I see the matter, this case is ultimately about the ambit of legitimate legislative choice in defining the attributes of a fundamental social institution, namely the rights and obligations attached to marriage. This court should be cautious in labelling as discriminatory laws which simply seek to define the rights and obligations of married persons differently from those who choose to cohabit outside of marriage.

IV — Analysis

13

A. General Principles Applicable to s. 15 of the Charter

14 It has been firmly established by this court that not all distinctions infringe s. 15 of the *Charter*. A breach of s. 15 occurs only when one of the four equality rights set out therein has been infringed in a discriminatory manner. McIntyre J. outlined in *Andrews*, supra, at pp. 174-175, the concept of discrimination in the following words:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

15 The analysis to be undertaken under s. 15(1) of the *Charter* involves three steps. The first step looks to whether the law has drawn a distinction between the claimant and others. The second step then questions whether the distinction results in disadvantage, and examines whether the impugned law imposes a burden, obligation or disadvantage on a group of persons to which the claimant belongs which is not imposed on others, or does not provide them with a benefit which it grants others (*Andrews*, supra). It is at this second step that the direct or indirect effect of the legislation is examined.

16 The third step assesses whether the distinction is based on an irrelevant personal characteristic which is either enumerated in s. 15(1) or one analogous thereto. As McIntyre J. emphasized in *Andrews*, supra, at p. 165, s. 15(1) seeks to eliminate differences based on irrelevant personal characteristics:

In other words, the admittedly unattainable ideal [of equality] should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

In his separate concurring reasons, La Forest J. agreed that discrimination exists where distinctions are drawn "on the basis of 'irrelevant personal differences' such as those listed in s. 15 and, traditionally, in human rights legislation" (*Andrews*, supra, at p. 193). The ingredient of the relevancy of the personal characteristic was also emphasized as going to the essential core of this court's s. 15 jurisprudence by Professor Dale Gibson in his article "Analogous Grounds of Discrimination under the Canadian Charter: Too Much Ado About Next to Nothing" (1991), 29 *Alta. L. Rev.* 772, at p. 780.

17 This third step thus comprises two aspects: determining the personal characteristic shared by a group and then assessing its relevancy having regard to the functional values underlying the legislation. On the first aspect of the third step of the s. 15(1) analysis, the individual's membership in a group is an essential condition, while idiosyncrasies unrelated to membership in a group do not give rise to discrimination. However, the notion of a "group" should not be confused with the concept of a "disadvantaged group" which refers to a "discrete and insular minority" which has suffered from political, historical or legal disadvantage: *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1333. The identification of such a disadvantaged group in our society can serve as a meaningful indicium of discrimination, that is, it may help to identify the existence of a disadvantage attributable to an irrelevant personal characteristic. However, I agree with McLachlin J. that membership in such a disadvantaged group is not an essential precondition for bringing a claim under s. 15 of the *Charter*. The second aspect of the third step, that of assessing relevancy, looks to the nature of the personal characteristic and its relevancy to the functional values underlying the law. Of course, the functional values underlying the law may themselves be discriminatory. Such will be the case where the underlying values are irrelevant to any legitimate legislative purpose. Relevancy is assessed by reference to a ground enumerated in s. 15 or one analogous thereto. I will return to this aspect of the analysis below.

(1) The Importance of Context to the Comparative Analysis under s. 15 of the Charter

18 Throughout the s. 15(1) analysis, to paraphrase Iacobucci J. in *Symes v. R.*, (*sub nom. Symes v. Canada*) [1993] 4 S.C.R. 695, at p. 754, one must necessarily undertake a form of comparative analysis in order to determine whether particular facts give rise to inequality. This proposition was enunciated by McIntyre J. in *Andrews*, supra, at p. 164, in the following terms:

[Equality] is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises. It must be recognized at once, however, 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.

19 In *R. v. Turpin*, supra, at pp. 1331-1332, Wilson J. explained how this comparative analysis is linked to the examination of the larger context. In her words:

In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context ... Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in equality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage.

20 Thus, Wilson J.'s words stress the importance of a contextual approach in order to prevent the s. 15 analysis from becoming a mechanical and sterile categorization process. This admonition was most memorably issued by Dickson J., as he then was, in the landmark case of *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, where he stated that "the Charter was not enacted in a vacuum" and it must "be placed in its proper linguistic, philosophic and historical contexts". Context is indispensable to identifying the appropriate groups to be compared, to determining whether prejudice flows from the distinction, and to assessing the nature and relevancy of the personal characteristic upon which the distinction is drawn. In sum, the larger context importantly informs all stages of the analysis and ensures that it is not narrowly restricted to the "four corners of the impugned legislation" (to use the words of Wilson J. in *Turpin*, supra, at p. 1332).

21 More specifically, an indispensable element of the contextual approach to s. 15(1) involves an inquiry into whether a distinction rests upon or is the expression of some objective physical or biological reality, or fundamental value. This inquiry crucially informs the assessment of whether the prejudicial distinction has been drawn on a relevant basis, and therefore, whether or not that distinction is discriminatory.

22 For example, in *R. v. Nguyen*, (sub nom. *R. v. Hess; R. v. Nguyen*) [1990] 2 S.C.R. 906, at pp. 928-929, this court held that the legitimacy of distinctions drawn on the basis of sex in the context of the criminal law will depend on the nature of the offence in issue. In that case, s. 146(1) of the *Criminal Code* made it an offence for a man to have sexual intercourse with a female under the age of 14 who was not his wife. In finding that the legislation did not infringe s. 15(1), the court was careful to consider the offence in the appropriate context by taking into account certain fundamental biological realities, namely the fact that only men can commit the proscribed act. This court took a similar approach in *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872, where a male prison inmate challenged the constitutionality of frisk searching and patrolling conducted in male prisons by female guards. The appellant argued that the practice was discriminatory since female inmates were not also subject to cross-gender frisk searches. Speaking for the court, La Forest J. stated that the different treatment of male and female inmates does not necessarily amount to discrimination. As he explained (at p. 877), "[g]iven the historical, biological and sociological differences between men and women, equality does not demand that practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates". In both *Hess*, supra, and *Weatherall*, supra, this court found that distinctions drawn on the basis of relevant biological differences between the sexes do not necessarily constitute discrimination.

23 Like biological realities, fundamental values may also be critical to an appreciation of the appropriate context in which to conduct an analysis of s. 15(1). For example, in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 278, to support a finding of discrimination under s. 15(1), La Forest J. approvingly quoted from *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at p. 368, that employment is "one of the most fundamental aspects in a person's life". He held that a restriction on employment under the mandatory retirement policies of the respondent universities imposed a burden on the basis of the irrelevant personal difference of age and, hence, was discriminatory (at p. 278).

24 Finally, it is worth stressing that a contextual analysis may lead to fundamentally different assessments as to whether distinctions drawn on the basis of the same ground will amount to discrimination. In other words, depending on the context, the same ground may be discriminatory with respect to certain classes of distinction but not with respect to others. For example, this court recognized in *R. v. Turpin*, supra, that while province of residence was not a ground of discrimination under the applicable legislative scheme in that case, it was nevertheless possible that in different circumstances a distinction based on province of residence could be discriminatory. In the words of Wilson J., at p. 1333:

I would not wish to suggest that a person's province of residence or place of trial could not in some circumstances be a personal characteristic of the individual or group capable of constituting a ground of discrimination. I simply say that it is not so here.

In the same vein, in *R. v. Généreux*, [1992] 1 S.C.R. 259, Lamer C.J.C. dismissed the suggestion that the existence of a parallel system of military justice discriminated against members of the Armed Forces, but nevertheless added the following important caveat (at p. 311) [emphasis in original]:

I emphasize, however, that my conclusion here is confined to the context of this appeal. I do not wish to suggest that military personnel can *never* be the objects of disadvantage or discrimination in a manner that could bring them within the meaning of s. 15 of the *Charter*. Certainly it is the case, for instance, that after a period of massive demobilization at the end of hostilities, returning military personnel may well suffer from disadvantages and discrimination peculiar to their status, and I do not preclude that members of the Armed Forces might constitute a class of persons analogous to those enumerated in s. 15(1) under those circumstances. However, no circumstances of this sort arise in the context of this appeal, and the appellant gains nothing by pleading s. 15 of the *Charter*.

In short, a sensitive, contextual approach is essential in determining whether distinctions drawn on the basis of a particular ground are discriminatory in any given case. Differently put, context is indispensable in helping to determine whether a given basis of distinction is a discriminatory ground for certain classes of cases but not for others.

(2) Relevance and This Court's "Enumerated and Analogous Grounds" Approach to s. 15 in *Andrews*

25 As I noted above, a concern for whether a given distinction is drawn on a relevant basis is at the core of the analysis under s. 15. An otherwise prejudicial distinction drawn on a relevant basis is not discriminatory. In determining what constitutes such a relevant basis for distinction, this court in *Andrews*, supra, adopted the so-called "enumerated and analogous grounds" approach to discrimination. Under this approach, the analysis under s. 15 of the *Charter* encompasses a determination as to whether the prejudicial distinction is attributable to or on the basis of an enumerated or analogous ground. Such a ground is identified as one that is commonly used to make distinctions which have little or no rational connection with the subject-matter, generally reflecting a stereotype.

26 With respect to those grounds listed or enumerated in s. 15, distinctions drawn on such a basis are often but not necessarily always discriminatory, since they may be relevant as merely reflecting a fundamental reality or value. As I noted above, in *Hess*, supra, and *Weatherall*, supra, this court found that distinctions drawn on the basis of the enumerated ground of sex but relevant as reflecting certain biological realities are not discriminatory.

27 Relevancy is also at the heart of the identification of an analogous ground. The proper identification of such a ground requires a sensitive, contextual examination of its nature in order to determine whether it qualifies as a basis for irrelevant distinctions, and hence is an analogous ground. But as I pointed out above, a contextual analysis also serves to understand the nature of the ground and determine in what respect it so qualifies. It may be that a given ground is analogous in certain respects but not others. As in the case of enumerated grounds, the distinction being drawn may simply reflect certain biological or physical realities or fundamental values which are in themselves relevant. Certain distinctions may be inherently connected to the ground, indeed come within the scope of its definition and, by that very fact, may be relevant regardless of circumstances and incapable of grounding discrimination.

28 As I develop below, marital status is an example of a ground which, while analogous in certain respects, cannot be so with respect to those attributes and effects which serve to define marriage itself, which include the rights and obligations necessarily incident to the institution, and distinguish it from a state of absence of marriage. This is so, as marriage in itself is not discriminatory as it is a matter of choice and a basic institution of society.

29 To the extent, then, that a law in any given case mirrors or reflects a distinction drawn on such a basis that is relevant to its functional values which are not themselves discriminatory, the distinction drawn by the law will not be discriminatory. In the absence of such a relevant basis, the ground in issue is properly qualified as one analogous to those enumerated in s. 15 and a distinction based on it will be discriminatory and infringe s. 15.

30 I should also emphasize that the approach to s. 15 in these reasons in no way departs from this court's approach in *Andrews*, supra, and in subsequent jurisprudence. My concern has only been to clarify a qualification which must be made in the application of the analogous grounds approach, a qualification which merely calls for a heightened sensitivity to the nature of the ground in issue in any given case, and a recognition that a ground which may be the basis of discrimination in one context may be innocuous in another.

31 Parenthetically, I note that a recognition of the need for sensitivity to the context in a s. 15(1) analysis is also a complete response to my colleague McLachlin J.'s concern that a focus on relevance alone is not sufficient in all cases to address whether a charge of discrimination has been proven. Surely, if both the larger context and the varieties of context are kept firmly in mind in assessing the nature of an analogous or enumerated ground, then there can be no danger that the purpose of the equality guarantees will somehow be eclipsed or overlooked in a relevance approach to s. 15. Indeed, a criterion defined in terms of stereotype based on presumed group characteristics, rather than on the basis of merit, capacity or circumstances, is but an elaboration of the concept of relevance.

32 Nor, in my opinion, does recognition of the essential role of relevance under s. 15 raise the spectre of superficial biological differences re-emerging as a justification for sexual discrimination, as had been countenanced by this court's decision in *Bliss v. Canada (Attorney General)*, [1979] 1 S.C.R. 183. The lesson to be learned from *Bliss* is most emphatically not that a court should never sustain legislative distinctions on the basis of relevant biological differences between the sexes. If that were the case, then the state would, for example, be barred under s. 15 of the *Charter* from providing pregnant women with financial assistance for the purpose of assisting them to maintain their own and their child's physical well-being during the pregnancy, which would be absurd. I would venture to say, without any hesitation, that a distinction drawn on the basis of such a fundamental biological reality would be laudable as well as relevant. No, the lesson to be drawn from *Bliss* is rather that discrimination analysis must be conducted with a view to the larger context. Only then can a court sensibly separate biological differences which are normatively relevant and hence benign, from those which are irrelevant and thus discriminatory. This court was thus properly mindful of broadening the appropriate context in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1237, when it overturned *Bliss* and recognized that exclusion of pregnancy from coverage under an employer benefit plan for compensation of employees unable to work for health-related reasons was "untenable", being irrelevant to the purpose of the plan, as pregnancy is such a valid health-related reason. It was therefore discrimination and also discrimination on the basis of sex. The court rightly pointed out that while nature endowed only one of the sexes with the ability to bear children, a facile reliance on this fact would result in placing the major cost of procreation entirely on women.

(3) Relevance under s. 15(1) and its Relationship to Reasonableness under s. 1

33 Before addressing the application of s. 15(1) of the *Charter* to the facts of this case, I think it is important to clarify the relationship between the requirement of *relevance* under s. 15(1) of the *Charter* and that of *reasonableness* under s. 1. It should be emphasized that determining the relevancy of a distinction does not amount to importing under s. 15(1) the principles of justification found within s. 1 of the *Charter*. This approach is appropriately mindful, then, of the caution which Wilson J. issued in *Turpin*, supra, at p. 1328, that "[t]he equality rights must be given their full content divorced from justificatory factors properly considered under s. 1".

34 Fundamentally, s. 15(1) is concerned with the relevancy of distinctions. Relevancy goes to the determination of the existence of discrimination, whereas the s. 1 justification only arises after discrimination has been established. Thus, even where a distinction is based on an irrelevant personal characteristic, and is therefore discriminatory, it is still possible for the discrimination to be rationally connected to a pressing and substantial governmental objective. In this regard, it is useful to refer back to *Andrews*, supra. That decision significantly modified in at least two ways the concept of equality as it was then applied by the courts. First, the court rejected as deficient the rule of formal equality which stated that persons in similar situations must be given similar treatment. Second, and most relevant in the present context, this court also rejected what might be termed the "reasonableness test" (*Andrews*, supra, at pp. 181-182). The object pursued by the "reasonableness test" was to ascertain whether the impugned distinction was reasonable or fair, taking into account the

purposes, the aims and the effect of the legislation on the person. Under this test, both the finding of whether a distinction resulted in discrimination and, to a large extent, the justification of that discrimination were done under s. 15(1).

35 Instead, under the enumerated and analogous grounds approach adopted by the court in *Andrews*, the analysis under s. 15 of the *Charter* encompasses a determination as to whether the prejudicial distinction is attributable to an enumerated or analogous ground. Once the analogous ground is identified and defined in terms of its nature and scope as explained above, any further issues as to relevance are to be examined not under s. 15 but under s. 1 together with any other issues as to justification.

36 Differently put, the court in *Andrews*, supra, held that the relevance of a basis for differential treatment under s. 15 must be clearly distinguished from its reasonableness and thus whether it can be justified under s. 1. This distinction was made forcefully by La Forest J., who stated (at p. 197) [emphasis added]:

While it cannot be said that citizenship is a characteristic which "bears no relation to the individual's ability to perform or contribute to society" (*Fontiero v. Richardson*, 411 U.S. 677 (1973), at p. 686), it certainly typically bears an attenuated sense of relevance to these. That is not to say that no legislative conditioning of benefits (for example) on the basis of citizenship is acceptable in the free and democratic society that is Canada, merely that legislation purporting to do so ought to be measured against the touchstone of our Constitution. It requires justification.

37 An additional example of the proper relationship between s. 15(1) and s. 1 is found in *McKinney*, supra. La Forest J. found that the mandatory retirement policies of the respondent universities, though amounting to discrimination under s. 15(1) as impinging upon employment, were rationally connected to the legitimate objectives of the impugned legislation, which included the promotion of excellence in higher education and the preservation of academic freedom (p. 281). These values were not in issue. The debate bore upon the means chosen to promote them. La Forest J. examined the relationship between the needs of the universities and the tenure of faculty members. He concluded that "mandatory retirement [was] intimately tied to the tenure system" (p. 283). He further resolved that mandatory retirement "ensures continuing faculty renewal, a necessary process to enable universities to be centres of excellence ... In a closed system with limited resources, this can only be achieved by departures of other people" (*McKinney*, supra, at p. 284) (emphasis in original). The evidence submitted was found to demonstrate some correlation, depending on the resource allocation of universities, between the mandatory retirement and the renewal of faculty members. These were considerations properly weighed under s. 1 of the *Charter*.

38 Nor do I believe that an approach to s. 15 which focuses on enumerated or analogous grounds as explained above places any additional onus on a *Charter* claimant. First, as I have already noted, a concern for relevance has run through this court's s. 15 jurisprudence. In this sense, my clarification of the analogous grounds approach has obviously not imposed any additional burden on a *Charter* claimant. Secondly, the onus is always on a claimant to prove on the balance of probabilities that a *Charter*-guaranteed right or freedom has been infringed. Discharging this onus and demonstrating that legislative distinctions have been drawn on an irrelevant ground having regard to its nature and scope will, admittedly, require a knowledge of the wording of the legislation and of the larger context within which it is situated. However, these are obviously not matters to which only the enacting government is privy. Where it is not plain from the subject-matter and wording of the law that a distinction based on an enumerated or analogous ground reflects some biological or physical reality or fundamental value and where no other evidence is tendered, a court will generally be obliged to find that such a distinction is discriminatory. As a consequence, in any case where legislation is challenged under s. 15 of the *Charter*, the enacting government will have an incentive to assist the court to determine what relevance, if any, there is in the impugned legislative distinction.

39 I would also stress that there may indeed be significant overlap between the assessment of the functional values of the legislation under s. 15, and the purpose of the legislation under s. 1. This will not necessarily always be the case, however, as the legislation in *McKinney*, supra, clearly illustrates. However, to the extent that there is overlap between the functional values and the purpose of the legislation, this is not cause for concern, since fundamentally different questions are asked under s. 15 and under s. 1 proceeding under fundamentally different premises: under s. 15, one asks whether the

legislation is discriminatory on the basis of certain grounds, and then under s. 1, having found it to be discriminatory, one asks whether it is otherwise a reasonable limit which can be demonstrably justified in a free and democratic society. In short, as McIntyre J. stressed in *Andrews*, supra, while "the relationship between these two sections may well be difficult to determine on a wholly satisfactory basis" it is "important to keep them analytically distinct" (p. 178).

40 I conclude from the foregoing that a distinction deemed irrelevant because based on an enumerated or analogous ground and thus discriminatory under s. 15(1) may nevertheless be rationally connected to furthering a larger social purpose, and hence may be judged reasonable under s. 1.

B. Section 15(1) of the Charter and the Ground of Marital Status

41 The distinction drawn by the legislation at issue is made on the basis of marriage and the appellants have rested their whole argument upon the premise that their situation is identical to that of married couples, and carries with it the same consequences; it is therefore important in addressing the context of this distinction to examine briefly the concept of marriage and its place in our society, together with some implications of the unique contractual basis of marriage, even at the risk of stating the obvious.

(1) The Importance of Marriage as a Social Institution

42 The question raised by the case at bar is intimately linked with the institution of marriage, the importance of which has long been recognized in our society. Other countries, as well as international law, acknowledge both the importance of marriage and the legitimacy of state action which fosters this basic social institution.

43 For example, the United States Supreme Court has long recognized that marriage is a fundamental social institution. In *Maynard v. Hill*, 125 U.S. 190 (1888), at pp. 205, 211, the court stated:

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute ground for its dissolution.

.....

[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

44 The court has also affirmed the constitutional status of the right to marry. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), at p. 399, the court found that the liberty protected by the Fourteenth Amendment includes "the right of the individual ... to marry, establish a home and bring up children", and in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), at p. 541, that "[m]arriage and procreation are fundamental to the very existence and survival of the race". Nor can one forget Douglas J.'s eloquent words in *Griswold v. Connecticut*, 381 U.S. 479 (1965), at p. 486, in finding that freedom of choice in marriage and family relationships lies at the heart of the right to privacy:

We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as a noble a purpose as any involved in our prior decisions.

These sentiments were repeated by Warren C.J. in *Loving v. Virginia (Commonwealth)*, 388 U.S. 1 (1967), at p. 12: "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men". (See also *Boddie v. Connecticut*, 401 U.S. 371 (1971), at p. 374; *Cleveland Board of Education v. Laflaur*,

414 U.S. 632 (1974), at pp. 639-640; *Moore v. East Cleveland*, 431 U.S. 494 (1977), at p. 499; and *Zablocki v. Redhail*, 434 U.S. 374 (1978), at pp. 384-385.)

45 The California courts have also affirmed on several occasions the State's legitimate interest in fostering marriage as a social institution (see *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), at p. 122; *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988), at pp. 586-587; *Beaty v. Truck Insurance Exchange*, 8 Cal. Rptr. 2d 593 (Ct. App. 3 Dist. 1992), at p.600).

46 Moving from domestic to international law, art. 16 of the *Universal Declaration of Human Rights*, which is binding on Canada, and art. 12 of the *European Convention on Human Rights*, provide individuals with "the right to marry". For example, art. 16 of the *Universal Declaration* states that "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution".

47 This brief review of domestic and international law confirms what in my view requires little if any confirmation, namely that marriage is both a basic social institution and a fundamental right which states can legitimately legislate to foster.

(2) *The Contractual Basis of Marriage*

48 In considering the particular attributes of the ground at issue, it is also important to remember that married status, at least in our society, can only be acquired by the expression of the individual's personal, free choice, regardless of the reason for which that status is assumed. Marriage rests upon a contractual basis, to which the law attaches certain rights and obligations. The decision to marry includes the acceptance of various legal consequences incident to the institution of marriage, including the obligation of mutual support between spouses and the support and raising of children of the marriage. In my view, freedom of choice and the contractual nature of marriage are crucial to understanding why distinctions premised on marital status are not necessarily discriminatory: where individuals choose not to marry, it would undermine the choice they have made if the state were to impose upon them the very same burdens and benefits which it imposes upon married persons. The authors Michael D.A. Freedman and Christina M. Lyon, in *Cohabitation without Marriage* (1983), at p. 191, make just these points:

marriage is a voluntary institution in which the parties express their willingness to commit themselves to each other for life. Whether they are completely cognisant of all the legal effects of such a commitment is immaterial; the commitment is made, nevertheless, and marital rights and obligations inevitably follow. Cohabiting couples do not make that same commitment, and rights and duties akin to marriage should not as a result follow. The danger with imposing the incidents of marriage on a cohabiting couple is that it constitutes a denial of a fundamental freedom.

49 An additional element distinguishing marriage from other relationships is the commitment towards permanence accepted by the parties to the marriage contract. This contractual term "places it in a different category of relational interests than if it were temporary" (Bruce C. Hafen, "[The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests](#)" (1983), 81 Mich. L. Rev. 463, at p. 486). While I accept as a fact that some non-marital relationships do indeed endure as long as some marriages, my point is rather that the commitment towards permanence is a defining characteristic of the contract of marriage.

50 Similarly, while one may speculate that in many instances only one partner in a cohabiting couple does not want to marry, this clearly does not imply that the decision to marry is any less a matter of choice. The decision to marry or not is, admittedly, a joint choice, but a choice nonetheless. Simply because one party prefers not to marry does not entitle a couple to all the benefits which the legislature uniquely attaches to marriage.

51 In my opinion, distinctions drawn on the basis of the status, burdens and benefits acquired through marriage cannot, without more, be discriminatory under s. 15(1) of the *Charter*, since these attributes are acquired through contract. One cannot claim discrimination solely on the basis that the status, rights and obligations validly contracted for differ from those prevailing in the absence of contract. Distinctions premised on marital status are therefore relevant to laws which

are aimed at defining marriage, its effects and the rights and obligations to which it gives rise. Stated otherwise, the attributes of married status cannot give rise to discrimination as against those who are not married. In this aspect, marital status is not an analogous ground. In the case at bar, I will conclude that the benefits claimed by the appellants, namely the rehabilitation and medical compensation and the income benefits, are most appropriately characterized as falling within the scope of the support obligations imposed by law on married spouses. In my view, marital status is therefore relevant to the purposes underlying the distinction contained in the insurance policy, and accordingly, that distinction does not infringe s. 15(1).

C. Applying the s. 15(1) Analysis to This Case

(1) Step One: Has a Distinction Been Drawn by the Legislation?

52 Under the first step of the s. 15(1) analysis, one must determine whether the impugned legislation creates a distinction between the appellants and one or more groups. In this case, the relevant group to be compared is married spouses, and indeed, the appellants, an unmarried couple, urge the court to compare their situation with that of married spouses. They submit that, as an unmarried couple, they are in a relationship akin to marriage, that is, a relatively permanent state of interdependence and cohabitation carrying with it, in Ontario at least, an obligation of mutual support.

53 It is apparent that the insurance policy distinguishes between spouses and non-spouses. Under the definition set forth in Section B of the insurance policy, only "spouses" can claim for the loss of income and bodily injuries. As I mentioned above, I agree with McLachlin J. that the meaning of "spouse" for the purpose of this section of the insurance policy is limited to married couples. Thus, the legislation treats married and unmarried couples in a different manner.

(2) Step Two: Is There Prejudice Resulting from the Legislative Distinction?

54 I turn now to the second step of the s. 15(1) analysis, namely the determination of whether this distinction results in disadvantage. As Iacobucci J. observed in *Symes*, supra, at p. 761, the question at this stage is whether the differential treatment has "the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others".

55 It is true that the insurance policy, as regards injury and income benefits, distinguishes between married and unmarried spouses. It cannot be said, however, that this distinction is prejudicial when considered in the larger context of the rights and obligations uniquely and appropriately attached to marriage. In the words of the Ontario Court of Appeal in *Leroux*, supra, at pp. 620-621:

We appreciate that unmarried persons who live together do not possess some of the important rights that married persons have but, by the same token, they are not subject to many of the legal burdens and obligations of married persons. We do not think that it can be said that their overall position nets out as one of disadvantage.

While I agree with this statement of the Court of Appeal, I do not propose to dispose of the case at bar on this basis. I will, therefore, go on to consider the functional values underlying the impugned insurance legislation and their relevance to the distinction drawn between married and unmarried couples.

(3) Step Three: Are the Functional Values of the Legislation Relevant to Marital Status?

56 The third step of the s. 15(1) analysis asks the broad question of whether the alleged distinction is based upon an irrelevant personal characteristic which is enumerated in s. 15(1) or analogous thereto. In this case, this stage involves an inquiry into whether the functional values underlying the legislation are relevant to marital status. Thus, we must first inquire whether married status is a personal characteristic which qualifies as an analogous ground. In so proceeding, it is useful to turn to the enumerated grounds of s. 15(1) of the *Charter*. These enumerated grounds have been recognized as being the most socially and historically destructive forms of discrimination, and in many cases they are irrelevant to distinctions drawn by legislation (*Andrews*, supra, at p. 175).

57 While marital status is a personal characteristic, and distinctions between married and unmarried couples may be discriminatory under s. 15(1), it must be stressed that marital status has several unique characteristics which distinguish it from the grounds enumerated in s. 15(1) of the *Charter*. In addition to resting upon a consensual, contractual basis, marriage is a status to which the Legislature, as a reflection of its social policy, attaches a bundle of rights and obligations. In none of the enumerated grounds do we find these characteristics. For instance, while both citizenship and religion may in some instances be said to be "chosen", they do not reflect the acceptance of a legal status and rights and obligations founded in contract. Furthermore, as with other contracts, marriage must be entered into freely and voluntarily; failing this it may be annulled. This aspect also distinguishes married status from other grounds of discrimination.

58 As these comments suggest, it is imperative to be acutely sensitive to the nature of the personal characteristic and its specific attributes. This is so whether the ground of alleged discrimination is one enumerated in s. 15(1) or analogous thereto. For example, in *McKinney*, supra, at p. 297, La Forest J. recognized that not all enumerated grounds should be treated on the same basis. Different considerations may be applicable depending on the nature of the ground in question. For instance, in the case of age discrimination, he stated at p. 297:

there are important differences between age discrimination and some of the other grounds mentioned in s. 15(1). To begin with there is nothing inherent in most of the specified grounds of discrimination, e.g., race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. But that is not the case with age.

59 Furthermore, in applying this nuanced approach to the different protected grounds under s. 15(1), it may be useful in some circumstances to examine whether a party is claiming discrimination based on its membership in a group that is disadvantaged. While membership in a disadvantaged group is not an essential element, it may well be an indicium that a distinction is drawn on the basis of an irrelevant personal characteristic.

60 The appellants claim that marital status has historically been a basis for "pervasive discrimination" and, therefore, should be recognized as an analogous ground under the *Charter*. However, in contemporary society, unmarried couples do not constitute a distinct group suffering from stereotypes or prejudices, although they have been the subject of such prejudices in the past. In this respect, the fostering of marriage as a social institution does not stigmatize unmarried couples nor subject them to stereotypes.

61 Today, unmarried couples are not subject to legal restrictions. They may enter into binding and enforceable contracts and may agree upon their respective rights and obligations during cohabitation. Agreements may also relate to the division of assets, property, and expenses. Such agreements may be entered into by unmarried couples either during cohabitation or upon separation. Section 53 et seq. of the Ontario *Family Law Act* (S.O. 1986, c. 4 and R.S.O. 1990, c. F.3) expressly recognize the validity of such agreements. The validity of such contracts between unmarried couples has also been recognized in the United States (see *Marvin v. Marvin*, supra).

62 I also find some observations of the Attorney General of Quebec to be instructive. He explained that at the time of the broad reform of Quebec's family law in 1980, it was decided not to extend the rights and obligations attached to marriage to unmarried couples; this decision was taken with a view to respecting the choice made by unmarried couples, not to stigmatize them.

63 The appellants further submitted that marital status should be recognized as an analogous ground of discrimination in s. 15(1) of the *Charter* because provincial human rights legislation recognizes marital status as a prohibited ground of discrimination. In *Andrews*, supra, at pp. 175-176, McIntyre J. noted the usefulness of referring to provincial human rights Acts but he also emphasized their differences from s. 15(1) of the *Charter*. He observed, for example, that in provincial human rights statutes, the grounds of prohibited discrimination are restricted, and the prohibition itself is limited in scope though absolute in the area to which it applies. Moreover, certain limited exceptions are available by way of exemptions or defences, such as a bona fide occupational requirement. Under s. 15(1) of the *Charter*, by contrast,

the enumerated grounds are not exhaustive nor is the scope of the anti-discrimination protection limited. Additionally, it is significant that discrimination can be justified under s. 1. It is especially important to emphasize that although human rights laws constitute a pre-eminent category of legislation and are, in some cases, described as "quasi-constitutional" in nature (*Zurich Insurance Co. v. Ontario (Human Rights Commission)*), [1992] 2 S.C.R. 321, at p. 339), they do not have the same status as s. 15 of the *Charter*. Most importantly, s. 15 of the *Charter* is a constitutional provision which constrains or compels state but not individual action. This contrast was stated clearly by Cory J. in *University of Alberta v. Alberta (Human Rights Commission)*, (*sub nom. Dickason v. University of Alberta*) [1992] 2 S.C.R. 1103, at pp. 1121-1122, in the following terms:

Yet it must be remembered there is a crucial difference between human rights legislation and constitutional rights. Human rights legislation is aimed at regulating the actions of private individuals. The *Charter's* goal is to regulate and, on occasion, to constrain actions of the state.

Therefore, in my opinion, while I recognize that marital status may be an analogous ground, I would emphasize that any reference to the grounds enumerated in provincial human rights legislation for the purpose of interpreting s. 15(1) of the *Charter* should be made with caution.

64 In illustrating my position that marital status may be an analogous ground, I would first reiterate my earlier conclusion that the benefits and burdens which the law attaches to marriage itself cannot be considered as giving rise to discrimination as they are distinctly related to the existence of marriage. It may well be, however, that discrimination might occur from benefits granted or burdens imposed on the basis of marital status but which are not relevant to the institution of marriage. *Geiger v. London Monenco Consultants Ltd.* (1992), 43 C.C.E.L. 291, illustrates the point. There, the Ontario Court of Appeal decided that an employer's policy to offer married, but not unmarried, employees at a remote job site return flights to their home was discrimination based on marital status contrary to s. 4(1) (now 5(1)) of the *Ontario Human Rights Code, 1981*. Robins J.A. held that marital status was unrelated to the employees' performance of their duties and responsibilities (at pp. 300-301). There was thus no connection between marital status and the nature or the functions of the employment. In such a context, marital status is an irrelevant basis of distinction between employees.

65 I would add that in *Andrews*, supra, at p. 196, La Forest J. also expressed this concern for the specific attributes of the personal characteristic in issue to be closely examined to determine whether and under what circumstances it might be an analogous ground. While La Forest J. found that citizenship was an analogous ground in relation to the right to practise law, he recognized that it may not be analogous in other circumstances:

There is no question that citizenship may, in some circumstances, be properly used as a defining characteristic for certain types of legitimate governmental objectives.

For example, citizenship is a relevant criterion to determine the entitlement to the right to vote in a federal election having regard to s. 3 of the *Charter*, and in this respect is not an analogous ground.

66 Accepting, then, that the analysis under s. 15(1) should be conducted with the specific attributes of the personal characteristic firmly in mind, I turn now to examine the nature of the benefits in the case at bar. Since it is my position that the benefits in this case are most appropriately characterized as falling within the scope of the support obligations attached to marriage, and the appellants base their argument on the similarity of those support obligations with those imposed on common law couples, I will first compare the nature and scope of the support obligations of married couples with those of common law couples. With this comparison in mind, I will then consider the relevancy of the distinction drawn by the insurance legislation in relation to its functional values.

67 One of the essential characteristics of marriage is the obligation of mutual support which rests upon the mutual lifetime commitment spouses make to each other and which endures until the dissolution of the marriage. While the support obligations of marriage are defined by legislation, it is only by freely choosing to assume married status that the parties also choose to accept those support obligations. By contrast, outside marriage, at common law, this consensual,

mutual support obligation is non-existent. While it is true that the common law, through the constructive trust, may provide some relief at the end of a relationship, this is not specific to conjugal relationships and is only available with respect to property claims (*Becker v. Pettkus*, [1980] 2 S.C.R. 834; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38). In short, only in cases where the legislator imposes a support obligation on unmarried couples does it exist. The Ontario *Family Law Act* is an example of the Legislature's intervention. Under that legislation, the support obligation arises in a factual situation of cohabitation, and is therefore imposed without any regard to the will of the parties. For instance, s. 30, Pt. III, of the Ontario *Family Law Act*, which might apply to the appellants, states: "Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so." For the purpose of Pt. III, "spouse" has been defined as including either a man and a woman who are not married to each other and have cohabited, continuously for a period of not less than three years, or who are in a relationship of some permanence if they are the natural or adoptive parents of a child. The obligation terminates when cohabitation ceases. These obligations were only imposed by *The Family Law Reform Act, 1978* (S.O. 1978, c. 2, s. 14) in 1978.

68 Thus, in my view, the nature of the support obligations of unmarried couples and those of married couples is in essence very different. The sources of the obligations, the conditions governing their existence and their termination differ significantly, although both obligations may be given the same title.

69 In the case at bar, however, the appellant Miron claims that he should be entitled to accident benefits and loss of wage benefits under his unmarried partner's insurance policy because they are in the same situation as married spouses. The appellants submit that since the Ontario *Family Law Act* treats married and unmarried individuals in the same manner with respect to support obligations, they should have access to the means allowing them to fulfil their duty.

70 I cannot accept the appellants' position that because the *Family Law Act* imposes support obligations in particular circumstances on some unmarried couples, then it should follow that s. 15 of the *Charter* requires that common law spouses must be covered by all the provisions of the *Insurance Act*. Such an interpretation would in effect give an advantage to unmarried couples over married spouses since they are not burdened with the same obligations.

71 Nor do I think that economic interdependence is, without further qualification, a relevant consideration in concluding that the appellants should be covered under the insurance policy. The benefits contained in the insurance policy fall within the scope of a mutual support obligation arising from marriage since they compensate for physical injury (medical and rehabilitation benefits) and material loss (income replacement benefits); without the insurance policy, a married spouse would have to provide this kind of support to his or her injured spouse. While the insurance policy clearly is concerned with economic interdependence, such interdependence is only relevant in so far as it relates to the institution of marriage. If we were to follow the appellants' reasoning, and focus on economic interdependence simpliciter in determining the scope of policy coverage required by the *Charter*, then even those not cohabiting for the required time or those who ceased cohabiting could claim benefits under the insurance policy. For instance, according to the appellants' arguments, if an unmarried partner suffered from a partial permanent physical injury, he or she could claim the benefits which in fact are a permanent indemnity, although cohabitation between unmarried couples unlike that of married spouses is not de jure of a permanent nature. Therefore, unmarried couples would receive an advantage from the insurance policy without having committed to mutual support obligations of the same duration.

72 I therefore conclude that, contrary to the appellants' assertion, unmarried couples are not in a situation identical to married spouses with respect to mutual support obligations.

73 Keeping the above considerations in mind, I move now to consider the relevancy of the functional values of the legislation to marital status. Both McLachlin J. and the amicus curiae identified the functional values of the benefits provided by the *Insurance Act* as relating to financial interdependence, and more specifically, the provision of support to families when one member is incapable of contributing to the family unit. The amicus curiae first raised this characterization of the benefit in this court without providing any evidence.

74 I respectfully disagree with McLachlin J.'s description of the functional value of the benefits in the legislation. The very terms of the statute indicate that it was not the Legislature's intention to separate the benefit aimed at the financial well-being of families from the institution of marriage. On the contrary, in my view the Legislature was primarily concerned with defining certain benefits attached to marriage. In some cases, these benefits are extended to unmarried couples, but that does not change the essential character of the benefits, which is to provide support for marital relationships. Indeed, as the amicus curiae emphasized in relation to the amendments of this legislation since 1971, the Legislator's search "was directed towards defining a 'marriage-like' conjugal relationship". Thus, the functional value of the benefits is not to provide support for *all* family units living in a state of financial interdependence, but rather, the Legislature's intention was to assist those couples who are married, or, as in subsequent legislation, to assist certain prescribed couples who are in a "marriage-like relationship".

75 Furthermore, in my opinion it is clearly within the range of legitimate social policy for the Legislature to define the scope of a "marriage-like relationship". In other words, the functional value identified in this legislation, namely the support of marriage, is not itself discriminatory. Distinctions as to the scope of the institution and the benefits which attach thereto are properly the objects of legislative definition; assessing the legitimacy of those definitions must necessarily take into account the fundamental position of the institution of marriage in our society.

76 In this case, the appellants and others like them do not fall within the scope of the Legislature's definition of "spouse", since as noted above, "spouse" refers exclusively to married spouses. The *Insurance Act* demonstrates that where the Ontario Legislature has decided to extend some of the benefits conferred on married couples to unmarried couples, it expressly so provides and defines the conditions (such as the number of years of cohabitation, or the presence of a child). Thus, while the Legislature introduced the no-fault insurance benefits in 1971, as the amicus curiae pointed out it was not necessary at that time to define "spouse" as that term would have undoubtedly been interpreted as "married spouse". Only in 1978 did the Legislature modify the *Insurance Act* and decide to extend death benefits to unmarried couples. This was done as a remedial measure because without that amendment, the "lawful" surviving spouse would receive such benefits, even if the married spouses had been separated for years previously and the deceased spouse had been cohabiting at the time of his or her death with an unmarried partner. The amendment thus provided the death benefit to the unmarried partner over the lawful spouse, thereby extending to unmarried cohabitants a benefit previously restricted to married spouses.

77 It should be noted that after this case was initiated, the Legislature amended the *Insurance Act* in 1990 to extend the definition of "spouse" to include heterosexual couples who have cohabited for three years or live in a permanent relationship with a child. In enlarging the definition of "spouse", the Legislature was again simply carrying out its legitimate function of defining a "marriage-like relationship" for the purposes of benefits legislation. As in the case of the extension of a mutual support obligation to some unmarried couples, it is a matter of social policy for legislators to decide when and to what extent the attributes of marriage and their consequences should be extended and imposed upon unmarried couples, as indeed the Ontario Legislature decided to do in 1990 in amending the *Insurance Act*.

78 As a corollary of my position that it is within the scope of legitimate social policy for the Legislature to define the scope of "marriage-like relationships", I would add that there is no obligation on the Legislature to extend all the attributes of marriage to unmarried couples. As La Forest J. observed in *Andrews*, supra, at p. 194 [emphasis in original]:

it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society ... I am not prepared to accept that *all* legislative classifications must be rationally supportable before the courts. Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.

In short, it is my view that a Legislature may as a matter of social policy choose whether and under what circumstances to extend some or all of the attributes of marriage to unmarried couples without running afoul of s. 15(1) of the *Charter*.

Indeed, as I suggested above, to extend all the attributes of marriage to unmarried couples would interfere directly with the individual's freedom to voluntarily choose whether to enter the institution of marriage by imposing consequences on cohabitation without any regard to the will of the parties.

79 The courts must therefore be wary of second-guessing legislative social policy choices relating to the status, rights and obligations of marriage, a basic institution of our society intimately related to its fundamental values. Barring evidence of a change in these values by a clear consensus that there should be a constitutional constraint on the powers of the state to legislate in relation to marriage, the matter must remain within the scope of legitimate legislative action.

80 In closing, I note that similar views on the ambit of legitimate legislative discretion in defining the attributes of marriage have been asserted elsewhere. For instance, although the American approach to discrimination differs from that under our *Charter*, the Supreme Court of California in *Norman v. Unemployment Insurance Appeals Board*, 663 P.2d 904 (Cal. 1983), at pp. 907-908, reaffirmed the conclusion it had reached in *Marvin*, supra, that "[i]t is for the Legislature to determine whether such relationships [unmarried couples], because of their commonness in today's society or for other policy reasons, deserve the statutory protection afforded the sanctity of the marriage union". The California Court of Appeal also expressed similar views in the case of *Hendrix v. General Motors Corp.*, 193 Cal. Rptr. 922 (Ct. App. 1 Dist. 1983), at p. 925:

This strong public policy [of fostering the institution of marriage] would be thwarted if persons could gain marital legal rights without accepting the correlative marital legal responsibilities ... Were this court to extend to unmarried persons legal rights heretofore confined to married persons, we would overstep our authority and usurp the authority of the Legislature to set public policy. Only the Legislature responsible to the electorate should have the power to make such a radical change in the fabric of society.

81 This American approach accurately points out that it falls within the scope of the Legislature's legitimate authority to determine the conditions under which unmarried couples should benefit from rights attached to marriage without having to assume the correlative obligations. In the context of legislation defining the rights and obligations attached to marriage, marital status is a relevant ground of distinction. Moreover, s. 15 of the *Charter* does not compel the Legislature to extend the status, benefits or burdens of marriage to unmarried couples.

V — Conclusion

82 To conclude, in my view, the benefits the appellants claim under the insurance policy are most appropriately characterized as relating to the support obligations existing between married spouses. In that context, marital status cannot be a ground of discrimination since the distinction pertains to an inherent aspect of marriage, namely support obligations, and the function of the impugned provisions of this legislation is relevant to that status. Therefore, I would dismiss the appeal with costs.

L'Heureux-Dubé J.:

83 Although I agree with the result reached in the instant case by Justice McLachlin, I arrive at this conclusion somewhat differently. For the reasons I set out in *Egan v. Canada*, S.C.C., No. 23636, released concurrently [reported at (1995), 12 R.F.L. (4th) 201] I prefer to focus on the group adversely affected by the distinction as well as on the nature of the interest affected, rather than on the grounds of the impugned distinction. What follows, therefore, is my application of the framework developed in *Egan* to the facts of this case.

84 This case raises the question of the definition of "spouse", as that term is used in Section B, Subsection 2, and Section B, Subsection 3, Part II, of the Ontario Standard Automobile Policy. Although the term "spouse" is not defined anywhere in the legislation, I will assume without deciding, for the purposes of the following analysis, that its statutory interpretation contemplates only married couples and therefore excludes unmarried couples that are cohabiting. I shall therefore pass directly to an examination of whether this distinction violates s. 15 of the *Canadian Charter of Rights and Freedoms* and, if so, whether it can be saved by s. 1 of the *Charter*.

A. Section 15

85 In *Egan*, I set out the following factors that must be established by a rights claimant before the impugned distinction will be found to be discriminatory within the meaning of s. 15 of the *Charter*. (1) there must be a legislative distinction; (2) this distinction must result in a denial of one of the four equality rights on the basis of the rights claimant's membership in an identifiable group; and (3) this distinction must be "discriminatory" within the meaning of s. 15. I shall address each of these factors below.

86 To begin with, assuming that the meaning of "spouse" in the Standard Automobile Policy is limited to married couples, then it follows that a distinction is, indeed, made in the legislation.

87 The second question requires inquiry into whether the distinction has the effect of imposing a burden, obligation, or disadvantage not imposed on others, or of withholding or limiting access to opportunities, benefits and advantages available to others. The parameters of this inquiry cannot, however, generally be established without first ascertaining the appropriate basis for comparison. In other words, only once the appropriate comparator group has been identified can it be decided that there has been a denial of one of the four equality rights.

88 The respondents argue that the fact that the cohabiting appellants seek to compare themselves to persons who are married is, essentially, returning to the similarly situated test rejected by this court in *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143. In my view, this argument is incorrect. The similarly situated test, in essence, requires that persons who are "similarly situated be similarly treated", and that persons who are "differently situated be differently treated". It was rejected by this court on the basis that it contemplated only formal, Aristotelian equality, and because it excluded any consideration of the nature of the impugned law itself: *Andrews*, supra, at pp. 165-168. In rejecting the similarly situated test as a means to identify discrimination, however, this court did not reject in principle the process of drawing comparisons between groups. In fact, McIntyre J. noted at p. 164 that:

[Equality] is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.

89 In short, comparisons between different groups are necessary to discern the differential effect of the legislation and to assist the court in properly characterizing and identifying the groups that are relevant to the particular s. 15 inquiry at hand.

90 The question then becomes, who or what do we compare for the purpose of determining whether an equality right has been denied? In the instant case, the interpretation of "spouse" in the Standard Automobile Policy distinguishes between persons who are married and persons who are not married, and results in the extension of a benefit only to the former. The group of persons who are not married, however, comprises many subsets: for instance, persons cohabiting in a conjugal relationship (e.g., common law spouses), persons cohabiting who are not in a conjugal relationship (e.g., roommates), persons who are related (e.g., brother-sister), and single persons.

91 The guarantee of equality in s. 15 does not require that the entire, collective, heterogenous group of non-married persons be compared against the essentially homogenous group of married persons. In fact, uncritical comparison of dissimilar groups can undermine the purposes of s. 15 of the *Charter* rather than further them. Comparison is only a fruitful exercise when carried out between groups that possess sufficient analogous qualities to make the exercise of comparison meaningful in respect of the distinction being examined. Thus, in the present case, the only appropriate comparison is between married persons and unmarried persons who are in a relationship analogous to marriage (i.e., of some degree of publicly acknowledged permanence and interdependence). In other words, with all other things being roughly equal, the latter group is denied the equal benefit of the law for essentially one reason: the fact that they are not married.

92 What constitutes a relationship analogous to marriage is, of course, potentially a subject of considerable debate. I prefer not to engage in this debate. I am, however, satisfied that the appellants Miron and Valliere fall within this group. In August 1987, at the time of the accident which resulted in the present litigation, they had been cohabiting as common-law spouses for over four years, and Miron was the father of two of Valliere's three children, aged two and five. Miron and Valliere would fall within any number of legislatively accepted definitions of "relationship analogous to marriage". For this reason, I am satisfied that the impugned legislation denies Miron and Valliere the equal benefit of the law on the basis that they are in a relationship analogous to marriage.

93 The last ingredient in a s. 15 analysis is an inquiry into whether the distinction is "discriminatory" within the meaning of s. 15 of the *Charter*. In *Egan*, supra, I stated that a distinction would be discriminatory within the meaning of s. 15 where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration. I noted, as well, that this examination should be undertaken from a subjective-objective perspective. To give form and substance to this examination, I elaborated upon how discriminatory impact can be assessed by looking to the nature of both the interest and the group adversely affected by the impugned distinction. I observed, moreover, that neither category of factors will generally yield meaningful results without consideration of the other. It is to these factors that I now turn.

1. The Nature of the Group Affected

94 The question of whether or not persons in relationships analogous to marriage have typically suffered historical disadvantage is not clear-cut, partly because the modern phenomenon of common law cohabitation as an alternative to marriage is a comparatively recent one. The subgroups within the ground of marital status that have typically suffered the most historical disadvantage and marginalization are individuals who are single parents, or are divorced or separated. The mere fact that common law spouses are not the first group that comes to mind when considering historical disadvantage does not mean, however, that such relationships have escaped completely from societal opprobrium. In fact, non-traditional relationships outside of marriage have in the past generally been frowned upon and considered undesirable by large portions of society. Only recently have they come to be increasingly accepted. That they have become more accepted does not mean, however, that they are now accepted without reservation into the mainstream of society. The assumptions and attitudes underlying the continuing societal disapproval of such relationships are, in many ways, both exemplified and perpetuated by the impugned law, which essentially deems that John Miron and Jocelyne Valliere, a couple who at the time of the accident had been living together as common law spouses for over four years and had two children together, are not an interdependent family unit worthy of protection against the potentially catastrophic financial losses flowing from injury to one of their members.

95 The group of persons in relationships analogous to marriage is, of course, not homogenous. Clearly, the effect of a distinction will be felt more severely by certain persons within that group than by others. In the present case, sensitivity to what is reasonable and representative of the group of persons in relationships analogous to marriage therefore requires that we examine the issue from the perspective of both men and women. Although I will elaborate on this point very shortly, I think it important to note at this juncture that courts and legislatures have already acknowledged that the effect of a distinction based on marital status may be felt more severely by women than by men. I therefore have no difficulty concluding that persons in opposite-sex relationships analogous to marriage have suffered, and continue to suffer, some disadvantage, disapproval and marginalization in society, and are therefore somewhat sensitive to legislative distinctions having prejudicial effects.

96 Membership in a discrete and insular minority that is politically weak is another relevant consideration identified in *Andrews* and subsequent jurisprudence. I am not convinced, however, that it can necessarily be said that persons in relationships analogous to marriage represent a discrete and insular minority, or a politically powerless or vulnerable group. I emphasize, though, that the presence or absence of this factor alone, like any others, cannot be dispositive of the s. 15 analysis.

97 The last important factor to be considered is whether the impugned distinction is based upon a fundamental attribute of "personness" or "humanness". Many argue that marriage is a choice, and that cohabiting persons who are not married have often made a conscious choice to avoid the rights and obligations incumbent upon marriage. Consequently, since marriage is a legal status which people can assume by choice in a manner analogous to contract, it is argued that a distinction based upon this status does not touch upon anything that is sufficiently personal that it could be a basis for discrimination. A corollary of this argument is that treating common law couples in a manner similar to married couples would undermine people's "free choice" to contract in or out of these rights and obligations. Although the absence or presence of an element of "choice" should not be determinative of s. 15 analysis, my colleague Justice Gonthier addresses it in his reasons and I feel compelled to make some observations in this respect.

98 In my view, the decision of whether or not to marry can, indeed, be one of the most personal decisions an individual will ever make over the course of his or her lifetime. It can be as fundamental, as momentous, and as personal as a choice regarding, for instance, one's citizenship or even one's religion. Although certain rights and obligations follow from each one of these three diverse choices, it does not render any of these choices justice to reduce them to a question of contract. I highly doubt, for instance, that people enter the institution of marriage because it strikes them as offering an attractive package of contractual rights and obligations. By that same token, people who make a conscious decision not to subscribe to the institution of marriage may very well be motivated by very personal beliefs which have nothing whatsoever to do with the contractual rights and obligations that incidentally attach to that status.

99 Beyond this preliminary objection, however, my disagreement with the assertion that marriage is simply a matter of individual choice goes far deeper. In particular, I believe that this argument is premised upon an important and, in my mind, unchallenged assumption: that the majority of unmarried persons living in a relationship of some interdependence and duration are, indeed, exercising a "free choice". In my respectful view, this assumption may mischaracterize the reality of a significant number of persons in non-traditional relationships. This silent and oft-forgotten group constitutes couples in which one person wishes to be in a relationship of publicly acknowledged permanence and interdependence and the other does not [emphasis added]:

The two partners in a relationship may not have similar views: while one partner may value personal autonomy, that view may not be shared by the other. One may in fact be anxious to marry, while the other resists it. Whose view of the relationship is to prevail? ... *The flip-side of one person's autonomy is often another's exploitation.*

(W. Holland, "Marriage and Cohabitation — Has the Time Come to Bridge the Gap?" in *Family Law: Roles, Fairness and Equality*, Special Lectures of the Law Society of Upper Canada 1993, 369, at p. 380.) It is small consolation, indeed, to be told that one has been denied equal protection under the *Charter* by virtue of the fact that one's partner had a choice.

100 Both the courts and the legislatures have, in recent years, acknowledged and responded to the injustices that often flow from power imbalances of this type and have thereby given increasing recognition to non-traditional forms of relationships. Why else did the Ontario legislature in 1986 extend benefits from married persons to cohabiting partners in over 30 Ontario statutes, several of which raised issues of financial interdependence that are analogous to the impugned provisions of the *Insurance Act*? Why else has the Ontario *Family Law Act*, R.S.O. 1990, c. F.3, imposed an obligation of mutual support on common law spouses since 1978? Why else has the common law doctrine of constructive trust intervened to provide relief to unmarried persons in instances where one partner is unjustly enriched by the relationship? *Becker v. Pettkus*, [1980] 2 S.C.R. 834; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38. Finally, why else has this court rejected the hegemony of the "clean break" model of spousal support in both married and common law relationships of demonstrated duration and interdependence? *Moge v. Moge*, [1992] 3 S.C.R. 813. In all of these cases, although the language has generally employed gender-neutral references to "spouses", it is indisputable that much of the impetus for these changes stemmed from courts' and legislatures' increasing recognition of the disadvantage endured by dependent spouses, most often women, within the context of those relationships.

101 If the continuing individual autonomy of the parties were the only assumption governing the formation of family units, then none of these protections would be deemed necessary. Rather, however, it is now widely accepted that one cannot speak of "autonomy" or "free choice" without first asking *whose* autonomy one seeks to preserve, and at *what cost* to others. It is extremely important that, when contemplating the impact of a particular legislative distinction on an affected group, courts make reasonable accommodation for diverse points of view and life situations.

102 I do not dispute, of course, that some cohabiting couples do, indeed, continue to agree mutually that they wish to avoid the rights and obligations of marriage. Indeed, as I noted earlier, their reasons for doing so may be intensely personal, and their alternative forms of relationships are equally deserving of respect, consideration, and protection under the *Charter*. My point is merely that it is dangerous, and possibly untenable, to assume for the purposes of s. 15 *Charter* analysis that the reasons one starts to live together are necessarily the reasons that one continues to live together. Although many couples initially cohabit as part of a "trial relationship", and may therefore initially agree not to marry, such mutual agreement may diminish over time, as the length of cohabitation increases or most particularly after the birth of a child.

103 As I noted above, in recognition of this reality, legislatures have intervened in a wide variety of contexts to protect individuals' vested interests in relationships of some permanence and interdependence. These interventions are not anti-marriage. They simply acknowledge that the family unit is evolving in response to changing times. In my respectful view, it would therefore be a significant step backwards for this court nonetheless to conclude that "unfettered choice" is the only framework by which to measure and evaluate extramarital cohabitation. Such logic would, in effect, entail adopting a narrower approach to the realities of cohabitation under s. 15 of the *Charter* — which is supposed to be interpreted broadly and purposively — than has already been widely accepted both in the common law and in statutes throughout Canada.

104 Finally, it must be recalled that the imposition of marriage-like mutual rights and obligations upon couples in a relationship analogous to marriage need not deprive them of the autonomy required to make personal choices if these persons also have the possibility of resorting to domestic contract to exclude the effects of the legislation. Rather than placing the onus on unmarried couples to contract into any such mutual rights and obligations, inclusion within the legislation merely shifts the onus to those who wish to preserve individual autonomy to contract out.

105 To recapitulate, the decision of whether or not to marry is most definitely capable of being a very fundamental and personal choice. The importance actually ascribed to the decision to marry or, alternatively, *not* to marry, depends entirely on the individuals concerned. For a significant number of persons in so-called "non-traditional" relationships, however, I dare say that notions of "choice" may be illusory. It is inappropriate, in my respectful view, to condense the forces underlying the adoption of one type of family unit over another into a simple dichotomy between "choice" or "no choice". Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons — all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law.

106 I noted earlier that persons in non-traditional relationships have suffered, and continue to suffer, some degree of disadvantage and marginalization from the mainstream. To this, I would add that I believe that it is beyond dispute that the adverse effects of distinctions which exclude persons in relationships analogous to marriage are likely to be experienced more sharply by the more dependent member of these partnerships, most often still women (in heterosexual couples). It is important not to close our eyes to that social reality. On the other hand, I believe that it is nonetheless fair to say that, on the whole, the affected group is not so sensitive as to compel the conclusion that virtually any adverse distinction would have a discriminatory impact. Therefore, an examination of the nature of the interest affected by the impugned distinction is particularly important in the present instance.

2. The Nature of the Impugned Interest

107 At issue in the present appeal is the eligibility of John Miron, the common law spouse of Jocelyne Valliere, for insurance against injury, under her automobile insurance policy. The affected interest is the protection of family units from potentially disastrous financial consequences due to the injury of one of their members. Protection of "family" is, in turn, one of the most important interests imaginable in our society. Moreover, as I observed in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 634:

It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values.

108 Although it goes without saying that all injured persons are entitled to that part of their health care costs covered by their provincial medicare systems, actual health care costs may often represent only a small part of the total losses suffered as a result of injury in a motor vehicle accident when loss of income as well as pain and suffering are taken into account. Equally significant, although persons ineligible to claim from a private insurance company under the Standard Automobile Policy may still claim for some compensation under the *Motor Vehicle Accident Claims Act*, R.S.O. 1990, c. M.41 ("MVACA"), the cost, time and difficulty of recovery by this means are significantly greater than if the person were insured by a private company. The amicus curiae points out that one of the most notable differences is that no payment whatsoever is available from the MVACA until the injured person has successfully obtained a formal judgment in his or her favour. Under most private insurance plans, by contrast, there is frequently no need for the injured person to bring a legal action, and the injured party will often receive advance or periodic payments. The financial consequences of these differences can be profound on a family unit, particularly if the injured party is an income-earner who has been disabled as a result of the accident. Thus, I conclude that the impugned distinction adversely affects, to an extent that is potentially very serious in economic terms, an interest which has extremely high societal value. On the other side of the equation, however, I note that the value of this interest in constitutional terms is limited, and that this distinction does not restrict access in any meaningful way to any fundamental social institution.

109 The final factor contemplated in *Egan* is whether the distinction constitutes a complete non-recognition of the affected group. In the instant case, we are not faced with a legislative definition of common law spouse that some would simply consider overly restrictive or underinclusive for various reasons. Rather, the impugned distinction categorically excludes from joint insurance coverage *all* couples in a relationship analogous to marriage. This factor must be viewed as significant, since it can be reasonably perceived as sending a clear message that society does not consider this genre of relationship to be worthy of equal protection in such contexts.

110 I noted in *Egan* that evaluation of either the interest or the group affected was not entirely meaningful until each was assessed in light of the other. In the instant case, I believe the impugned interest to be sufficiently pressing, the possible economic consequences to be sufficiently severe, and the manner of exclusion to be sufficiently complete to constitute a significant, though not overwhelming, discriminatory potential. I also concluded earlier that the group affected by the distinction (i.e., unmarried persons in a relationship analogous to marriage) is somewhat vulnerable and that, in a significant number of cases, persons within this group do not have meaningful control over their circumstances. I noted that the consequences of excluding unmarried persons from the benefits or protections of the law will generally be experienced more severely by the dependent spouse, who is still all too often female. Viewing all of these factors together, I conclude that the impugned distinction does, on the whole, have an impact that is discriminatory within the sense of s. 15 of the *Charter*. The impugned distinction is reasonably capable of either promoting or perpetuating a view amongst persons in relationships analogous to marriage that they are less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration. On this basis, I find the impugned distinction to be in violation of s. 15(1) of the *Charter*.

111 Having determined that the impugned distinction violates s. 15 of the *Charter*, I now turn to the question of whether this distinction is relevant to a proportionate extent to a pressing and substantial objective, and may therefore be saved under s. 1.

B. Section 1

112 When characterizing the objective of the Standard Automobile Policy for the purposes of s. 1 analysis, it is important to adopt a functional and pragmatic approach which frames that purpose neither too broadly nor too narrowly. The objective of the Standard Automobile Policy, which I accept as pressing and substantial, is to protect stable family units by insuring against the economic consequences that may follow from the injury of one of the members of the family. Although I might agree that an incidental *effect* of this legislation, as a result of the impugned distinction, may be to encourage marriage, I cannot agree that, by reason of this distinction alone, we should conclude that the promotion of marriage is, itself, the fundamental *purpose* of the legislation. I cannot see people seriously considering the availability of joint automobile insurance as a factor in their decision of whether or not to marry. As such, taken as a whole, although the legislation is most certainly "pro-family", I do not believe that it would be proper to characterize it as "pro-marriage".

113 It is now trite law to observe that the onus of demonstrating a rational connection between the impugned distinction and the pressing and substantial objective lies with the government. Unfortunately, only the intervener the Attorney General of Manitoba has submitted any argument on this point. The amicus curiae appointed by this court to make submissions on the s. 1 issue argues that the violation cannot be saved under s. 1. Thus, this court is left in the uncomfortable position of envisioning s. 1 arguments on the government's behalf.

114 The Attorney General of Manitoba argues that restricting the meaning of "spouse" in the legislation to married couples is rationally connected to the objective because it promotes certainty and determinacy, and because it would be impossible for the legislature to settle with certainty upon a defined standard that would not be underinclusive of someone. This argument, which essentially urges judicial deference to a legislative choice, more properly goes to the question of whether or not the legislation is minimally impairing, and I shall address it in that context below.

115 It could, however, be argued that the rational connection requirement is fulfilled because it is rational for the legislature to believe that, in general, marriages are longer-lasting and more likely to engender relationships of interdependency than common law relationships. If such an argument were to be advanced, though, then this court would require some empirical evidence to this effect from the government, since it would undermine the very purpose of s. 15 to permit the government to justify a violation of s. 15 by relying on assumptions that may, themselves, be stereotypical and discriminatory in nature.

116 In *Egan*, I also noted that unless the distinction relates to a right or obligation flowing from a particular legal status, it would be difficult to envision that the distinction is rationally connected to the legislative objective. As my colleague Gonthier J. points out, the common law imposes an obligation of mutual support between married partners yet does not impose that obligation upon unmarried partners. In the instant case, it could therefore be argued that the exclusion of common law couples from the Standard Automobile Policy is rationally connected to the objective of the legislation because this exclusion relates to the absence of an obligation of mutual support between unmarried individuals.

117 As I have already noted elsewhere in these reasons, however, the impugned insurance legislation is in effect in Ontario — a jurisdiction in which the *Family Law Act* has, since 1978, prescribed a mutual obligation of support for common law spouses (see s. 29 of the Act). Thus, as at August 1987, common law spouses in Ontario were, indeed, bound by an obligation of mutual support yet were excluded from a Standard Automobile Policy whose basic purpose was almost inextricably related to that mutual obligation and to the relationship of interdependency upon which that obligation is premised. Other applicable laws form part of the social context of a distinction and I therefore cannot see how, in light of the fact that an obligation of support applies to common law couples, it can still be said that the impugned distinction is rationally connected to the purpose of the legislation.

118 I would therefore conclude that the distinction cannot be justified on the basis that the government has not demonstrated that the impugned distinction is rationally connected to the objective of the legislation.

119 Even if the rational connection test were found to be satisfied, I would also conclude that the impugned distinction fails the minimal impairment test. The unit that the legislator has decided to protect (i.e., married persons) is underinclusive of the purpose of the legislation. The argument could be made that the legislation is minimally intrusive because there is no other reasonably ascertainable standard which could further the purposes of the Act.

120 Although this submission may have merit in other contexts, it does not in the present case. Indeed, although the unit deserving of protection can be defined by marriage, it can also be defined in a workable and acceptably certain way by reference to the length of the relationship or to the existence of children. These two criteria have been recognized by the legislature as feasible indicia of interdependence in other statutes which confer rights or obligations upon relationships outside of marriage. In fact, the legislature adopted just such criteria in the instant case when it amended the impugned legislation to include common law spouses in 1990. Although deference should be had with respect to policy choices made by the legislature as to what duration of cohabitation is necessary to define such a relationship, courts should not feel obliged to be as deferential when the legislature has simply excluded other possibilities altogether, unless the government can demonstrate that this exclusion is, itself, the product of a reasonable attempt to balance competing social science or policy interests. In the present case, the government has once again not overcome that burden.

C. Remedy and Disposition

121 Underinclusive legislation raises special problems from a remedial perspective. The fact that legislation is underinclusive, however, does not make it any less discriminatory. Underinclusion is, in many ways, a backhanded way of permitting discrimination. I agree with McLachlin J. that the appropriate remedy in this case is to take the unusual step of retroactively "reading in" the definition of "spouse" adopted by the legislature in 1990 for the purposes of this very legislation. I find further comfort in this conclusion from the fact that the proposed remedy would not impose any additional burden upon the public purse. The insurance companies would have to absorb this additional cost (which, the court has been informed, would have caused only a nominal increase in premiums to the public, of roughly 0.7% over the period from 1978 to 1989). Consequently, I would dispose of this matter in the manner proposed by McLachlin J.

McLachlin J. (Sopinka, Cory and Iacobucci JJ. concurring):

122 This appeal requires us to decide whether exclusion of unmarried partners from accident benefits available to married partners violates the equality guarantees of the *Canadian Charter of Rights and Freedoms*. I conclude that it does.

123 The record before us posits the following facts. John Miron and Jocelyne Valliere lived together with their children. They were not married, yet their family functioned as an economic unit. In 1987, John Miron was injured while a passenger in a motor vehicle owned by the respondent William James McIsaac and driven by the respondent Richard Trudel. Neither McIsaac nor Trudel was insured. After the accident, Mr. Miron could no longer work and contribute to his family's support. He made a claim for accident benefits for loss of income and damages against Ms. Valliere's insurance policy which extended accident benefits to the "spouse" of the policyholder. The insurance company, Economical Mutual, denied his claim on the ground that Mr. Miron was not legally married to Ms. Valliere and hence not her "spouse".

124 Mr. Miron and Ms. Valliere sued the insurer. The insurer brought a preliminary motion to determine whether the word "spouse", as used in the applicable portions of the policy, includes unmarried common law spouses. The motions court judge found that "spouse" meant a person who is legally married [reported at (1990), 65 D.L.R. (4th) 670 (Ont. H.C.)]. Mr. Miron and Ms. Valliere appealed the decision to the Ontario Court of Appeal, arguing first that Mr. Miron is a spouse under the terms of the policy, and alternatively, that the policy terms which are prescribed by the *Insurance Act*, R.S.O. 1980, c. 218, discriminate against him in violation of s. 15(1) of the *Charter*. The Court of Appeal dismissed their claim: (1991), 4 O.R. (3d) 623, 83 D.L.R. (4th) 766, [1991] I.L.R. 1-2770, 7 C.C.L.I. (2d) 317. They now appeal to this court.

Issues

125 A. Are the claimants "spouses" under the policy?

126 B. If not, does the limitation of benefits to married persons violate the equality provisions of the *Charter*?

127 1. The test for violation of s. 15(1) and the relationship between s. 15(1) and s. 1 of the *Charter*

128 2. Section 15(1) — Discrimination and its grounds

129 3. Justification under s. 1 of the *Charter*

130 C. The remedy

Analysis

131

A. Are the Claimants "Spouses" under the Policy?

132 The insurance company contends that Mr. Miron was not a spouse under its policy because he was not legally married to Ms. Valliere. Mr. Miron objects. He submits that "spouse" in the policy extends to couples who live together in a common law relationship.

133 The wording and history of the provisions under which Mr. Miron claims pose difficulties for his argument. The benefits in question were governed by 1980 legislation. That legislation extended the accident and loss of income benefits in question to the "spouse" of the insured, left undefined. By contrast, the same legislation included in "spouse" for the purposes of the death benefit provisions a man and woman who were not married to each other but who had cohabited continuously for five years or lived in a relationship of some permanence and had a child. In 1990, the Legislature amended the Act and expanded the definition of "spouse" in relation to the benefits Miron and Valliere claim. The new definition of "spouse" includes a heterosexual couple who have cohabited for three years or who have lived in a permanent relationship with a child.

134 The extended definition of "spouse" in the 1980 legislation for death benefits and in the 1990 legislation for the benefits here at issue belies the suggestion that the Legislature in 1980 intended the term "spouse" to apply to unmarried partners. In fact, where the Legislature wanted to extend benefits to such persons, it expressly did so. In the face of this, the submissions that "spouse" is an ambiguous term, which ambiguity should be resolved in favour of the insured, cannot prevail.

135 I conclude that "spouse" in the 1980 provisions relating to loss of income benefits and uninsured motorist claims did not include unmarried couples living in a common law relationship.

B. Does the Limitation of Benefits to Married Persons Violate the Equality Provisions of the Charter?

136 Mr. Miron and Ms. Valliere advance an alternative argument: that denial of benefits to them on the ground that they are not legally married and hence "spouses" violates the equality provisions of the *Charter*.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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.

1. The Test for Violation of s. 15(1) and the Relationship between s. 15(1) and s. 1 of the Charter

137 The early days of the *Charter* saw debate on the division of the equality analysis between s. 15(1) and s. 1. Some thought that denial of equality on any ground would establish discrimination under s. 15(1), propelling the analysis immediately to s. 1: Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at p. 800. The other extreme held that s. 15(1) could be satisfied only by showing that there had been a denial of equality which was irrational or unreasonable, leaving little for s. 1: *Andrews v. Law Society (British Columbia)* (1986), 27 D.L.R. (4th) 600 (B.C. C.A.). This court in *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143, rejected both approaches, charting instead a middle course.

138 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*.

139 This shift of the burden through the use of s. 15 and s. 1 is appropriate. It places the duty of adducing proof upon the parties who are in the best position to adduce it. It is for the claimant to show that he or she has been denied a benefit or suffers a disadvantage compared with another person. It is also for the claimant to show the basis for imposing the burden or withholding the benefit. These matters are within the knowledge of the claimant. Once these have been made out the burden shifts to the state. It is the state's law that has violated the individual's equality on suspect grounds, and it is the state that most appropriately defends the violation. To require the claimant to prove that the unequal treatment suffered is irrational or unreasonable or founded on irrelevant considerations would be to require the claimant to lead evidence on state goals, and often to put proof of discrimination beyond the reach of the ordinary person. Nor is the resultant burden unjust to the state: while it is open to the state to attempt to differentiate on suspect stereotypical grounds, it must be prepared to justify such suspect differentiation if it wishes its law to stand. In cases such as the present, where the party upholding the law is a non-state actor, it is always open to the state to defend its law as an intervenor in the proceedings. (If still in doubt as to the law's purpose and rationale, the court may also appoint an amicus curiae to assist the court by providing an impartial assessment, as was done in this appeal.)

140 This division of the analysis between s. 15(1) and s. 1 accords with the injunction to which this court has adhered from the earliest *Charter* cases: courts should interpret the enumerated rights in a broad and generous fashion, leaving the task of narrowing the prima facie protection thus granted to conform to conflicting social and legislative interests to s. 1. See *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486, at p. 509; *Cotroni c. Centre de prévention de Montréal, (sub nom. United States v. Cotroni)* [1989] 1 S.C.R. 1469, at p. 1480. It is significant that where the *Charter* seeks to narrow rights by concepts like reasonableness, it does so expressly, as in s. 8 and s. 11(b). Section 15(1) does not contain this sort of limitation.

141 At the same time, this approach does not trivialize s. 15(1) by calling all distinctions discrimination. Unequal treatment alone — the mere fact of making a distinction — does not establish a breach of s. 15(1) of the *Charter*. The s. 15(1) guarantee relied on is "... equal benefit of the law *without discrimination*". To prove discrimination, the claimant must show that the unequal treatment is based on one of the grounds expressly mentioned in s. 15(1) — race, national or ethnic origin, colour, religion, sex, age or mental or physical disability — or some analogous ground. These grounds serve as a filter to separate trivial inequities from those worthy of constitutional protection. They reflect the overarching purpose of the equality guarantee in the *Charter* — to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance.

142 The enumerated and analogous grounds serve as ready indicators of discrimination because distinctions made on these grounds are typically stereotypical, being based on presumed rather than actual characteristics. Nevertheless,

in some situations distinctions made on enumerated or analogous grounds may prove to be, upon examination, non-discriminatory. For example, the distinction may be found not to engage the purpose of the *Charter* guarantee. Thus in *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1333, Wilson J., while leaving open the possibility that province of residence could be an analogous ground, held that it was not used in a way that engaged the purpose of s. 15 in that case. See also *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at pp. 392-393 per Wilson J.; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 992 per Lamer C.J.C.; and *Symes v. R.*, (sub nom. *Symes v. Canada*) [1993] 4 S.C.R. 695, at p. 761 per Iacobucci J. 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. Cases where a distinction made on an enumerated or analogous ground does not amount to discrimination, however, are rare. Faced with a denial of equal benefit based on an enumerated or analogous ground, one would be hard-pressed to show that the distinction is not discriminatory: *Andrews*, supra, at pp. 174-175 and *McKinney v. University of Guelph*, supra, at pp. 392-393 per Wilson J.

143 My colleague Gonthier J. asserts that discrimination under s. 15(1) is conclusively rebutted by a finding that the ground on which the equal treatment is denied is relevant to the legislative goal or the functional values underlying the impugned law. With respect, I cannot agree. Proof that the enumerated or analogous ground founding a denial of equality is relevant to a legislative goal may assist in showing that the case falls into the class of rare cases where such distinctions do not violate the equality guarantees of s. 15(1), serving as an indicator that the legislator has not made the distinction on stereotypical assumptions about group characteristics. However, relevance is only one factor in determining whether a distinction on an enumerated or analogous ground is discriminatory in the social and political context of each case. A finding that the distinction is relevant to the legislative purpose will not in and of itself support the conclusion that there is no discrimination. The inquiry cannot stop there; it is always necessary to bear in mind that the purpose of s. 15(1) is to prevent the violation of human dignity and freedom through the stereotypical application of presumed group characteristics. If the basis of the distinction on an enumerated or analogous ground is clearly irrelevant to the functional values of the legislation, then the distinction will be discriminatory. However, it does not follow from a finding that a group characteristic is relevant to the legislative aim, that the legislator has employed that characteristic in a manner which does not perpetuate limitations, burdens and disadvantages in violation of s. 15(1). This can be ascertained only by examining the effect or impact of the distinction in the social and economic context of the legislation and the lives of the individuals it touches.

144 In approaching the concept of relevance within s. 15(1), great care must be taken in characterizing the functional values of the legislation. My colleague Gonthier J. concedes that the distinction here at issue — denial on the basis of marital status — might, for some purposes, be viewed as an analogous ground. He asserts, however, that it is not used in a discriminatory manner in this case because "the functional value of the benefits is not to provide support for all family units living in a state of financial interdependence, but rather, the Legislature's intention was to assist those couples who are married" (para. 72). He concludes that distinguishing on the basis of marital status is relevant to this purpose and hence that the law is not discriminatory. On examination, the reasoning may be seen as circular. Having defined the functional values underlying the legislation in terms of the alleged discriminatory ground, it follows of necessity that the basis of the distinction is relevant to the legislative aim. This illustrates the aridity of relying on the formal test of logical relevance as proof of non-discrimination under s. 15(1). The only way to break out of the logical circle is to examine the actual impact of the distinction on members of the targeted group. This, as I understand it, is the lesson of the early decisions of this court under s. 15(1). The focus of the s. 15(1) analysis must remain fixed on the purpose of the equality guarantees which is to prevent the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics in violation of human dignity and freedom.

145 The same criticism can be made of La Forest J.'s reasoning in *Egan v. Canada*, S.C.C. No. 23636, released concurrently [reported at (1995), 12 R.F.L. (4th) 201]. La Forest J. characterizes the functional value of the legislation as meeting the need to support married couples who are elderly. Because, in his view, marriage is "firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate" (para. 21), Parliament may use the relevant ground of sexual orientation as a basis for distinguishing who should receive benefits under the Act. By

defining the legislative aim in terms of the alleged discriminatory ground, namely married couples, the relevance of the ground is assured. On the assumption — misplaced in my view — that this relevance suffices to negate discrimination, s. 15(1) is said to be met without examining the actual impact of the legislation on members of groups who may be disadvantaged by the distinction.

146 The danger of using relevance as a complete answer to the question of whether discrimination is made out, and thus of losing sight of the values underlying s. 15(1), is acute when one is dealing with so-called "biological" differences. This is the lesson of *Bliss v. Canada (Attorney General)*, [1979] 1 S.C.R. 183, and *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219. In *Bliss*, a *Bill of Rights* case, this court denied benefits to pregnant women under the *Unemployment Insurance Act, 1971*, on the reasoning that the distinction drawn under the Act was based on relevant biological differences. Ten years later, in *Brooks*, this court acknowledged that the superficial relevance of the biological difference between women and men had led it astray in *Bliss*. The ultimate issue was whether the impugned distinction denied benefits to a class of people — pregnant women — in a way which was discriminatory on the basis of sex. In the result, the court concluded that the denial of benefits had the effect of denying equality to women, the only class of persons who could become pregnant, and unfairly placed an economic burden due to pregnancy solely on the shoulders of women. Much as this court did in *Bliss*, La Forest J. relies on the biological differences between heterosexual and homosexual couples to find that the *Old Age Security Act* does not discriminate on the basis of sexual orientation. Following the lesson of *Brooks*, I would respectfully suggest that more is required; if we are not to undermine the promise of equality in s. 15(1) of the *Charter*, we must go beyond biological differences and examine the impact of the impugned distinction in its social and economic context to determine whether it, in fact, perpetuates the undesirable stereotyping which s. 15(1) aims to eradicate.

147 Relevance as the ultimate indicator of non-discrimination suffers from the disadvantage that it may validate distinctions which violate the purpose of s. 15(1). A second problem is that it may lead to enquiries better pursued under s. 1. As pointed out by this court in *Andrews v. Law Society (British Columbia)*, supra, an analysis within s. 15 of whether the distinction was reasonable leaves little to s. 1, because in determining reasonableness, one must look at the conflicting state interest and determine if its importance outweighs the denial of equality. The same difficulties arise with asking whether the unequal treatment is justified because the distinction is relevant to the legislative goal. If any professed relevance suffices, unevaluated and unweighed, then few claims would pass s. 15(1). On the other hand, an evaluation of the degree of relevance of the ground of distinction to the legislative goal necessarily involves weighing the legislative purpose against the seriousness of the unequal treatment. Under the scheme of the *Charter*, such questions are better posed under s. 1.

148 Dividing the analysis between s. 15(1) and s. 1 as I have suggested also corresponds to the Canadian practice under human rights codes. Typically, these codes prohibit distinctions made on specified grounds, similar to those enumerated in s. 15(1) of the *Charter*. To found a complaint, it suffices to show that there has been a denial of equality on one of the listed grounds. But this is not the end of the story. The person alleged to have contravened the Code may avoid liability by establishing a justificatory defence, for example, that the distinction was justified in view of the requirements of the workplace (a bona fide occupational requirement).

149 Finally, the analysis I propose does not preclude the state from making distinctions between people on grounds like race, sex, age and citizenship. The state may do so, provided it can justify its use of the suspect criterion. Citizenship, recognized as an analogous ground in *Andrews*, provides a ready example. The state may be justified in confining certain privileges, like carrying a passport or serving in high government office, to citizens. If it can establish that justification, it may deny the privileges to non-citizens. *McKinney v. University of Guelph*, supra, provides another example. While the court found that the university's policy of mandatory retirement at age 65 constituted discrimination on the basis of age, the policy was held to be reasonable and demonstrably justified in a free and democratic society. In short, the *Charter* does not forbid all distinctions on the basis of the enumerated or analogous grounds; it forbids stereotypical distinctions which the state cannot justify.

150 To recapitulate, the analysis under s. 15(1) involves two steps: examination of whether there has been a denial of "equal protection or equal benefit of the law", and a finding that the denial constitutes discrimination. To establish

discrimination, the claimant must bring the distinction within an enumerated or analogous ground. In most cases, this suffices to establish discrimination. However, exceptionally it may be concluded that the denial of equality on the enumerated or analogous ground does not violate the purpose of s. 15(1) — to prevent the violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics, rather than on the basis of merit, capacity or circumstance. While irrelevance of the ground of distinction may indicate discrimination, the converse is not true. Proof of relevance does not negate the possibility of discrimination. We must look beyond relevance to ascertain whether the impact of the impugned legislation is to disadvantage the group or individual in a manner which perpetuates the injustice which s. 15(1) is aimed at preventing.

151 If a violation of s. 15(1) is established, the burden shifts to the party upholding the denial of equality to justify it under s. 1 of the *Charter*. Section 15(1) and s. 1 of the *Charter* must be read together. Neither, in itself, is complete. Together, they provide a comprehensive equality analysis that provides effective remedies against discrimination while preserving the power of the state to deny protections and benefits to individuals where differences between them justify it.

2. Section 15(1) — Discrimination and its Grounds

152 As indicated, the equality analysis under s. 15(1) involves a two-step process. First, the claimant must show that the law treats the claimant unequally in relation to another person. Second, the claimant must show that the denial results in discrimination and was made on the basis of one of the grounds enumerated in s. 15(1) or an analogous ground.

Step one — denial of equal benefit or equal protection of law and its basis

153 In this case, the insurer concedes that the legislation-based Ontario standard automobile policy held by Ms. Valliere at the time of Mr. Miron's injury grants benefits to married couples which it does not accord to couples who are unmarried. The policy denies a person in an unmarried relationship benefits granted a similar person in a married relationship. Thus denial of equal benefit on the basis of marital status is established. The alleged discrimination is direct; there is no question of indirect discrimination because of the effect of the legislation, as opposed to its facial wording. The next inquiry is whether marital status is an analogous ground under s. 15(1).

Step two — is marital status an analogous ground and if so, is the distinction on the basis of marital status discriminatory?

154 Section 15(1) of the *Charter* forbids discrimination, and "in particular, ... discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". The ground upon which the distinction in this case is based — marital status — is not included in the list of particularized grounds. We must therefore determine whether marital status is an analogous ground.

155 Our approach must be generous, reflecting the "continuing framework" of the constitution and the need for " 'the unremitting protection' of equality rights": *Andrews*, per McIntyre J., at p. 175. *Andrews* instructs us that our approach must also reflect the human rights background against which the *Charter* was adopted. In evoking human rights law as the defining characteristic of discrimination under s. 15(1) of the *Charter*, this court in *Andrews* engaged the principle of equality which underlies the constitutions of free and democratic countries throughout the world. This principle recognizes the dignity of each human being and each person's freedom to develop his body and spirit as he or she desires, subject to such limitations as may be justified by the interests of the community as a whole. It recognizes that society is based on individuals who are different from each other, and that a free and democratic society must accommodate and respect these differences.

156 The corollary of the recognition of the dignity of each individual is the recognition of the wrong that lies in withholding or limiting access to opportunities, benefits, and advantages available to other members of society, solely on the ground that the individual is a member of a particular group deemed to be less able or meritorious than others. This is the evil we call discrimination. It denies to the individual the right to realize his or her potential and to live in the freedom accorded to others, solely because of the group to which the individual belongs. In the course of the past century, free

and democratic societies throughout the world have recognized that the elimination of such discrimination is essential, not only to achieving the kind of society to which we aspire, but to democracy itself. "The principle of equality, which is but the other side of the coin of discrimination and to which the law of every democratic country strives to realize in pursuit of justice and decency, means that one must apply, for the purpose of the [legislative] goal in question, equal treatment for all people, where there are no real differences amongst them that are relevant to that goal": *Boronovsky v. Chief Rabbis of Israel*, P.D. CH [25] (1), 7, 35.

157 The grounds of discrimination enumerated in s. 15(1) of the *Charter* identify group characteristics which often serve as irrelevant grounds of distinction between people. The history of the human rights movement is a history of reaction against persecution and denial of opportunity on the basis of irrelevant stereotypical group classifications like race, sex, and religion. It is not surprising therefore to see these as well as other common markers of irrelevant exclusion enumerated in s. 15(1). But the categories are not closed, as s. 15(1) recognizes. Analogous grounds of discrimination may be recognized. Logic suggests that in determining whether a particular group characteristic is an analogous ground, the fundamental consideration is whether the characteristic may serve as an irrelevant basis of exclusion and a denial of essential human dignity in the human rights tradition. In other words, may it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual? An affirmative answer to this question indicates that the characteristic may be used in a manner which is violative of human dignity and freedom.

158 The theme of violation of human dignity and freedom by imposing limitations and disadvantages on the basis of a stereotypical attribution of group characteristics rather than on the basis of individual capacity, worth or circumstance is reflected in qualities which judges have found to be associated with analogous grounds. One indicator of an analogous ground may be that the targeted group has suffered historical disadvantage, independent of the challenged distinction: *Andrews*, supra, at p. 152 per Wilson J.; *Turpin*, supra, at pp. 1331-1332. Another may be the fact that the group constitutes a "discrete and insular minority": *Andrews*, supra, at p. 152 per Wilson J. and at p. 183 per McIntyre J.; *Turpin*, supra, at p. 1333. Another indicator is a distinction made on the basis of a personal characteristic; as McIntyre J. stated in *Andrews*, "[d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed" (at pp. 174-175). By extension, it has been suggested that distinctions based on personal and *immutable* characteristics must be discriminatory within s. 15(1): *Andrews*, supra, at p. 195 per LaForest J. Additional assistance may be obtained by comparing the ground at issue with the grounds enumerated, or from recognition by legislators and jurists that the ground is discriminatory: see *Egan v. Canada*, supra, per Cory J.

159 All of these may be valid indicators in the inclusionary sense that their presence may signal an analogous ground. But the converse proposition — that any or all of them *must* be present to find an analogous ground — is invalid. As Wilson J. recognized in *Turpin* (at p. 1333), they are but "analytical tools" which may be "of assistance". For example, analogous grounds cannot be confined to historically disadvantaged groups; if the *Charter* is to remain relevant to future generations, it must retain a capacity to recognize new grounds of discrimination. Nor is it essential that the analogous ground target a discrete and insular minority; this is belied by the inclusion of sex as a ground enumerated in s. 15(1). And while discriminatory group markers often involve immutable characteristics, they do not necessarily do so. Religion, an enumerated ground, is not immutable. Nor is citizenship, recognized in *Andrews*; nor province of residence, considered in *Turpin*. All these and more may be indicators of analogous grounds, but the unifying principle is larger: the avoidance of stereotypical reasoning and the creation of legal distinctions which violate the dignity and freedom of the individual, on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual.

160 What then of the analogous ground proposed in this case — marital status? The question is whether the characteristic of being unmarried — of not having contracted a marriage in a manner recognized by the state — constitutes a ground of discrimination within the ambit of s. 15(1). In my view, it does.

161 First, discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from *Charter* consideration on the ground that its recognition would trivialize the equality guarantee.

162 Second, marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1) of the *Charter*. Persons involved in an unmarried relationship constitute an historically disadvantaged group. There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits. In recent years, the disadvantage experienced by persons living in illegitimate relationships has greatly diminished. Those living together out of wedlock no longer are made to carry the scarlet letter. Nevertheless, the historical disadvantage associated with this group cannot be denied.

163 A third characteristic sometimes associated with analogous grounds — distinctions founded on personal, immutable characteristics — is present, albeit in attenuated form. In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one's partner to marry; financial, religious or social constraints — these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual's effective control. In this respect, marital status is not unlike citizenship, recognized as an analogous ground in *Andrews*: the individual exercises limited but not exclusive control over the designation.

164 Comparing discrimination on the basis of marital status with the grounds enumerated in s. 15(1), discrimination on the ground of marital status may be seen as akin to discrimination on the ground of religion, to the extent that it finds its roots and expression in moral disapproval of all sexual unions except those sanctioned by the church and state.

165 Of late, legislators and jurists throughout our country have recognized that distinguishing between cohabiting couples on the basis of whether they are legally married or not fails to accord with current social values or realities. As the amicus curiae has pointed out, 63 Ontario statutes currently make no distinction between married partners and unmarried partners who have cohabited in a conjugal relationship. For example, the right to spousal maintenance is not conditioned on marriage: see Part III, *Family Law Act*, R.S.O. 1990, c. F.3, which establishes a right to spousal support for those who have cohabited continuously for a period of not less than three years or who have cohabited in a relationship of some permanence and who have a child. Other provinces have adopted similar benefit thresholds. In the judicial domain, judges have recognized the right of unmarried spouses to share in family property through the doctrine of unjust enrichment: *Becker v. Pettkus*, [1980] 2 S.C.R. 834; *Peter v. Beblow*, [1993] 1 S.C.R. 980. All this suggests recognition of the fact that it is often wrong to deny equal benefit of the law because a person is not married.

166 These considerations, taken together, suggest that denial of equality on the basis of marital status constitutes discrimination within the ambit of s. 15(1) of the *Charter*. If the evil to which s. 15(1) is addressed is the violation of human dignity and freedom by imposing limitations or disadvantages on the basis of the stereotypical application of presumed group characteristics, rather than on the basis of individual capacity, worth or circumstance, then marital status should be considered an analogous ground. The essential elements necessary to engage the overarching purpose of s. 15(1) — violation of dignity and freedom, an historical group disadvantage, and the danger of stereotypical group-based decision-making — are present and discrimination is made out.

167 These observations are sufficient to dispose of the insurer's arguments based on alleged absence of historical disadvantage and the "mutable" nature of the unmarried state. It remains to consider, however, the theme underlying the whole of the insurer's submissions — that marriage is a good and honourable state and hence cannot serve as a

ground for discrimination. To most in our society, marriage is a good thing; to many a sacred thing. There is nobility in the public commitment of two people to each other to the exclusion of all others. How can it be wrong to use this commitment as the condition of receiving legal protection and benefit?

168 These sentiments, valid as they are, do not advance the insurer's case. The argument, simply put, is that marriage is good; the grounds of discrimination evil; therefore marriage cannot be a ground of discrimination. The fallacy in the argument is the assumption that the grounds of discrimination are evil. Discrimination is evil. But the grounds upon which it rests are not. Consider the enumerated grounds — race, national or ethnic origin, colour, religion, sex, age and mental or physical disability. None of these are evil in themselves. Indeed, people rightfully take pride in their race and ethnic origin; they find identity in their colour and their sex. Even mental and physical disabilities should be regarded not as deficiencies, but differences — differences which, while they will make some aspects of life more difficult, do not affect others, and may, moreover, contribute to society's richness and texture. What is evil is not the ground of discrimination, but its *inappropriate use* to deny equal protection and benefit to people who are members of the marked groups — not on the basis of their true abilities or circumstance, but on the basis of the group to which they belong. The argument that marital status cannot be an analogous ground because it is good cannot succeed. The issue is not whether marriage is good, but rather whether it may be used to deny equal treatment to people on grounds which have nothing to do with their true worth or entitlement due to circumstance. L'Heureux-Dubé J. stated in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 634: "It is not anti-family to support protection for non-traditional families." One might equally say it is not anti-marriage to accord equal benefit of the law to non-traditional couples.

169 Consider this court's decision in *Andrews*. The quality of citizenship there at issue is universally regarded as a good and valuable thing. Like marriage, it is the formal marker of a relationship — the relationship between the individual and his or her country. At trial, the argument prevailed that citizenship, as the sacred marker of a relationship of commitment and permanence, could not found a claim for discrimination under s. 15(1) of the *Charter*. But this court took a different view. It held that citizenship could constitute an analogous ground of discrimination. In itself citizenship was good. But it could not be used inappropriately to permit the exclusion of people from activities for which, in terms of personal merit, they were qualified. It was not citizenship which constituted discrimination, but its inappropriate use to bar Mr. Andrews from an activity to which citizenship was only tangentially relevant. Similarly marriage, however sacred, may be inappropriately used to bar individuals not belonging to the married group from the protection or benefit of laws to which the status of legal marriage has little real relevance. This potential for denial of benefit based on stereotypical characteristics attributed (or not attributed) to a group rather than on the basis of the characteristics of the individual makes marriage, like citizenship, an analogous ground. This does not mean that citizenship or marriage cannot be used as the basis of appropriate legislative distinctions. Marriage and citizenship may be used as the basis to exclude people from protections and benefits conferred by law, provided the state can demonstrate under s. 1 that they are truly relevant to the goal and values underlying the legislative provision in question.

170 I conclude that marital status may serve as an analogous ground of discrimination under s. 15(1) of the *Charter*.

Conclusion on s. 15

171 The legislation reflected in the insurance policy at issue denies equal benefits to partners in an unmarried relationship solely on the ground of their marital status. This ground is an analogous ground under s. 15(1). This is not one of the exceptional cases where a distinction drawn on the basis of an enumerated or analogous ground does not fall within the anti-discrimination guarantees of the *Charter*. It follows that discrimination under s. 15(1) is established.

3. Justification under s. 1 of the Charter

172 A finding of denial of equal benefit or protection of the law on a discriminatory ground under s. 15(1) does not mean that the law is unconstitutional. The court must go on to examine whether, notwithstanding its discriminatory character, the law or government action in question is "demonstrably justified in a free and democratic society". The

complainant bears the burden of showing discrimination under s. 15(1). This established, the burden shifts to the state or the party seeking to uphold the law to justify the discrimination.

173 Determining whether it has been demonstrated that the impugned distinction is "demonstrably justified in a free and democratic society" involves two inquiries. First, the goal of the legislation is ascertained and examined to see if it is of pressing and substantial importance. Then the court must carry out a proportionality analysis to balance the interests of society with those of individuals and groups. The proportionality analysis comprises three branches. First, the connection between the goal and the discriminatory distinction is examined to ascertain if it is rational. Second, the law must impair the right no more than is reasonably necessary to accomplish the objective. Finally, if these two conditions are met, the court must weigh whether the effect of the discrimination is proportionate to the benefit thereby achieved. See *R. v. Oakes*, [1986] 1 S.C.R. 103.

174 Examination of the goal of the legislation is vital in discrimination cases as elsewhere. Sometimes the legislative goal is apparent on the face of the legislation. Other times it may not be. Legislation aimed at effecting a less than worthy goal may be cloaked in the rhetoric of justice and reason. The task of the court in every case is to identify the functional values underlying the law.

175 The goal or functional value of the legislation here at issue is to sustain families when one of their members is injured in an automobile accident. When an adult partner in a family unit is injured, economic dislocation may not be far behind. If the injured partner is a wage-earner, the family income may be reduced or eliminated. If the injured party works in the home, it may be necessary to hire replacement services. In either case, the result is economic dislocation. This, in turn, can work great hardship on the family and its members. The goal of the legislation is to reduce this economic dislocation and hardship. This is a laudable goal. And given the frequency of injuries from motor vehicle accidents, it assumes an importance which can without exaggeration be described as pressing and substantial.

176 The next inquiry is whether a rational connection has been shown to exist between the legislative goal and the discrimination. As we have seen, analogous grounds may be used in ways that are relevant, or rationally connected, to a valid legislative goal. For example, exclusion from a regulated activity on the basis of age or citizenship might be justified if the state can show that age or citizenship is relevant to the ability to perform the activity safely and properly. If the proponent of the law can demonstrate that the ground of denial of a protection or benefit is relevant to the goal of the legislation, the discrimination loses its sting. "[I]f the ... differences amongst different people are relevant to the goal in question, then this will be a permissible distinction": *Boronovsky v. Chief Rabbis of Israel*, supra.

177 At this point we meet the problem of *how* relevant a criterion must be in discrimination cases. This inquiry echoes the "minimal impairment" analysis undertaken in *Oakes*, supra, and discussed in *R. v. Videoflicks Ltd.*, (sub nom. *R. v. Edwards Books & Art Ltd.*) [1986] 2 S.C.R. 713, and *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123. The marker chosen by the legislator may be only tangentially relevant to the legislative goal, as citizenship was found to be to the determination of ability to practise law in *Andrews*. In such cases, we say it is a poor marker; one which excessively impairs the equality rights. Although it may eliminate some people who may legitimately be excluded, it also excludes many who, given the goal of the legislation, should not be excluded. In contrast, a good marker excludes most people who should be excluded given the goal of the legislation, and only a few who should not. The standard which the legislator must meet is not perfection, but reasonableness. Of necessity laws use group criteria; and of necessity there are sometimes individual members of the group chosen who do not conform to the usual profile of the group and with respect to whom, viewed individually, even a relevant legislative marker may be irrelevant. For example, a law may deny drivers' permits to persons under the age of sixteen. There may be some people under the age of sixteen who are good drivers. But if the state can show that most people under sixteen would not be competent and responsible drivers, the age of sixteen may be defended as a relevant marker of those who should be permitted to drive. Provided the group marker chosen by the state is relevant to the legislative goal, the existence of minor anomalies due to the variation of individuals within the group will not render the marker violative. On the other hand, if the number of anomalies is so high that it significantly undermines the relevance of the group marker, or if more reasonable markers are available, the law may be invalid because it impairs the right more than reasonably necessary to achieve the legislative goal.

178 Returning to the case at bar, the question is whether marital status is a reasonably relevant marker of individuals who should receive benefits in the event of injury of a family member in an automobile accident, given the goal of the legislation. The insurer defends the marker of marital status as an indicator of stability which goes to the economic interdependence of the family unit. To maintain this claim, the state (or the insurer that here stands in its stead) must show that stable, and thus economically interdependent, family units typically involve married partners, and conversely, that unmarried partners in stable relationships are but a minor anomaly. Further, given the injustice of any anomalies, one would expect a demonstration that better criteria, producing fewer anomalous cases, are not readily available. In short, it must be demonstrated that the chosen group marker is reasonably relevant to the legislative goal in all the circumstances of the case, having regard to available alternative criteria and the need to minimize prejudice to anomalous cases within the group.

179 This the insurer and the state have not done. The record suggests that the legislators recognized that marital status was at best a problematic indicator of who should receive accident benefits upon injury in a motor vehicle accident. The debate centred on marital equivalence. To quote the amicus curiae, "[the legislators'] search was directed towards defining a 'marriage-like' conjugal relationship, usually in terms of mutual commitment and permanence — a 'near' marriage — instead of trying to define the underlying functional values, e.g., financial interdependence, relevant to the legislative subject-matter of the *Insurance Act*." Having misconstrued the issue as one of marriage equivalence, the Legislature found itself unable to agree. But this provides no justification for failing, from 1980 to 1987, to deal directly with the problem of which family units were so financially interdependent and stable as to warrant provision of the benefits in question.

180 If the issue had been viewed as a matter of defining who should receive benefits on a basis that is relevant to the goal or functional values underlying the legislation, rather than marriage equivalence, alternatives substantially less invasive of *Charter* rights might have been found. For example, the Legislature was able to agree in 1980 on a formula to extend death benefits to a certain class of unmarried persons. And in 1981, in the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53, s. 9(j) the Legislature agreed on a definition of "spouse" as the person to whom a person of the opposite sex is married or with whom the person is living in a conjugal relationship outside marriage. A modified version of the *Human Rights Code* definition requires marriage or cohabitation for at least one year or having a child together, or entering into a cohabitation agreement under s. 53 of the *Family Law Act*. This modified definition is used in 21 Ontario statutes.

181 It thus emerges that in fixing on marital status as the criterion of eligibility for family accident benefits, the Legislature chose a criterion that was at best only collaterally related to its legislative goal; a criterion, moreover, that had the effect of depriving a substantial number of deserving candidates of receipt of benefits. Better tests were available. In short, the Legislature did not choose a reasonably relevant marker.

182 It is suggested that the Legislature's choice of an inappropriate marker for family accident benefits can be defended on the ground that the legislation was passed in a period of rapidly changing family norms. Legislatures, it is argued, should not be held to standards of social perfection. As La Forest J. wrote in *McKinney v. University of Guelph*, supra, at p. 317:

a Legislature should not be obliged to deal with all aspects of a problem at once. It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time ...

183 I agree with these sentiments; however the need for legislative leeway is of little assistance in the case at bar. Marital status was not a reasonable criterion even in 1980, and the alternatives adopted in the years that followed belie the suggestion that the failure to adopt a more relevant criterion in the years between 1980 and 1987 can be attributed to the time required for legislative response.

184 It remains to consider whether the Legislature's choice of the inappropriate criterion of marital status to distinguish between those who receive benefits and those who do not can be justified on the ground that the resultant discrimination is proportionate to the legislative goal. Having determined that marital status is not a reasonable indicator of those who

should obtain accident benefits — that, to use the language of *Oakes*, the rational connection between the discrimination and the goal of the legislation is deficient and the law impairs the right more than reasonably necessary to achieve the legislative goal — it is unnecessary to move to the final step to consider whether the effect of the infringement is "proportionate" to the benefit to be derived from using the discriminatory marker.

185 I conclude that the state has failed to demonstrate that the exclusion of unmarried members of family units from motor vehicle accident benefits is demonstrably justified in a free and democratic society. It follows that the *Charter* violation is established.

C. Remedy

186 Having found that the impugned statutory provisions of the *Insurance Act* violate the *Charter*, the court is left with the choice between "reading in" appropriate amendments into the provisions, or leaving them as they are with the result that they fall as invalid under s. 52 of the *Constitution Act, 1982*. In the latter case, the court may consider a declaration of suspension of the invalidity for a period of time sufficient to allow the Legislature to remedy the violation.

187 The remedy of "reading in" is available if the question of how far the benefit should be extended can be answered with "sufficient precision" to justify the court in doing so, so as to bring the case within the guidelines laid out in *Rocket v. Royal College of Dental Surgeons (Ontario)*, [1990] 2 S.C.R. 232, and *Schachter v. Canada*, [1992] 2 S.C.R. 679. An affirmative answer in this case is suggested by the fact that in 1990 the Ontario Legislature amended the eligibility criteria in a way which would include the appellants, thus giving an indication of what it would do if the matter were remitted to it anew. While this does not meet concerns that the social and legislative picture may have changed further in the years since 1990, or resolve the problem for the other Ontario statutes containing similar provisions, it does offer reasonably conclusive evidence of how the Legislature would have remedied the 1980 legislation had it been required to do so when the appellants' claim arose.

188 The alternative remedy entails a declaration of invalidity of the 1980 legislation. It also entails consideration of a temporary suspension of that declaration for a period of time during which the Legislature might be expected to amend the 1980 *Insurance Act*, in order to avoid the revocation of benefits payable under that Act. If this were done, it would still leave the appellants and others in their situation without a remedy.

189 It is suggested that the court could fashion a remedy for the appellants under s. 24(1) of the *Charter*, which provides that "[a]nyone whose rights or freedoms ... have been infringed or denied may apply to a court ... to obtain such remedy as the court considers appropriate and just in the circumstances". In *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 577, this court (per Lamer C.J.C., dissenting on other grounds) suggested that an order of suspension of invalidity might be coupled with individual relief in the form of a "constitutional exemption" to the applicant who has suffered the *Charter* violation and has initiated court proceedings to obtain *Charter* relief. Three other dissenting judges agreed. Assuming the court was inclined to grant the appellants an exemption from the 1980 legislation and insurance policy provisions, the question remains of how it could do so without creating further inequities between the appellants and others in their situation who have been denied benefits. To avoid this, any constitutional exemption would have to be extended to all similar families. This in turn would require formulation of general criteria of eligibility, thus involving the court in the very activity which would have led it to eschew "reading up" the 1980 statute in conformity with the terms legislated in 1990. Yet to deny such persons a remedy would be to perpetuate the effects of a discrimination which the court has found to violate the *Charter* when the obvious remedy — the payment of the benefits that should have been paid — remains available.

190 Having considered the available remedies, I am persuaded that this is one of those exceptional cases where retroactively "reading up" a statute may be justified. The 1990 amendments provide the best possible evidence of what the Legislature would have done had it been forced to face the problem the appellants raise. The only claims are monetary and readily calculable and satisfied. Most importantly, the result will be to cure an injustice which might otherwise go unremedied.

191 In this case, the benefit payments are actually made available pursuant to the insurance contract between Ms. Valliere and Economical Mutual. Because the provisions in the insurance policy were mandated by the *Insurance Act*, the effect of reading up the Act is to import the 1990 definition of spouse into the standard automobile insurance policy.

Disposition

192 The appeal is allowed with costs on a party and party basis. The insurer's application to strike out the appellants' action is dismissed. The action is remitted for trial to determine whether Mr. Miron and Ms. Valliere meet the requirements of the 1990 legislation.

Appeal allowed.

TAB 8

Most Negative Treatment: Not followed

Most Recent Not followed: [Anawak v. Nunavut \(Chief Electoral Officer\)](#) | 2008 NUCJ 26, 2008 CarswellNun 26, 172 A.C.W.S. (3d) 391 | (Nun. C.J., Nov 5, 2008)

1999 CarswellNat 663
Supreme Court of Canada

Corbiere v. Canada (Minister of Indian & Northern Affairs)

1999 CarswellNat 663, 1999 CarswellNat 664, [1999] 2 S.C.R. 203, [1999] 3 C.N.L.R. 19, [1999] S.C.J. No. 24, 163 F.T.R. 284 (note), 173 D.L.R. (4th) 1, 239 N.R. 1, 61 C.R.R. (2d) 189, 88 A.C.W.S. (3d) 518, J.E. 99-1058

Her Majesty The Queen as represented by the Minister of Indian and Northern Affairs Canada, the Attorney General of Canada and Batchewana Indian Band, Appellants v. John Corbiere, Charlotte Syrette, Claire Robinson and Frank Nolan, each on their own behalf and on behalf of all non-resident members of the Batchewana Band, Respondents and Aboriginal Legal Services of Toronto Inc., Congress of Aboriginal Peoples, Lesser Slave Lake Indian Regional Council, Native Women's Association of Canada and United Native Nations Society of British Columbia, Interveners

Bastarache J., Binnie J., Cory J., Gonthier J., Iacobucci J.,
L'Heureux-Dubé J., Lamer C.J.C., Major J., McLachlin J.

Heard: October 13, 1998

Judgment: May 20, 1999

Docket: 25708

Proceedings: varying (1996), [142 D.L.R. \(4th\) 122](#) (Fed. C.A.); ; varying (1993), [107 D.L.R. \(4th\) 582](#) (Fed. T.D.);

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Philip P. Healey, *Martin J. Henderson* and *Catherine M. Twinn*, for Intervener, Lesser Slave Lake Indian Regional Council.

Mary Eberts and *Lucy McSweeney*, for Intervener, Native Women's Association of Canada.

Sharon D. McIvor and *Teressa Nahanee*, for Intervener, United Native Nations Society of British Columbia.

Subject: Constitutional; Public; Human Rights

Related Abridgment Classifications

Aboriginal law

III Government of Aboriginal people

III.2 Self-government

III.2.a Bands and First Nations

Constitutional law

XI Charter of Rights and Freedoms

XI.3 Nature of rights and freedoms

XI.3.h Equality rights

XI.3.h.i General principles

Constitutional law

XI Charter of Rights and Freedoms

XI.4 Nature of remedies under Charter

XI.4.a General principles

Headnote

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Equality rights — General Members of native band who did not reside on reserve sought declaration that s. 77(1) of Indian Act which requires that band members be "ordinarily resident" on reserve in order to vote in band elections violated s. 15(1) of Charter — Trial court granted declaration that s. 77(1) of Act was invalid in its entirety and suspended declaration for period of 10 months — Declaration was confined to band — Judgment was affirmed on appeal but appeal court determined that appropriate remedy was constitutional exemption — Crown appealed — Appeal dismissed but remedy designed by appeal court was modified — Words "and ordinarily resident on reserve" in s. 77(1) of Act are inconsistent with s. 15(1) of Charter — Implementation of declaration of invalidity to be suspended for 18 months — No constitutional exemption to be granted to band during period of suspension as it was preferable to develop electoral process that would balance rights of off-reserve and on-reserve band members — Indian Act, R.S.C. 1985, c. I-5, s. 77(1) — Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 15(1).

Constitutional law --- Charter of Rights and Freedoms — Nature of remedies under Charter — General

Members of native band who did not reside on reserve sought declaration that s. 77(1) of Indian Act which requires that band members be "ordinarily resident" on reserve in order to vote in band elections violated s. 15(1) of Charter — Trial court granted declaration that s. 77(1) of Act was invalid in its entirety and suspended declaration for period of 10 months — Declaration was confined to band — Judgment was affirmed on appeal but appeal court determined that appropriate remedy was constitutional exemption — Crown appealed — Appeal dismissed but remedy designed by appeal court was modified — Words "and ordinarily resident on reserve" in s. 77(1) of Act are inconsistent with s. 15(1) of Charter — Implementation of declaration of invalidity to be suspended for 18 months — No constitutional exemption to be granted to band during period of suspension as it was preferable to develop electoral process that would balance rights of off-reserve and on-reserve band members — Indian Act, R.S.C. 1985, c. I-5, s. 77(1) — Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 15(1).

Native law --- Constitutional issues — Bands and band government

Members of native band who did not reside on reserve sought declaration that s. 77(1) of Indian Act which requires that band members be "ordinarily resident" on reserve in order to vote in band elections violated s. 15(1) of Charter — Trial court granted declaration that s. 77(1) of Act was invalid in its entirety and suspended declaration for period of 10 months — Declaration was confined to band — Judgment was affirmed on appeal but appeal court determined that appropriate remedy was constitutional exemption — Crown appealed — Appeal dismissed but remedy designed by appeal court was modified — Words "and ordinarily resident on reserve" in s. 77(1) of Act are inconsistent with s. 15(1) of Charter — Implementation of declaration of invalidity to be suspended for 18 months — No constitutional exemption to be granted to band during period of suspension as it was preferable to develop electoral process that would balance rights of off-reserve and on-reserve band members — Indian Act, R.S.C. 1985, c. I-5, s. 77(1) — Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 15(1).

Droit constitutionnel --- Charte des droits et libertés — Nature des droits et libertés — Droits à l'égalité — En général Membres d'une bande indienne ne résidant pas sur la réserve ont demandé que le par. 77(1) de la Loi sur les Indiens, lequel exige que les membres de la bande « résident ordinairement sur la réserve » pour pouvoir voter lors des élections de la bande, soit déclaré être en contravention du par. 15(1) de la Charte — Juge de première instance a déclaré le par. 77(1) invalide en totalité et a suspendu la prise d'effet de cette déclaration pour une période de 10 mois — Jugement déclaratoire ne s'appliquait qu'à la bande — Jugement a été confirmé en appel mais la Cour d'appel a conclu que la réparation convenable était une exemption constitutionnelle — Couronne a formé un pourvoi — Pourvoi a été rejeté mais la réparation désignée par la Cour d'appel a été modifiée — Termes « et résident ordinairement sur la réserve » du par. 77(1) de la Loi sont incompatibles avec le par. 15(1) de la Charte — Prise d'effet de la déclaration d'invalidité a été suspendue pendant 18 mois — Aucune exemption constitutionnelle ne doit être accordée à la bande pendant la

suspension puisqu'il est préférable d'élaborer un système électoral qui mettra en équilibre les droits des membres vivant hors des réserves et ceux des membres qui y résident — Loi sur les Indiens, L.R.C. 1985, ch. I-5, par. 77(1) — Charte canadienne des droits et libertés, Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11, art. 15(1).

Droit constitutionnel --- Charte des droits et libertés — Nature des droits et libertés — En général

Membres d'une bande indienne ne résidant pas sur la réserve ont demandé que le par. 77(1) de la Loi sur les Indiens, lequel exige que les membres de la bande « résident ordinairement sur la réserve » pour pouvoir voter lors des élections de la bande, soit déclaré être en contravention du par. 15(1) de la Charte — Juge de première instance a déclaré le par. 77(1) invalide en totalité et a suspendu la prise d'effet de cette déclaration pour une période de 10 mois — Jugement déclaratoire ne s'appliquait qu'à la bande — Jugement a été confirmé en appel mais la Cour d'appel a conclu que la réparation convenable était une exemption constitutionnelle — Couronne a formé un pourvoi — Pourvoi a été rejeté mais la réparation désignée par la Cour d'appel a été modifiée — Termes « et résident ordinairement sur la réserve » du par. 77(1) de la Loi sont incompatibles avec le par. 15(1) de la Charte — Prise d'effet de la déclaration d'invalidité a été suspendue pendant 18 mois — Aucune exemption constitutionnelle ne doit être accordée à la bande pendant la suspension puisqu'il est préférable d'élaborer un système électoral qui mettra en équilibre les droits des membres vivant hors des réserves et ceux des membres qui y résident — Loi sur les Indiens, L.R.C. 1985, ch. I-5, par. 77(1) — Charte canadienne des droits et libertés, Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11, art. 15(1).

Droit autochtone --- Questions constitutionnelles — Bandes et Conseils de bande

Membres d'une bande indienne ne résidant pas sur la réserve ont demandé que le par. 77(1) de la Loi sur les Indiens, lequel exige que les membres de la bande « résident ordinairement sur la réserve » pour pouvoir voter lors des élections de la bande, soit déclaré être en contravention du par. 15(1) de la Charte — Juge de première instance a déclaré le par. 77(1) invalide en totalité et a suspendu la prise d'effet de cette déclaration pour une période de 10 mois — Jugement déclaratoire ne s'appliquait qu'à la bande — Jugement a été confirmé en appel mais la Cour d'appel a conclu que la réparation convenable était une exemption constitutionnelle — Couronne a formé un pourvoi — Pourvoi a été rejeté mais la réparation désignée par la Cour d'appel a été modifiée — Termes « et résident ordinairement sur la réserve » du par. 77(1) de la Loi sont incompatibles avec le par. 15(1) de la Charte — Prise d'effet de la déclaration d'invalidité a été suspendue pendant 18 mois — Aucune exemption constitutionnelle ne doit être accordée à la bande pendant la suspension puisqu'il est préférable d'élaborer un système électoral qui mettra en équilibre les droits des membres vivant hors des réserves et ceux des membres qui y résident — Loi sur les Indiens, L.R.C. 1985, ch. I-5, par. 77(1) — Charte canadienne des droits et libertés, Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11, art. 15(1).

The members of a native band who did not reside on the reserve sought a declaration that s. 77(1) of the *Indian Act* which requires that band members be "ordinarily resident" on the reserve in order to vote in band elections violated s. 15(1) of the *Charter*. The trial court granted a declaration that s. 77(1) of the Act was invalid in its entirety and suspended the declaration for a period of 10 months. The declaration was confined to the band. The judgment was affirmed on appeal but the remedy was modified. The appeal court determined that the appropriate remedy was a constitutional exemption. The Crown appealed.

Held: The appeal was dismissed.

Per McLachlin and Bastarache JJ. (Lamer C.J., Cory and Major JJ. concurring): The exclusion of off-reserve members of an Indian band from the right to vote in band elections pursuant to s. 77(1) of the *Indian Act* is inconsistent with s. 15 of the *Charter*. Aboriginality residence as it pertained to whether an aboriginal band member lived on or off the reserve was a ground analogous to those enumerated in s. 15 of the *Charter*. The criteria for the identification of analogous grounds of discrimination includes the viewpoint that the enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case. Affirmative answers to both inquiries of whether distinction is on the basis of an enumerated or analogous ground and whether that distinction on the facts of the case affronts s. 15 of the *Charter* are a precondition to establishing a constitutional claim. By denying off-reserve band members the right to vote and participate in their band's governance, s. 77(1) of the Act perpetuates the historic disadvantage experienced by off-reserve band members.

Section 77(1) of the Act relates to the cultural identity of off-reserve band members in a stereotypical way and so engages the dignity aspect of a s. 15 *Charter* analysis and results in the denial of substantive equality. Such an infringement is not justified under s. 1 of the *Charter*. Section 77(1) of the Act does not minimally impair s. 15 *Charter* rights. The words "and is ordinarily resident on the reserve" in s. 77(1) of the *Indian Act* were declared to be inconsistent with s. 15(1) of the *Charter* but the implementation of the declaration was to be suspended for 18 months. No constitutional exemption was granted to the band during the period of suspension as it was preferable to develop an electoral process that would balance the rights of off-reserve and on-reserve band members.

Per L'Heureux-Dubé J. (dissenting) (Gonthier, Iacobucci and Binnie JJ., concurring): Section 77 (1) of the *Indian Act* infringes the right to equality without discrimination of the off-reserve members of bands affected by it. Section 77(1) of the Act draws a distinction between band members who live on-reserve and those who live off-reserve, by excluding the latter from the definition of "elector" within the band and so constitutes differential treatment. Off-reserve band member status should be recognized as an analogous ground. An inquiry into analogous grounds of discrimination must be undertaken in a purposive and contextual manner as various contextual factors may demonstrate that the trait or combination of traits by which the claimants are defined has discriminatory potential. The differential treatment accorded to off-reserve band members did not correspond with the needs, characteristics or circumstances of the claimants in a manner which respected and valued their dignity and difference. The interests affected were fundamental and had important societal significance from the perspective of those affected. The infringement of s. 15(1) of the *Charter* by s. 77(1) of the Act is not justified under s. 1 of the *Charter* as a complete exclusion of non-residents from the right to vote does not constitute a minimal impairment of these rights. The appropriate remedy was a declaration that the words "and is ordinarily resident on the reserve" in s. 77(1) of the Act are invalid with the declaration suspended for 18 months to give Parliament the time necessary to carry extensive consultations and respond to the needs of the different groups affected.

Les membres d'une bande indienne ne résidant pas dans la réserve cherchaient à obtenir un jugement déclarant que l'art. 77(1) de la *Loi sur les Indiens*, qui prévoit que seuls les membres d'une bande qui « réside[nt] ordinairement » dans la réserve sont habiles à voter aux élections des bandes, enfreignait l'art. 15(1) de la *Charte canadienne des droits et libertés*. Le tribunal de première instance a rendu un jugement déclarant que l'art. 77(1) de la loi était invalide en totalité et a suspendu la prise d'effet de son jugement déclaratoire pour une période de 10 mois. La déclaration n'avait d'effet qu'à l'égard de la bande concernée. La Cour d'appel a maintenu le jugement, mais a modifié la réparation. Elle a statué que la réparation adéquate consistait en une exemption constitutionnelle. Le ministère public a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Les juges McLachlin et Bastarache (le juge en chef Lamer, les juges Cory et Major y souscrivant : En privant les membres d'une bande indienne ne résidant pas dans la réserve de leur droit de vote lors des élections des bandes, l'art. 77(1) de la *Loi sur les Indiens* enfreignait l'art. 15 de la Charte. Lorsqu'il vise à déterminer si un membre d'une bande autochtone réside ou non dans une réserve, le critère de lieu de résidence d'un Autochtone constitue un motif de discrimination analogue aux motifs énumérés à l'art. 15 de la Charte. Les critères permettant d'identifier les motifs de discrimination analogues comprennent celui qui consiste à considérer que les motifs énumérés et les motifs analogues constituent des indicateurs permanents de l'existence d'un processus décisionnel suspect ou de discrimination potentielle. La distinction entre ces motifs réside dans la réponse donnée à la question de savoir s'ils sont source de discrimination dans les circonstances particulières d'une affaire donnée. Une réponse affirmative à la question de savoir si la distinction est fondée sur un motif énuméré à l'art. 15 de la Charte ou sur un motif analogue, et à celle qui consiste à déterminer si, à la lumière des faits de l'affaire, la distinction enfreint l'art. 15 de la Charte, constitue un préalable à l'établissement du bien-fondé d'une demande sur le plan constitutionnel. En refusant aux membres d'une bande indienne ne résidant pas dans la réserve d'exercer leur droit de voter et de participer à l'administration de leur bande, l'art. 77(1) de la loi perpétue le désavantage historique vécu par les membres hors réserve. L'article 77(1) de la loi porte d'une manière stéréotypée sur l'identité culturelle des membres hors réserve d'une bande indienne et, par conséquent, soulève l'application de l'aspect dignité de l'analyse fondée sur l'art. 15 et entraîne le déni du droit à l'égalité réelle. Une telle atteinte ne trouve aucune justification aux termes de l'art. 1 de la Charte. L'article 77(1) de la loi ne porte pas atteinte de façon minimale aux droits garantis par la Charte. Les mots « et réside ordinairement sur la réserve » figurant à l'art. 77(1) de la *Loi sur les Indiens* portaient atteinte à l'art. 15(1) de la Charte, mais la mise en application du jugement déclaratoire devait être suspendue pour une période

de 18 mois. Aucune exemption constitutionnelle n'a été accordée à la bande pour la période de suspension parce qu'il était préférable d'établir un système électoral mettant en équilibre les droits des membres ne vivant pas dans les réserves et ceux des membres qui y résidaient.

Le juge L'Heureux-Dubé (dissident) (les juges Gonthier, Iacobucci et Binnie y souscrivant) : L'article 77(1) de la *Loi sur les Indiens* porte atteinte au droit à l'égalité sans discrimination des membres hors réserve d'une bande indienne touchés par celui-ci. Cette disposition établit une distinction entre les membres des bandes qui vivent dans les réserves et ceux qui vivent en dehors de celles-ci, en excluant ces derniers de la définition d'« électeur » aux fins des élections de la bande. Cette distinction constitue une différence de traitement. Il convenait d'admettre que la qualité de membre hors réserve d'une bande indienne constituait un motif analogue. Une analyse des motifs de discrimination analogues doit être faite en fonction de l'objet et du contexte étant donné que divers facteurs contextuels sont susceptibles de permettre de déterminer si la caractéristique ou la combinaison de caractéristiques qui définit les demandeurs peut constituer une source de discrimination. La différence de traitement réservé aux membres des bandes ne résidant pas dans la réserve ne répondait pas aux besoins et caractéristiques des requérants d'une manière qui respecte et valorise leur dignité et leur différence. Les droits qui étaient ainsi touchés étaient fondamentaux et revêtaient une grande importance du point de vue social pour les personnes concernées. L'art. 77(1) de la loi contrevenait à l'art. 15(1) de la Charte d'une manière qui ne pouvait se justifier en vertu de l'art. 1 de la Charte puisque le retrait total du droit de vote des non-résidents ne constituait pas une atteinte minimale à leurs droits. La réparation adéquate consistait en un jugement déclarant que les mots « et réside ordinairement sur la réserve » figurant à l'art. 77(1) de la loi étaient inopérants, et suspendant l'effet de cette déclaration d'invalidité pour une période de 18 mois afin de donner au Parlement le temps nécessaire pour procéder à de vastes consultations et répondre aux besoins des divers groupes de personnes touchées.

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Vriend v. Alberta, 156 D.L.R. (4th) 385, 50 C.R.R. (2d) 1, 224 N.R. 1, 212 A.R. 237, 168 W.A.C. 237, 31 C.H.R.R. D/1, [1998] 1 S.C.R. 493, 98 C.L.L.C. 230-021, 67 Alta. L.R. (3d) 1, [1999] 5 W.W.R. 451 (S.C.C.) — considered

Statutes considered by / Législation citée par *McLachlin and Bastarache JJ.*:

Canadian Charter of Rights and Freedoms/Charte canadienne des droits et libertés, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11/Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11

s. 1 — considered

s. 15 — considered

s. 15(1) — considered

s. 25 — considered

Constitution Act, 1982/Loi constitutionnelle de 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44/constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11, réimprimée L.R.C. 1985, annexe II, no44

s. 52 — considered

Indian Act/Indiens, Loi sur les, R.S.C./L.R.C. 1985, c. I-5

Generally/en général

s. 77(1) [rep. & sub./abr. et rempl. R.S.C./L.R.C. 1985, c. 32 (1st Supp./1e suppl.), s. 14] — considered

Indian Act, Act to Amend the/Indiens, Loi modifiant la Loi sur les, S.C./L.C. 1985, c. 27

Generally/en général — considered

Statutes considered by / Législation citée par *Heureux-Dubé J.*:

Canadian Bill of Rights/Déclaration canadienne des droits, S.C./L.C. 1960, c. 44, Pt. I, reprinted R.S.C. 1985, App. III/Partie I réimprimée L.R.C. 1985, Annexe III

Generally/en général — considered

Canadian Charter of Rights and Freedoms/Charte canadienne des droits et libertés, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11/Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11

s. 1 — considered

s. 2(d) — considered

s. 15 — considered

s. 15(1) — considered

s. 24(1) — considered

s. 25 — considered

Civilization of the Indian Tribes in the Province, and to amend the Laws respecting Indians, Act to encourage the gradual, S. Prov. C. 1857, c. 26

Generally — considered

Constitution Act, 1982/Loi constitutionnelle de 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44/constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11, réimprimée L.R.C. 1985, annexe II, no44

s. 35 — considered

s. 52(1) — considered

Gradual Enfranchisement Act, S.C. 1869, c. 6

Generally — considered

Indian Act, R.S.C. 1906, c. 81

s. 172(b) — considered

Indian Act, R.S.C. 1927, c. 98

s. 51(2) — considered

s. 163(a) — considered

Indian Act, S.C. 1950-51, c. 29

s. 2(1)(e) — considered

s. 12 — considered

s. 14 — considered

s. 76(1) — considered

Indian Act/Indiens, Loi sur les, R.S.C./L.R.C. 1985, c. I-5

Generally/en général — considered

s. 2(1) "band" — considered

s. 2(1) "bande" — considered

s. 2(1) "council of the band" — considered

s. 2(1) "conseil de la bande" — considered

s. 2(1) "électeur" [rep. & sub./abr. et rempl. R.S.C./L.R.C. 1985, c. 32 (1st Supp./1e suppl.), s. 1(1)] — considered

s. 2(1) "elector" [rep. & sub./abr. et rempl. R.S.C./L.R.C. 1985, c. 32 (1st Supp./1e suppl.), s. 1(1)] — considered

s. 20(1) — considered

s. 38(1) [rep. & sub./abr. et rempl. R.S.C./L.R.C. 1985, c. 17 (4th Supp./4e suppl.), s. 2] — considered

s. 39(1) [rep. & sub./abr. et rempl. R.S.C./L.R.C. 1985, c. 17 (4th Supp./4e suppl.), s. 3] — considered

s. 39(1)(b) [rep. & sub./abr. et rempl. R.S.C./L.R.C. 1985, c. 17 (4th Supp./4e suppl.), s. 3] — considered

s. 62 — considered

s. 64(1) [renumbered/nouv. num. R.S.C./L.R.C. 1985, c. 32 (1st Supp./1e suppl.), s. 10(1)] — considered

s. 66(1) — considered

s. 69 — considered

s. 69(1) — considered

s. 74(1) — considered

s. 75 — considered

s. 77 [rep. & sub./abr. et rempl. R.S.C./L.R.C. 1985, c. 32 (1st Supp./1e suppl.), s. 14] — considered

s. 77(1) [rep. & sub./abr. et rempl. R.S.C./L.R.C. 1985, c. 32 (1st Supp./1e suppl.), s. 14] — considered

s. 81(1) [renumbered/nouv. num. R.S.C./L.R.C. 1985, c. 32 (1st Supp./1e suppl.), s. 15(3)] — considered

s. 81(1)(i) [renumbered/nouv. num. R.S.C./L.R.C. 1985, c. 32 (1st Supp./1e suppl.), s. 15(3)] — considered

s. 81(1)(p) [renumbered/nouv. num. R.S.C./L.R.C. 1985, c. 32 (1st Supp./1e suppl.), s. 15(3)] — considered

s. 81(1)(p.1) [en./ad. R.S.C./L.R.C. 1985, c. 32 (1st Supp./1e suppl.), s. 15(1)] — considered

s. 83 [am./mod. R.S.C./L.R.C. 1985, c. 17 (4th Supp./4e suppl.), s. 10] — considered

s. 83(1)(f) — considered

s. 83(2) [rep. & sub./abr. et rempl. R.S.C./L.R.C. 1985, c. 17 (4th Supp./4e suppl.), s. 10(3)] — considered

s. 85.1 [en./ad. R.S.C./L.R.C. 1985, c. 32 (1st Supp./1e suppl.), s. 16] — considered

s. 85.1(1) [en./ad. R.S.C./L.R.C. 1985, c. 32 (1st Supp./1e suppl.), s. 16] — considered

Indian Advancement Act, 1884, S.C. 1884, c. 28

s. 5 — considered

Indian Advancement Act, R.S.C. 1886, c. 44

s. 5(1) — considered

Indian Act, Act to amend the/Indiens, Loi modifiant la Loi sur les, S.C./L.C. 1985, c. 27

Generally/en général — considered

Organization of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordinance Lands, Act providing for the, S.C. 1868, c. 42

s. 8(1) — considered

Rules considered by / Règles cités par Heureux-Dubé J.:

Rules of the Supreme Court of Canada/Cour suprême du Canada, Règles de la, SOR/83-74

R. 32 [am./mod. SOR/92-674; am/mod. SOR/98-489] — considered

R. 32(1) [rep. & sub./abr. et rempl. SOR/92-674; am/mod. SOR/98-489] — considered

R. 32(4) [rep. & sub./abr. et rempl. SOR/92-674] — considered

Regulations considered by Heureux-Dubé J.:

Indian Act, R.S.C. 1985, c. I-5

Indian Bands Council Elections Order, SOR/97-138

Generally

APPEAL by Crown of judgment reported at [142 D.L.R. \(4th\) 122](#) affirming declaration of invalidity of s. 77(1) of the Indian Act and granting constitutional exemption.

POURVOI formé par la Couronne à l'encontre du jugement publié à [142 D.L.R. \(4th\) 122](#) confirmant la déclaration d'invalidité du par. 77(1) de la Loi sur les Indiens et accordant une exemption constitutionnelle.

McLachlin J. and Bastarache JJ.:

1 We have read the reasons for judgment of Justice L'Heureux-Dubé. We believe that this case can be resolved on simpler grounds. We will therefore briefly outline the reasoning upon which we base our own decision.

2 L'Heureux-Dubé J. has set out in detail the facts in this case as well as a description of its judicial history. We adopt this factual background.

3 The narrow issue raised in this appeal is whether the exclusion of off-reserve members of an Indian band from the right to vote in band elections pursuant to s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, is inconsistent with s. 15(1) of the *Canadian Charter of Rights and Freedoms*. There is no need for us to describe the steps applicable to a s. 15(1) analysis. They have been affirmed with great precision by Iacobucci J. in *Law v. Canada (Minister of Employment & Immigration)*, S.C.C., No. 25374, judgment rendered March 25, 1999 [reported (1999), [60 C.R.R. \(2d\) 1](#) (S.C.C.)]

4 The first step is to determine whether the impugned law makes a distinction that denies equal benefit or imposes an unequal burden. The Act's exclusion of off-reserve band members from voting privileges on band governance satisfies this requirement.

5 The next step is to determine whether the distinction is discriminatory. The first inquiry is whether the distinction is made on the basis of an enumerated ground or a ground analogous to it. The answer to this question will be found in considering the general purpose of s. 15(1), i.e. to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice, and to promote a society where all persons are considered worthy of respect and consideration.

6 We agree with L'Heureux-Dubé J. that Aboriginality-residence (off-reserve band member status) constitutes a ground of discrimination analogous to the enumerated grounds. However, we wish to comment on two matters: (1) the suggestion by some that the same ground may or may not be analogous depending on the circumstances; and (2) the criteria that identify an analogous ground.

7 The enumerated grounds function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making. They are a legal expression of a general characteristic, not a contextual, fact-based conclusion about whether discrimination exists in a particular case. As such, the enumerated grounds must be distinguished from a finding that discrimination exists in a particular case. Since the enumerated grounds are only indicators of suspect grounds of distinction, it follows that decisions on these grounds are not always discriminatory; if this were otherwise, it would be unnecessary to proceed to the separate examination of discrimination at the third stage of our analysis discussed in *Law, supra, per Iacobucci J.*

8 The same applies to the grounds recognized by the courts as "analogous" to the grounds enumerated in s. 15. To say that a ground of distinction is an analogous ground is merely to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality. Like distinctions made on enumerated grounds, distinctions made on analogous grounds may well not be discriminatory. But this does not mean that they are not analogous grounds or that they are analogous grounds only in some circumstances. Just as we do not speak of enumerated grounds existing in one circumstance and not another, we should not speak of analogous grounds existing in one circumstance and not another. The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case.

9 We therefore disagree with the view that a marker of discrimination can change from case to case, depending on the government action challenged. It seems to us that it is not the *ground* that varies from case to case, but the determination of whether a distinction on the basis of a constitutionally cognizable ground is *discriminatory*. Sex will always be a ground, although sex-based legislative distinctions may not always be discriminatory. To be sure, *R. v. Turpin*, [1989] 1 S.C.R. 1296 (S.C.C.), suggested that residence *might* be an analogous ground in certain contexts. But in view of the synthesis of previous cases suggested in *Law, supra*, it is more likely that today the same result, dismissal of the claim, would be achieved either by finding no analogous ground or no discrimination in fact going to essential human dignity.

10 If it is the intention of L'Heureux-Dubé J.'s reasons to affirm contextual dependency of the enumerated and analogous grounds, we must respectfully disagree. If "Aboriginality-residence" is to be an analogous ground (and we agree with L'Heureux-Dubé J. that it should), then it must always stand as a constant marker of potential legislative discrimination, whether the challenge is to a governmental tax credit, a voting right, or a pension scheme. This established, the analysis moves to the third stage: whether the distinction amounts, in purpose or effect, to discrimination on the facts of the case.

11 Maintaining the distinction in *Law, supra*, between the enumerated or analogous ground analysis and the third-stage contextual discrimination analysis, offers several advantages. Both stages are concerned with discrimination and the violation of the presumption of the equal dignity and worth of every human being. But they approach it from different perspectives. The analogous grounds serve as jurisprudential markers for suspect distinctions. They function conceptually to identify the sorts of claims that properly fall under s. 15. By screening out other cases, they avoid trivializing the s. 15 equality guarantee and promote the efficient use of judicial resources. And they permit the

development over time of a conceptual jurisprudence of the sorts of distinctions that fall under the s. 15 guarantee, without foreclosing new cases of discrimination. A distinction on an enumerated or analogous ground established, the contextual and fact-specific inquiry proceeds to whether the distinction amounts to discrimination in the context of the particular case.

12 Our second concern relates to the manner in which a new analogous ground may be identified. In our view, conflation of the second and third stages of the *Law* framework is to be avoided. To be sure, *Law* is meant to provide a set guidelines and not a formalistic straitjacket, but the second and third stages are unquestionably distinct: the former asks whether the distinction is on the basis of an enumerated or analogous ground, the latter whether that distinction on the facts of the case affronts s. 15. Affirmative answers to *both* inquiries are a precondition to establishing a constitutional claim.

13 What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 — race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

14 L'Heureux-Dubé J. ultimately concludes that "Aboriginality-residence" as it pertains to whether an Aboriginal band member lives on or off the reserve is an analogous ground. We agree. L'Heureux-Dubé J.'s discussion makes clear that the distinction goes to a personal characteristic essential to a band member's personal identity, which is no less constructively immutable than religion or citizenship. Off-reserve Aboriginal band members can change their status to on-reserve band members only at great cost, if at all.

15 Two brief comments on this new analogous ground are warranted. First, reserve status should not be confused with residence. The ordinary "residence" decisions faced by the average Canadians should not be confused with the profound decisions Aboriginal band members make to live on or off their reserves, assuming choice is possible. The reality of their situation is unique and complex. Thus no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground. Second, we note that the analogous ground of off-reserve status or Aboriginality-residence is limited to a subset of the Canadian population, while s. 15 is directed to everyone. In our view, this is no impediment to its inclusion as an analogous ground under s. 15. Its demographic limitation is no different, for example, from pregnancy, which is a distinct, but fundamentally interrelated form of discrimination from gender. "Embedded" analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination.

16 Having concluded that the distinction made by the impugned law is made on an analogous ground, we come to the final step of the s. 15(1) analysis: whether the distinction at issue in this case in fact constitutes discrimination. In plain words, does the distinction undermine the presumption upon which the guarantee of equality is based — that each individual is deemed to be of equal worth regardless of the group to which he or she belongs?

17 Applying the applicable *Law* factors to this case — pre-existing disadvantage, correspondence and importance of the affected interest — we conclude that the answer to this question is yes. The impugned distinction perpetuates the historic disadvantage experienced by off-reserve band members by denying them the right to vote and participate in their band's governance. Off-reserve band members have important interests in band governance which the distinction denies.

They are co-owners of the band's assets. The reserve, whether they live on or off it, is their and their children's land. The band council represents them as band members to the community at large, in negotiations with the government, and within Aboriginal organizations. Although there are some matters of purely local interest, which do not as directly affect the interests of off-reserve band members, the complete denial to off-reserve members of the right to vote and participate in band governance treats them as less worthy and entitled, not on the merits of their situation, but simply because they live off-reserve. The importance of the interest affected is underlined by the findings of the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 1, *Looking Forward, Looking Back*, at pp. 137-91. The Royal Commission writes in vol. 4, *Perspectives and Realities*, at p. 521:

Throughout the Commission's hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal people in cities.

And at p. 525:

Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable.... Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.

18 Taking all this into account, it is clear that the s. 77(1) disenfranchisement is discriminatory. It denies off-reserve band members the right to participate fully in band governance on the arbitrary basis of a personal characteristic. It reaches the cultural identity of off-reserve Aboriginals in a stereotypical way. It presumes that Aboriginals living off-reserve are not interested in maintaining meaningful participation in the band or in preserving their cultural identity, and are therefore less deserving members of the band. The effect is clear, as is the message: off-reserve band members are not as deserving as those band members who live on reserves. This engages the dignity aspect of the s. 15 analysis and results in the denial of substantive equality.

19 The conclusion that discrimination exists at the third stage of the *Law* test does not depend on the composition of the off-reserve band members group, its relative homogeneity or the particular historical discrimination it may have suffered. It is the present situation of the group relative to that of the comparator group, on-reserve band members, that is relevant. All parties have accepted that the off-reserve group comprises persons who have chosen to live off-reserve freely, persons who have been forced to leave the reserve reluctantly because of economic and social considerations, persons who have at some point been expelled then restored to band membership through Bill C-31 (*An Act to amend the Indian Act*, S.C. 1985, c. 27), and descendants of these people. It is accepted that off-reserve band members are the object of discrimination and constitute an underprivileged group. It is also accepted that many off-reserve band members were expelled from the reserves because of policies and legal provisions which were changed by Bill C-31 and can be said to have suffered double discrimination. But Aboriginals living on reserves are subject to the same discrimination. Some were affected by Bill C-31. Some left the reserve and returned. The relevant social facts in this case are those that relate to off-reserve band members as opposed to on-reserve band members. Even if all band members living off-reserve had voluntarily chosen this way of life and were not subject to discrimination in the broader Canadian society, they would still have the same cause of action. They would still suffer a detriment by being denied full participation in the affairs of the bands to which they would continue to belong while the band councils are able to affect their interests, in particular by making decisions with respect to the surrender of lands, the allocation of land to band members, the raising of funds and making of expenditures for the benefit of all band members. The effect of the legislation is to force band members to choose between living on the reserve and exercising their political rights, or living off-reserve and renouncing the exercise of their political rights. The political rights in question are related to the race of the individuals affected, and to their cultural identity. As mentioned earlier, the differential treatment resulting from the legislation is discriminatory because it implies that off-reserve band members are lesser members of their bands or persons who have chosen to be assimilated by the mainstream society.

20 We have been asked to consider the possible application of s. 25 of the *Charter*. This section provides that rights accorded in the *Charter* must not be construed as abrogating or derogating from the rights of Aboriginals. We agree with L'Heureux-Dubé J. that given the limited argument on this issue, it would be inappropriate to articulate general principles pertaining to s. 25 in this case. Suffice it to say that a case for its application has not been made out here.

21 Having found that s. 77(1) is discriminatory, we must address the s. 1 argument of the appellants. The applicable test was recently described by Iacobucci J. in *Egan v. Canada*, [1995] 2 S.C.R. 513 (S.C.C.), at para. 182. We are satisfied that the restriction on voting is rationally connected to the aim of the legislation, which is to give a voice in the affairs of the reserve only to the persons most directly affected by the decisions of the band council. It is admitted that although all band members are subject to some decisions of the band council, most decisions would only impact on members living on the reserve. The restriction of s. 15 rights is however not justified under the second branch of the s. 1 test; it has not been demonstrated that s. 77(1) of the *Indian Act* impairs the s. 15 rights minimally. Even if it is accepted that some distinction may be justified in order to protect legitimate interests of band members living on the reserve, it has not been demonstrated that a complete denial of the right of band members living off-reserve to participate in the affairs of the band through the democratic process of elections is necessary. Some parties and interveners have mentioned the possibility of a two-tiered council, of reserved seats for off-reserve members of the band, of double-majority votes on some issues. The appellants argue that there are important difficulties and costs involved in maintaining an electoral list of off-reserve band members and in setting up a system of governance balancing the rights of on-reserve and off-reserve band members. But they present no evidence of efforts deployed or schemes considered and costed, and no argument or authority in support of the conclusion that costs and administrative convenience could justify a complete denial of the constitutional right. Under these circumstances, we must conclude that the violation has not been shown to be demonstrably justified.

22 With regard to remedy, the Court of Appeal was of the view that it would be preferable to grant the Batchewana Band a permanent constitutional exemption rather than to declare s. 77(1) of the *Indian Act* to be unconstitutional and without effect generally. With respect, we must disagree. The remedy of constitutional exemption has been recognized in a very limited way in this Court, to protect the interests of a party who has succeeded in having a legislative provision declared unconstitutional, where the declaration of invalidity has been suspended; see *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.), at pp. 715-17; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), at p. 577. We do not think this is a case where a possible expansion of the constitutional exemption remedy should be considered. There is no evidence of special circumstances upon which this possibility might be raised. The evidence before the Court is that there are off-reserve members of most if not all Indian bands in Canada that are affected by s. 77(1) of the *Indian Act*, and no evidence of other rights that may be relevant in examining the effect of s. 77(1) with regard to any band other than the Batchewana Band. If another band could establish an Aboriginal right to restrict voting, as suggested by the Court of Appeal, that right would simply have precedence over the terms of the *Indian Act*; this is not a reason to restrict the declaration of invalidity to the Batchewana Band.

23 Where there is inconsistency between the *Charter* and a legislative provision, s. 52 of the *Constitution Act, 1982* provides that the provision shall be rendered void to the extent of the inconsistency. We would declare the words "and is ordinarily resident on the reserve" in s. 77(1) of the *Indian Act* to be inconsistent with s. 15(1) but suspend the implementation of this declaration for 18 months. We would not grant a constitutional exemption to the Batchewana Band during the period of suspension, as would normally be done according to the rule in *Schachter*. The reason for this is that in the particular circumstances of this case, it would appear to be preferable to develop an electoral process that will balance the rights of off-reserve and on-reserve band members. We have not overlooked the possibility that legislative inaction may create new problems. Such claims will fall to be dealt with on their merits should they arise.

24 We would therefore dismiss the appeal and modify the remedy by striking out the words "and is ordinarily resident on the reserve" in s. 77(1) of the *Indian Act* and suspending the implementation of the declaration of invalidity for 18 months, with costs to the respondents. We would answer the restated constitutional questions as follows:

1. Do the words "and is ordinarily resident on the reserve" contained in s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms*, either generally or with respect only to members of the Batchewana Indian Band?

Yes, in their general application.

2. If the answer to question 1 is in the affirmative, is s. 77(1) of the *Indian Act* demonstrably justified as a reasonable limit pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

L'Heureux-Dubé J.:

25 Section 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5 (the "Act"), defines voter eligibility in bands whose election regime is governed by the Act's provisions. The section requires band members to be at least 18 years old, and "ordinarily resident on the reserve" to be entitled to vote. This appeal requires a determination of whether the residence requirement violates s. 15(1) of the *Canadian Charter of Rights and Freedoms*, and, if so, whether the legislation is justified under s. 1 of the *Charter*. The appeal also requires the Court to consider whether the legislation violates s. 15 in relation only to the Batchewana Band, or whether the violation occurs generally, as well as the appropriate remedy, if any, for the violation.

I. Factual Background

26 The chiefs and councils of *Indian Act* bands, pursuant to the definition of "council of the band" in s. 2(1), are chosen following the band's custom, or, if an order in council has been made under s. 74(1), by the procedures set out in the Act, including s. 77(1). The trial judge found that the policy of the Department of Indian and Northern Affairs Canada is that a band will not be deleted from the order in council placing it under the election procedures of the Act unless the band council and the current "electors" so approve, either through a plebiscite or at a public meeting. Certain other conditions must also be met. The most recent order in council, the *Indian Bands Council Elections Order*, SOR/97-138, which came into effect on March 4, 1997, provides that 288 bands select their leadership in accordance with the *Indian Act*. This number represents just under half of the *Indian Act* bands in Canada.

27 The respondents are members of the Batchewana Indian Band, which has three reserves near the city of Sault Ste. Marie, Ontario: the Rankin, Goulais Bay, and Obadjiwan reserves. The Batchewana Band is included in the 1997 order in council, its councillors are not chosen in electoral sections, and voter eligibility for its elections is therefore governed by s. 77(1) of the *Indian Act*. The respondent John Corbiere resides on the Rankin Reserve, while the other three respondents are members of the Batchewana Band who do not live on any of the reserves. They take this action on their own behalf and on behalf of all non-resident members of the band. Of the 1,426 members of the band who were registered in 1991, 958 members, or 67.2 percent, lived off-reserve. The Batchewana Band's history, like that of many First Nations, involved the loss of most of its traditional land base. Prior to 1850, the Batchewana and other bands of the Ojibway occupied large areas of land along the eastern and northern shores of Lake Huron, the northern shore of Lake Superior, and various areas inland. In 1850, as part of the Robinson-Huron Treaty, this land was surrendered to the Crown and the Batchewana obtained a reserve of 246 square miles. In 1859, the band surrendered all of this reserve through the Pannepfather treaty, leaving it only with Whitefish Island, a small island in the St. Mary's River. Under this treaty, the band's members were promised that the band would be given land on the reserve of the Garden River Band near Sault Ste. Marie. This promise was never fulfilled. For 20 years, therefore, the band owned only approximately 15 acres of land.

28 After 1879, the band began to re-acquire land. In that year, the band council purchased what is now the Goulais Bay Reserve north of Sault Ste. Marie, and its size was increased by a donation from the Roman Catholic Church in 1885. When Whitefish Island was expropriated by three railway companies in 1900 and 1902, the Goulais Bay Reserve became the band's only land. Until the 1960s or early 1970s, therefore, most band members lived on the Garden River Reserve

belonging to another band. In the 1940s, the band council, made up of and elected by non-residents, assembled land which became the Rankin Reserve in 1952. The main portion of this land is surrounded by the city of Sault Ste. Marie, and portions of it also border the St. Mary's River and the Garden River Reserve. The third reserve, the Obadjiwan Reserve, which became part of the Batchewana Band's land base in 1962, is quite small and, like the Goulais Bay Reserve, is located in a rural area north of Sault Ste. Marie. The largest percentage of those who live on one of the band's reserves live on the Rankin Reserve.

29 Residence on the reserve was required, by law, for band members to be eligible to vote for band councils, beginning with *The Indian Advancement Act, 1884, S.C. 1884*, c. 28, s. 5. This requirement was also contained in *The Indian Advancement Act*, R.S.C. 1886, c. 44, s. 5(1), the *Indian Act*, R.S.C. 1906, c. 81, s. 172(b), and the *Indian Act*, R.S.C. 1927, c. 98, s. 163(a). In addition, band members were required to be over 21 and male. To vote on the surrender or release of land, historically, the requirement was not as strict, requiring, for example, residence "on or near" the lands in question (*An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands*, S.C. 1868, c. 42, s. 8(1)) and later, requiring voters on these questions to be resident "on or near" and "interested in" the reserve (*Indian Act*, R.S.C. 1927, c. 98, s. 51(2)). Voter eligibility provisions similar to the present ones, though they provided for a minimum age of 21 years, were introduced in *The Indian Act*, S.C. 1951, c. 29, ss. 2(1)(e) and 76(1). From the first election in 1902 until 1962, the residency requirement was not enforced in Batchewana Band elections. Since that time, only band members living on one of the three reserves have been allowed to vote.

30 The number of Batchewana Band members has risen dramatically since 1985, and at the same time the percentage of band members living on the reserves has dramatically fallen. In 1985, 71.1 percent of the 543 registered members of the band lived on-reserve. In 1991, only 32.8 percent of the 1,426 registered members lived on the reserve. The parties agree that this trend is continuing. This dramatic increase in the number of off-reserve members occurred largely because of the passage of *An Act to amend the Indian Act*, S.C. 1985, c. 27 ("Bill C-31"), by Parliament. This legislation restored Indian status to most of those who had lost this status because of the operation of certain sections of the *Indian Act*, as well as to the descendants of such people. Prior to this legislation, women with Indian status who married non-Indian men lost their status, and their children did not get status, though men who married non-Indian women, and their children, maintained Indian status. Registered Indians who voluntarily "enfranchised" also lost Indian status. For the Batchewana Band, approximately 85 percent of the growth in band membership consisted of people who were reinstated to Indian status and band membership because of Bill C-31. Similar trends may be seen in many other bands.

II. Relevant Constitutional, Statutory, and Regulatory Provisions

31

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.

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.

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Constitution Act, 1982

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

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.

Indian Act, R.S.C., 1985, c. I-5

2. (1) In this Act

"band" means a body of Indians

(a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(b) for whose use and benefit in common, moneys are held by Her Majesty,

or

(c) declared by the Governor in Council to be a band for the purposes of this Act;

"council of the band" means

(a) in the case of a band to which section 74 applies, the council established pursuant to that section,

(b) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;

"elector" means a person who

(a) is registered on a Band List,

(b) is of the full age of eighteen years, and

(c) is not disqualified from voting at band elections;

20. (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

38. (1) A band may surrender absolutely to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in a reserve.

39. (1) An absolute surrender or a designation is void unless

- (a) it is made to Her Majesty;
- (b) it is assented to by a majority of the electors of the band
 - (i) at a general meeting of the band called by the council of the band,
 - (ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender or designation, or
 - (iii) by a referendum as provided in the regulations; and
- (c) it is accepted by the governor in council.

64. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band

- (a) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;
- (b) to construct and maintain roads, bridges, ditches and watercourses on the reserves or on surrendered lands;
- (c) to construct and maintain outer boundary fences on reserves;
- (d) to purchase land for use by the band as a reserve or as an addition to a reserve;
- (e) to purchase for the band the interest of a member of the band in lands on a reserve;
- (f) to purchase livestock and farm implements, farm equipment or machinery for the band;
- (g) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;
- (h) to make to members of the band, for the purpose of promoting the welfare of the band, loans not exceeding one-half of the total value of
 - (i) the chattels owned by the borrower, and
 - (ii) the land with respect to which he holds or is eligible to receive a Certificate of Possession,and may charge interest and take security therefor;
- (i) to meet expenses necessarily incidental to the management of lands on a reserve, surrendered lands and any band property;
- (j) to construct houses for members of the band, to make loans to members of the band for building purposes with or without security and to provide for the guarantee of loans made to members of the band for building purposes; and
- (k) for any other purpose that in the opinion of the Minister is for the benefit of the band.

66. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any member of the band.

69. (1) The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke such an order.

74. (1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.

75. (1) No person other than an elector who resides in an electoral section may be nominated for the office of councillor to represent that section on the council of the band.

(2) No person may be a candidate for election as chief or councillor unless his nomination is moved and seconded by persons who are themselves eligible to vote.

77. (1) A member of a band who has attained the age of eighteen years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting purposes consists of one section, to vote for persons nominated as councillors.

(2) A member of a band who is of the full age of eighteen years and is ordinarily resident in a section that has been established for voting purposes is qualified to vote for a person nominated to be councillor to represent that section.

81. (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely:

(a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;

(b) the regulation of traffic;

(c) the observance of law and order;

(d) the prevention of disorderly conduct and nuisances;

(e) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision for fees and charges for their services;

(f) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works;

(g) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any zone;

(h) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;

(i) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefor has been granted under section 60;

(j) the destruction and control of noxious weeds;

(k) the regulation of bee-keeping and poultry raising;

(l) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;

(m) the control or prohibition of public games, sports, races, athletic contests and other amusements; p0>(n) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;

(o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;

(p) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;

(p.1) the residence of band members and other persons on the reserve;

(p.2) to provide for the rights of spouses and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;

(p.3) to authorize the Minister to make payments out of capital or revenue moneys to persons whose names were deleted from the Band List of the band;

(p.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;

(q) with respect to any matter arising out of or ancillary to the exercise of powers under this section; and

(r) the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.

83. (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

(a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;

(a.1) the licensing of businesses, callings, trades and occupations;

(b) the appropriation and expenditure of moneys of the band to defray band expenses;

(c) the appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any moneys raised pursuant to paragraph (a);

(d) the payment of remuneration, in such amount as may be approved by the Minister, to chiefs and councillors, out of any moneys raised pursuant to paragraph (a);

(e) the enforcement of payment of amounts that are payable pursuant to this section, including arrears and interest;

(e.1) the imposition and recovery of interest on amounts that are payable pursuant to this section, where those amounts are not paid before they are due, and the calculation of that interest;

(f) the raising of money from band members to support band projects; and

(g) with respect to any matter arising out of or ancillary to the exercise of powers under this section.

(2) An expenditure made out of moneys raised pursuant to subsection (1) must be so made under the authority of a by-law of the council of the band.

85.1 (1) Subject to subsection (2), the council of a band may make by-laws

- (a) prohibiting the sale, barter, supply or manufacture of intoxicants on the reserve of the band;
- (b) prohibiting any person from being intoxicated on the reserve;
- (c) prohibiting any person from having intoxicants in his possession on the reserve; and
- (d) providing for exceptions to any of the prohibitions established pursuant to paragraph (b) or (c).

Rules of the Supreme Court of Canada, SOR/83-74

32. (1) Within 60 days after the filing of a notice of appeal, a party to an appeal who intends to raise a constitutional question shall apply to the Chief Justice or a judge to have the constitutional question stated, where the appeal raises a question of

- (a) the constitutional validity or the constitutional applicability of a statute of the Parliament of Canada or of a legislature of a province or of regulations made thereunder;
- (b) the inoperability of a statute of the Parliament of Canada or of a legislature of a province or of regulations made thereunder; or
- (c) the constitutional validity or the constitutional applicability of a common law rule.

(4) The Chief Justice or a judge may state the question and direct service of the question on the Attorney General of Canada and the attorneys general of all the provinces and the ministers of justice of the governments of the territories within the time fixed by the Chief Justice or judge, together with notice that any of them who intends to intervene, whether or not the attorney general or minister of justice wishes to be heard, shall, within a time fixed in the notice that is not less than four weeks after the date of the notice, file a notice of intervention in Form C and serve that notice upon the parties.

III. Judgments

A Federal Court -- Trial Division, (1993), [1994] 1 F.C. 394 (Fed. T.D.)

32 The only defendant represented at trial was Her Majesty the Queen: the Batchewana Band took no part in the trial. Strayer J. (as he then was) reviewed the history of the Batchewana Band's land holdings, and the structure of the *Indian Act* provisions setting out a band council's powers. He then considered the test for s. 15(1) set out by this Court in *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.). He held that the denial of the vote to non-residents of the Batchewana Band had a negative impact on those not ordinarily resident on the reserve. He noted the historical difficulties of the band in maintaining an adequate land base, and therefore the inability of many of those who wished to live on the reserve to do so. He also noted that many of the band members who live off-reserve were restored to band membership because of Bill C-31. He emphasized that such people were mostly women, or the children of women who had been denied Indian status for marrying non-Indian men, and that others had lost their status for race-based reasons, having decided to enfranchise and exercise the full rights of a Canadian citizen. Strayer J. concluded that those not ordinarily resident on the Batchewana reserves therefore fell under an analogous ground.

33 He then examined the nature and purpose of the legislation, and held that he was required to determine whether it made distinctions based on irrelevant personal differences. He observed that certain of the powers of the band council relate purely to the administration of the reserve: for example, those powers enumerated in s. 81(1) of the *Indian Act*. He held that the evidence showed that most of the operational funding provided by the government and spent by the band council relates to local purposes, although he acknowledged that in certain aspects the disbursement of these funds affects non-residents. He found that for the powers of the band council that relate to the governance of the territory of the reserve, residency is an appropriate way to determine the right to vote.

34 He noted, however, that the voting restrictions in s. 77(1) also affect other decisions that do not relate only to the interests of reserve residents, but rather to the use and disposition of communal property. He held that for such matters, residency is an irrelevant personal characteristic. He identified three provisions, in particular, where all band members' interests are implicated and which are affected by s. 77(1): votes to surrender reserve lands under s. 39(1)(b), and the powers of the band council under ss. 64(1) and 66(1). In short, Strayer J. concluded that as it related to the disposition of reserve lands or Indian monies held for the band as a whole, the definition in s. 77(1) violated s. 15(1), but for functions relating solely to governance of the reserve territory, s. 15(1) was not violated.

35 Strayer J. then turned to justification under s. 1. He held that for the functions affecting all band members, there was no appropriate justification advanced as to why only certain band members should have control over the property belonging to all band members. He found that, given his finding that s. 15(1) was infringed, it was not necessary to consider the respondents' claim under s. 2(d), freedom of association.

36 Strayer J. issued a declaration that s. 77(1) violates s. 15(1) of the *Charter*, "insofar as it has the effect of preventing members of the Batchewana Band who are not ordinarily resident on any of that band's reserves from participating in the giving or refusal of assent of the band pursuant to paragraph 39(1)(b) of that Act or from being represented by persons for whom they have an opportunity to vote in the giving of consent on behalf of the band to the expenditure of Indian moneys under subsections 64(1) and 66(1) of the *Indian Act*", and suspended the order until July 1, 1994. In his reasons, he noted that the declaration was confined to the Batchewana Band because the pleadings and the evidence related only to that band. He also noted that though he had described the effects of the legislation which were impermissible, the declaration was for the invalidity of s. 77(1) in its entirety.

B. Federal Court of Appeal, (1996), [1997] 1 F.C. 689 (Fed. C.A.)

37 The judgment of the Court of Appeal panel consisting of Stone, Linden, and McDonald JJ.A. was delivered by the court. The court first considered arguments of the intervener the Lesser Slave Lake Indian Regional Council that the right to control a band's own membership and the incidents of that membership, including voting rights, constituted an Aboriginal right guaranteed by s. 35 of the *Constitution Act, 1982*. The court noted that under the test for Aboriginal rights as set out in *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.), this determination depends on the particular Aboriginal community claiming the right, and also requires evidence that a practice was integral to the distinctive culture of the Aboriginal community before the time of contact with Europeans. The court found that there was no evidence in the record that would demonstrate that the Batchewana Band had a s. 35 Aboriginal right to exclude certain members from voting, since elections for the band had only been held since 1902. The court then addressed the possibility that s. 25 of the *Charter* might affect the s. 15 analysis. It held that since no s. 35 right was involved, and since the *Indian Act* system of elections could not be considered one of the "other rights or freedoms that pertain to the aboriginal peoples of Canada", s. 25 was not triggered.

38 The court then turned to the analysis under s. 15(1). It held that the denial of the vote to off-reserve band members constituted a denial of a benefit, since the right to vote is central to having a voice in the democratic governance of the band of which they are members. The court stated that the benefit which was denied related not only to the powers specified in Strayer J.'s judgment, but also to the other powers of the band council: to make by-laws under s. 81(1) of the Act. It noted that many of the council's s. 81(1) powers could affect both on-reserve and off-reserve band members.

39 The court examined whether the denial of this benefit was discriminatory. It began with an examination of whether non-residency on a reserve could constitute an analogous ground. The court noted that the question of whether an analogous ground exists is a contextual one, which must be determined by examining whether distinctions on that ground could affect the human dignity of the claimant. It held that a stereotype had been attached to those living off-reserve, since many had characterized them as being unworthy of trust in using their electoral power for the benefit of the band. The court emphasized that many in this group had suffered from historical disadvantage, because large numbers of them were deprived of band membership because of discriminatory legislation that was later remedied by Bill C-31. Finally,

it held that off-reserve band members are generally politically powerless. Based on these factors, it determined that an analogous ground was at issue. The court also concluded that the distinction was discriminatory, since it engaged the purpose of s. 15(1). It stressed that the distinction was discriminatory in relation to all powers of the band, not only those not related to the governance of the reserve territory.

40 The court held that the legislation was not justified under s. 1. It concluded that the goal of the legislation is to "establish a voting regime in which all those who are affected by the outcome of the vote are entitled to participate" (para. 59). The court decided that there was no rational connection between the legislation and this objective, since non-resident members are bound by the decisions of the chief and council, in relation to all the council's powers.

41 The court determined that the appropriate remedy in this case was a constitutional exemption. It held that this was appropriate "[i]n the unusual and special circumstances of this case" (para. 76). This order was warranted, the court decided, because other bands might be able to demonstrate an Aboriginal right under s. 35 to exclude non-residents from voting. If a s. 35 Aboriginal right were demonstrated, the court suggested, the interaction of s. 25 with s. 15(1) would mean that the analysis would proceed differently. It also noted that in the context of other bands, more justificatory evidence under s. 1 might be presented. Concluding that Aboriginal rights should be determined on a case-by-case basis, it found that the exemption should be granted under the court's powers under s. 24(1) of the *Charter*. The court determined that the declaration of invalidity would not be suspended.

42 By order of Stone J.A., the judgment of the Court of Appeal was stayed pending a decision by this Court on leave to appeal: (1996), 206 N.R. 122 (Fed. C.A.). By order of Gonthier J. on November 24, 1998, a further stay was granted until judgment was rendered by this Court.

IV. Issues

43 Two constitutional questions have been stated in this appeal:

1. Do the words "and is ordinarily resident on the reserve" contained in s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms* with respect only to members of the Batchewana Indian Band?
2. If the answer to question 1 is in the affirmative, is s. 77(1) of the *Indian Act* a reasonable limit on the rights of members of the Batchewana Indian Band, and so not inconsistent with the *Constitution Act, 1982*?

44 Five principal issues must be determined:

- (1) the approach to be taken to the s. 15 analysis in this case, given that the legislation was alleged to violate the *Charter* only in the circumstances of the Batchewana Band;
- (2) the effect of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982* on the s. 15(1) analysis in this case;
- (3) whether the impugned legislation violates s. 15(1);
- (4) if s. 15(1) is infringed, whether it is justified under s. 1 of the *Charter*;
- (5) if necessary, the appropriate remedy.

V. Analysis

A. Should the Section 15 Analysis Focus Only on the Batchewana Band?

45 A preliminary question is whether the s. 15(1) analysis should focus on the Batchewana Band in particular, or on the legislation as it applies in general, to all bands affected by s. 77(1). At trial, the focus was on the particular situation of the Batchewana Band, since the respondents asked only for a constitutional exemption applying to their band.

46 However, examining only the circumstances of the Batchewana Band in the s. 15(1) analysis would be to presume that the appropriate remedy is a constitutional exemption. As the guardians of the rights in the *Charter*, it is courts' duty to ensure that a remedy is given that is commensurate with the extent of the violation that has been found, and to determine the appropriate remedy. Before considering any question of constitutional exemption, therefore, the general application of the legislation, and the available evidence relating to that general application, should be examined. Only if there is no evidence of general invalidity will it be necessary to consider the specific circumstances of the Batchewana Band and, therefore, the doctrine of constitutional exemption.

47 The appellants argue that such an analysis would be improper because of the manner in which this case was presented at trial, which addressed specifically the circumstances of the Batchewana Band. However, the plaintiffs' statement of claim, in its allegations relating to the equality claim, alleged discrimination on the face of the legislation, and did not relate this only to the particular context of the Batchewana Band. Therefore, discrimination in s. 77(1) as it applies generally has been at issue since the beginning of these proceedings. Issues surrounding the question of the constitutionality of the legislation as it applies generally have been addressed by the parties and by the interveners in their submissions before this Court, and a general analysis was conducted by the Court of Appeal in its decision. Therefore, an analysis of the constitutionality of the law in its general application will not take any parties by surprise.

48 The constitutional questions, as formulated, address only the situation of the members of the Batchewana Band. It must therefore be determined whether considering the application of the legislation in a general sense and the possibility of a remedy other than constitutional exemption is foreclosed by the formulation of the constitutional questions. When the constitutional validity or applicability of legislation is challenged, a constitutional question must be stated by the Chief Justice or a judge of this Court, pursuant to Rule 32(1) of the *Rules of the Supreme Court of Canada*, SOR/83-74, though the parties are "generally left wide latitude" in formulating the questions which will be stated: *Bisaillon c. Keable*, [1983] 2 S.C.R. 60 (S.C.C.), at p. 71. However, this Court has held that it is not bound by the precise wording of the constitutional question. For example, in *Bisaillon* at p. 72, this Court reworded one of the stated constitutional questions to make it more narrow. In *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 (S.C.C.), the parties were unable to agree on the provisions implicated by a constitutional challenge and therefore all of the affected provisions were not included in the constitutional questions. In its formal judgment, reported at [1997] 3 S.C.R. 389 (S.C.C.), the Court subsequently made an order affecting the constitutional applicability of several sections of the challenged legislation not included in the constitutional question as stated.

49 In B.A. Crane and H.S. Brown, *Supreme Court of Canada Practice 1998* (1997), at p. 225, the authors note that the purpose of stating constitutional questions is to ensure that the Attorney General of Canada, the attorneys general of the provinces, and the ministers of justice of the territories are made aware of constitutional challenges as required by Rule 32(4), so that they may decide whether or not to exercise their right to intervene. I agree with this characterization of the purpose of the provision, and would add that it also constitutes a signal to the parties and other potential interveners about the constitutional issues being addressed. In my opinion, the jurisdiction of the Court to restate constitutional questions, or make a declaration of invalidity broader than that contained within them, is appropriately exercised when doing so does not, in substance, deprive attorneys general of their right to notice of the fact that the constitutionality of a given legislative provision is at issue in this Court, or deprive those who have a stake in the outcome of the opportunity to argue the substantive issues relating to this question.

50 Here, the constitutional question that was served on the appropriate parties pursuant to Rule 32, though it did contain the words "with respect only to the members of the Batchewana Indian Band", constituted notice to all attorneys general that the constitutional validity of the residency requirement for voting contained in the *Indian Act* was at issue. The remedy preferred by the federal Crown in this case, if there is to be one, is for a general declaration to be made rather than a constitutional exemption, and this was argued in its factum and oral argument. As emphasized above, the issues relating to the general application of s. 77(1) were argued and discussed before us and in the Federal Court of Appeal by the parties and by interveners. Despite the wording of the question, it was clear that this Court, when analysing the situation of the Batchewana Band, might set down principles that would apply to other bands. I do not believe, therefore,

that any substantive prejudice has been caused to attorneys general or anyone else by the wording of the question, or that they would reasonably have made a different decision about exercising their right to intervene. In the circumstances, therefore, I will restate the constitutional questions as follows:

1. Do the words "and is ordinarily resident on the reserve" contained in s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms*, either generally or with respect only to members of the Batchewana Indian Band?
2. If the answer to question 1 is in the affirmative, is s. 77(1) of the *Indian Act* demonstrably justified as a reasonable limit pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

B. Sections 25 and 35

51 The effects of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*, are raised by the intervener the Lesser Slave Lake Indian Regional Council (the "Council"), but this issue was not addressed by either of the appellants or by the respondents. The Council argues that the restriction of voting rights to those who are ordinarily resident on the reserve constitutes a codification of Aboriginal or treaty rights under s. 35, or falls under the "other rights or freedoms" protected under s. 25, and that, therefore, s. 25 requires that s. 15 be interpreted so as not to abrogate or derogate from those rights in any way. It suggests that for this reason the impugned provisions are shielded from review. In contrast, the intervener the Native Women's Association of Canada argues that s. 25 guides the interpretation of other *Charter* rights so that the rights of Aboriginal peoples cannot be challenged by *non-Aboriginal* people, but it does not shield Aboriginal rights from challenge by members of the Aboriginal community.

52 The arguments of the Council do not, in my opinion, indicate that the relief requested by the respondents could "abrogate or derogate" from the rights included in s. 25. Section 25 is triggered when s. 35 Aboriginal or treaty rights are in question, or when the relief requested under a *Charter* challenge could abrogate or derogate from "other rights or freedoms that pertain to the aboriginal peoples of Canada". This latter phrase indicates that the rights included in s. 25 are broader than those in s. 35, and may include statutory rights. However, the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the "other rights or freedoms" included in s. 25. The Council argues that s. 77(1) protects or recognizes rights guaranteed by s. 35 including Aboriginal title, treaty rights, and Aboriginal rights of self-government. It also alleges that s. 77(1) is a statutory right that protects bands' self-determination and self-government. The Council's arguments relating to s. 25 rest, in large part, on the assertion that Bill C-31 violates Aboriginal and treaty rights, a matter which is not before this Court and in relation to which no evidence has been presented. In my opinion, therefore, the submissions of the Council do not show that s. 25 is triggered in this case.

53 Because it has not been shown to apply, and argument on this question was extremely limited, it would be inappropriate to articulate, in this case, a general approach to s. 25. In particular, I will not decide how the words "shall not be construed so as to abrogate or derogate" affect the analysis under other *Charter* provisions when the section is triggered, or whether s. 25 "shields" the rights it includes from the application of the *Charter*. I also find it unnecessary to decide the scope of the "other rights or freedoms" protected by the section. These questions will be determined when the issues directly arise and the Court has heard full argument on them.

54 I emphasize, however, that as I will discuss below, the contextual approach to s. 15 requires that the equality analysis of provisions relating to Aboriginal people must always proceed with consideration of and respect for Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights, and with emphasis on the importance for Aboriginal Canadians of their values and history.

C. Section 15(1) Analysis

(1) The Section 15(1) Framework

55 In *Law v. Canada (Minister of Employment & Immigration)*, S.C.C., No. 25374, March 25, 1999 [reported (1999), 60 C.R.R. (2d) 1 (S.C.C.)], Iacobucci J. discussed the framework within which s. 15(1) analysis must be carried out. As set out in para. 88 of *Law*, an inquiry into whether legislation violates s. 15(1) involves three broad inquiries:

A. 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 substantially differential treatment between the claimant and others on the basis of one or more personal characteristics?

B. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

C. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

56 At all three of these stages, it must be recognized that the focus of the inquiry is purposive and contextual (see, e.g., *Law, supra*, at para. 41). A court considering a discrimination claim must examine the legislative, historical, and social context of the distinction, the reality and experiences of the individuals affected by it, and the purposes of s. 15(1).

(2) First Stage: Differential Treatment

57 The first stage of inquiry is easily satisfied in the present case. Section 77(1) of the *Indian Act* draws a distinction between band members who live on- reserve and those who live off-reserve, by excluding the latter from the definition of "elector" within the band. This constitutes differential treatment.

(3) Second Stage: Analogous Grounds

58 The differential treatment in this case is based on the status of holding membership in an *Indian Act* band, but living off that band's reserve. This combination of traits does not fall under one of the enumerated or already recognized analogous grounds. The fundamental consideration at the second stage, if the ground is not enumerated or already recognized as analogous, is whether recognition of the basis of differential treatment as an analogous ground would further the purposes of s. 15(1): *Law, supra*, at para. 93. These purposes are, as stated at para. 51 of *Law*:

[T]o 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.

59 The analysis at the analogous grounds stage involves considering whether differential treatment of those defined by that characteristic or combination of traits has the *potential* to violate human dignity in the sense underlying s. 15(1): *Egan v. Canada*, [1995] 2 S.C.R. 513 (S.C.C.), at para. 171, *per Cory J.* In *Law*, the concept of human dignity as it relates to s. 15(1) was described by Iacobucci J., at para. 53, as follows:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological empowerment and integrity. Human dignity is harmed by unfair treatment premised on 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.

The analogous grounds inquiry, like the other two stages of analysis, must be undertaken in a purposive and contextual manner: *Law, supra*, at para. 41. The "nature and situation of the individual or group at issue, and the social, political, and legal history of Canadian society's treatment of that group" must be considered: *Law, supra*, at para. 93. As stated by Wilson J. in *Andrews, supra*, at p. 152, cited with approval in *Law* at para. 29, the determination of whether a ground qualifies as analogous under s. 15(1):

...is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political, and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.

60 Various contextual factors have been recognized in the case law that may demonstrate that the trait or combination of traits by which the claimants are defined has discriminatory potential. An analogous ground may be shown by the fundamental nature of the characteristic: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging. The fact that a characteristic is immutable, difficult to change, or changeable only at unacceptable personal cost may also lead to its recognition as an analogous ground: *Miron v. Trudel*, [1995] 2 S.C.R. 418 (S.C.C.), at para. 148; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (S.C.C.), at para. 90. It is also central to the analysis if those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked: *Andrews, supra*, at p. 152; *Law, supra*, at para. 29. Another indicator is whether the ground is included in federal and provincial human rights codes: *Miron, supra*, at para. 148. Other criteria, of course, may also be considered in subsequent cases, and none of the above indicators are *necessary* for the recognition of an analogous ground or combination of grounds: *Miron, supra*, at para. 149.

61 I should also note that if indicia of an analogous ground are not present in general, or among a certain group in Canadian society, they may nevertheless be present in another social or legislative context, within a different group in Canadian society, or in a given geographic area, to give only a few examples. Here, to illustrate, the nature of the decisions band members make about whether to live on or off a reserve are different from those made by many other Canadians in relation to their place of residence. So are other factors related to the analogous grounds analysis that still affect them. The second stage must therefore be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect (such as race, band membership, and place of residence in this case), and to reflect changing social phenomena or new or different forms of stereotyping or prejudice. As this Court unanimously held in *Law, supra*, at para. 73: "The possibility of new forms of discrimination denying essential human worth cannot be foreclosed".

62 Here, several factors lead to the conclusion that recognizing off-reserve band member status as an analogous ground would accord with the purposes of s. 15(1). From the perspective of off-reserve band members, the choice of whether to live on- or off-reserve, if it is available to them, is an important one to their identity and personhood, and is therefore fundamental. It involves choosing whether to live with other members of the band to which they belong, or apart from them. It relates to a community and land that have particular social and cultural significance to many or most band members. Also critical is the fact that as discussed below during the third stage of analysis, band members living off-reserve have generally experienced disadvantage, stereotyping, and prejudice, and form part of a "discrete and insular minority" defined by race and place of residence. In addition, because of the lack of opportunities and housing on many reserves, and the fact that the *Indian Act's* rules formerly removed band membership from various categories of band members, residence off the reserve has often been forced upon them, or constitutes a choice made reluctantly or at high personal cost. For these reasons, the second stage of analysis has been satisfied, and "off-reserve band member status" is an analogous ground. It will hereafter be recognized as an analogous ground in any future case involving this

combination of traits. I note that in making this determination, I make no findings about "residence" as an analogous ground in contexts other than as it affects band members who do not live on the reserve of the band to which they belong.

(4) *Third Stage of Analysis*

63 At the third stage, the appropriate focus is on how, in the context of the legislation and Canadian society, the particular differential treatment *impacts* upon the people affected by it. This requires examining whether the legislation conflicts with the purposes of s. 15(1): to recognize all individuals and groups as equally deserving, worthy, and valuable, to remedy stereotyping, disadvantage and prejudice, and to ensure that all are treated as equally important members of Canadian society. Determining whether legislation violates these purposes requires examining the legislation in the context in which it applies, with attention to the interests it affects, and the situation and history in Canadian society of those who are treated differentially by it. It must be examined how "a person legitimately feels when confronted with a particular law": *Law, supra*, at para. 53.

64 The perspective that must be adopted in making this determination is subjective and objective: *Law, supra*, at paras. 59-61; *Egan, supra*, at para. 56, *per* L'Heureux-Dubé J. It must be considered whether a reasonable person possessed of similar traits to the claimant would find that the legislation imposes a burden or withholds a benefit from him or her

in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.

(*Law, supra*, at para. 88)

The analysis of discriminatory impact must be conducted with a careful eye to the context of *who* is affected by the legislation and *how* it affects them.

65 I would emphasize that the "reasonable person" considered by the subjective-objective perspective understands and recognizes not only the circumstances of those *like* him or her, but also appreciates the situation of others. Therefore, when legislation impacts on various groups, particularly if those groups are disadvantaged, the subjective-objective perspective will take into account the particular experiences and needs of all of those groups.

66 Before turning to the specific contextual factors enumerated by Iacobucci J. in *Law*, it is worth mentioning one additional factor important to the particular circumstances of this appeal. Section 77(1) implicates, in a direct way that does not affect other Canadians, the interests of two groups who have generally experienced "pre-existing disadvantage, vulnerability, stereotyping, or prejudice": *Law, supra*, at para. 63. All band members affected by this legislation, whether on-reserve or off-reserve, have been affected by the legacy of stereotyping and prejudice against Aboriginal peoples.

67 When analysing a claim that involves possibly conflicting interests of minority groups, one must be especially sensitive to their realities and experiences, and to their values, history, and identity. This is inherent in the nature of a subjective-objective analysis, since a court is required to consider the perspective of someone possessed of similar characteristics to the claimant. Thus, in the case of equality rights affecting Aboriginal people and communities, the legislation in question must be evaluated with special attention to the rights of Aboriginal peoples, the protection of the Aboriginal and treaty rights guaranteed in the Constitution, the history of Aboriginal people in Canada, and with respect for and consideration of the cultural attachment and background of all Aboriginal women and men. It must also always be remembered that s. 15(1) provides for the "unremitting protection" of the right to equality, in whatever context the analysis takes place, whether there is one disadvantaged or minority group affected or more than one: see *Andrews, supra*, at p. 175; *R. v. Turpin*, [1989] 1 S.C.R. 1296 (S.C.C.), at p. 1326. In addition, it must be recalled that all the circumstances must always be evaluated from the perspective of a person with similar characteristics to the claimant, fully informed of the circumstances.

68 I am aware, of course, that issues have been raised about the constitutionality of distinctions created by the *Indian Act* between band members and non-band members within the Aboriginal community. One such issue was dealt with in Bill C-31, discussed below. While the discussion of context which follows necessarily touches on the experiences of Aboriginal peoples generally, the decision in this case relates only to the constitutionality of the voting distinctions made within bands themselves by s. 77(1) of the *Indian Act*.

69 Since equality is a comparative concept, the analysis must consider the person relative to whom the claimant is being treated differentially: *Law, supra*, at para. 56. I accept the claimants' argument that the comparison here is between band members living on and off-reserve, since these are the two groups whom the legislation treats differentially on its face. This denies the benefit of voting for band leadership to members of bands affected by s. 77(1) who do not live on a reserve. Because of the groups involved, the Court must also be attentive to the fact that there may be unique disadvantages or circumstances facing on-reserve band members. However, no evidence has been presented that would suggest that the legislation, in purpose or effect, ameliorates the position of band members living on-reserve, and therefore I find it unnecessary to consider the third contextual factor outlined in *Law*. I turn now to the particular contextual factors outlined in *Law* which may indicate that the legislation conflicts with the purposes of s. 15(1).

(a) Disadvantage, Vulnerability, Stereotyping, and Prejudice

70 Groups or individuals who are generally subject to unfair treatment in society because of their characteristics or circumstances are already demeaned in dignity, and further differential treatment of them is more likely to have a discriminatory impact, since it often perpetuates or increases that disadvantage: *Law, supra*, at para. 63. Pre-existing disadvantage, stereotyping, and vulnerability are important to the analysis in this case in three particular ways.

71 First, band members living off-reserve form part of a "discrete and insular minority", defined by both race and residence, which is vulnerable and has at times not been given equal consideration or respect by the government or by others in Canadian or Aboriginal society. Decision makers have not always considered the perspectives and needs of Aboriginal people living off reserves, particularly their Aboriginal identity and their desire for connection to their heritage and cultural roots. As noted by the Royal Commission on Aboriginal Peoples,

Before the Commission began its work, however, little attention had been given to identifying and meeting the needs, interests and aspirations of urban Aboriginal people. Little thought had been given to improving their circumstances, even though their lives were often desperate, and relations between Aboriginal people and the remainder of the urban population were fragile, if not hostile.

The information and policy vacuum can be traced at least in part to long-standing ideas in non-Aboriginal culture about where Aboriginal people 'belong'.

(Report of the Royal Commission on Aboriginal Peoples (1996), vol. 4, Perspectives and Realities, at p. 519)

Similarly, there exist general stereotypes in society relating to off-reserve band members. People have often been only seen as "truly Aboriginal" if they live on reserves. The Royal Commission wrote:

MANY CANADIANS THINK of Aboriginal people as living on reserves or at least in rural areas. This perception is deeply rooted and persistently reinforced...

...There is a history in Canada of putting Aboriginal people 'in their place' on reserves and in rural communities. Aboriginal cultures and mores have been perceived as incompatible with the demands of industrialized urban society. This leads all too easily to the assumption that Aboriginal people living in urban areas must deny their culture and heritage in order to succeed -- that they must assimilate into this other world. The corollary is that once Aboriginal people migrate to urban areas, their identity as Aboriginal people becomes irrelevant.

(Perspectives and Realities, supra, at p. 519)

72 Second, off-reserve band members experience particular disadvantages compared to those living on-reserve because of their separation from the reserve. They are apart from communities to which many feel connection, and have experienced racism, culture shock, and difficulty maintaining their identity in particular and serious ways because of this fact. Third, it should be noted that the context is one in which, due to various factors, Aboriginal women, who can be said to be doubly disadvantaged on the basis of both sex and race, are among those particularly affected by legislation relating to off-reserve band members, because of their history and circumstances in Canadian and Aboriginal society.

(b) Relationship Between the Basis of the Differential Treatment and the Claimant's Characteristics or Circumstances

73 The second factor set out by Iacobucci J. examines the relationship between the basis on which the differential treatment occurs and the characteristics of the claimant and others, with the goal of recognizing the human dignity and right to full participation in society of all of them. Some distinctions may correspond to the needs, capacities, or circumstances of a group in a manner that does not affect their human dignity or that of others, viewed from a subjective-objective perspective (*Law, supra*, at paras. 69-71).

74 In the case at bar, considering this factor involves examining the legislative context surrounding the distinction at issue. The voting rights at issue affect other sections of the legislation; it must be determined how the functions of electors and powers of the band council chosen by them relate to the needs, circumstances, and human dignity of the band members included and excluded by the voting scheme. In my opinion, if the powers of electors or the chief and council they vote for affect issues that are purely local, and do not affect the interests of off-reserve band members, the differential treatment between band members contained in s. 77(1) cannot be considered to violate the right to substantive equality of the off-reserve members. Such differential treatment would relate to the different positions and needs of the two groups and could not be said, in my opinion, to stereotype off-reserve members or suggest they are less deserving, worthy, or important band members from the perspective of someone affected by them. However, if the powers of the electors and the band council affect the interests and needs of both groups, this will be an indicator that the differential treatment is more likely to be discriminatory.

75 The band council chosen by the electors has by-law making powers under s. 81(1), which include the regulation of traffic on the reserve, control over the observance of law and order, and other such powers. Strayer J., the trial judge, found that these powers are mostly of a local nature, related to the governance of the reserve itself, and he suggested that they primarily affect residents. I would agree, in general, with this characterization, and I would add to the list of provisions affecting primarily local functions the powers contained in s. 85.1. However, I would note that several paragraphs of s. 81(1) affect in a particular way all band members, irrespective of residence on the reserve. Section 81(1) (i) allows the band council to allot land on the reserve, where this authority has been given by the Governor in Council. Sections 81(1)(p) and 81(1)(p.1) allow by-laws relating to residence and trespass on the reserve, may affect the ability of non-residents to use the facilities and land on the reserve, and return to live there. The ability to live on the reserve, or to participate in activities on reserve lands if they desire, has been shown to be important to non-residents, and these functions of the band council affect their circumstances and needs directly and in a fundamental way: see *Perspectives and Realities, supra*, at p. 49.

76 Section 83 gives the council power to make money by-laws, which include taxation of land on the reserve, licensing of businesses, appropriation of moneys to defray band expenses, and payment of remuneration to chiefs and councillors. These powers, in my opinion, are a mixture of functions that affect residents on the reserve only, and also all members of the band. While the taxation of land and businesses on the reserve and the licensing of businesses are primarily local functions, appropriation of money for various band purposes and the amounts to be paid to chiefs and councillors are matters in which all band members have an interest. In addition, under s. 83(1)(f), the band may make by-laws relating to "the raising of money from band members to support band projects" which may have the potential to affect all band members.

77 Although the band council's powers under ss. 81(1) and 83(1) are similar, in many ways, to those of a municipality, the exclusion of non-residents from voting rights affects other powers of the band council that relate to the needs of all members of the band, whether or not they are ordinarily resident on the reserve. Section 64(1) allows the expenditure by the Minister, with the band council's consent, of the band's capital moneys for various purposes, including distributions per capita to members of the band, and construction of new housing. The band's capital moneys come from the sale of surrendered lands or capital assets of the band (s. 62), assets that belong, collectively, to *all* members of the band. As found by Strayer J., all band members have important interests in these expenditures. Similarly, under s. 66(1), the Minister, with the approval of the band council, can make orders appropriating the band council's revenue moneys; the band council may be authorized to do so under s. 69. Expenditures by the band council may include matters like education, creation of new housing, creation of facilities on reserves, and other matters that may affect off-reserve band members' economic interest in its assets and the infrastructure that will be available to help them return to the reserve if they wish. Finally, s. 39(1)(b) requires the consent of a majority of "electors" of the band for the surrender of band lands. The definition of "elector" in s. 2(1) excludes band members who are disqualified from voting in band elections, so the wording of s. 77(1) excludes off-reserve members from voting on the question of whether the lands they own in common will be surrendered.

78 The wording of s. 77(1), therefore, gives off-reserve band members no voice in electing a band council that, among other functions, spends moneys derived from land owned by all members, and money provided to the band council by the government to be spent on all band members. The band council also determines who can live on the reserve and what new housing will be built. The legislation denies those in the position of the claimants a vote in decisions about whether the reserve land owned by all members of the band will be surrendered. In addition, members who live in the vicinity of the reserve, as shown by the evidence of several of the plaintiffs in this case, may take advantage of services controlled by the band council such as schools or recreational facilities. Moreover, as a practical matter, representation of Aboriginal peoples in processes such as land claims and self-government negotiations often takes place through the structure of *Indian Act* bands. The need for and interest in this representation is shared by all band members, whether they live on- or off-reserve. Therefore, although in some ways, voting for the band council and chief relates to functions affecting reserve members much more directly than others, in other ways it affects all band members. Since interests are affected that are unrelated to the basis upon which the differential treatment is made (off-reserve residence status), considering the principle of respect for human dignity and substantive equality, this is an important indicator that the differential treatment is discriminatory.

(c) Nature of the Affected Interest

79 The fourth contextual factor which was described by Iacobucci J. in *Law, supra*, at paras. 74-75, and which is of particular importance in this case, is the nature of the affected interest. In general, the more important and significant the interest affected, the more likely it will be that differential treatment affecting this interest will amount to a discriminatory distinction within the meaning of s. 15(1).

80 Several social and legislative facts are important to analysing this contextual factor. The first is the important financial interest that non-residents have in the affairs of the band. As I outlined in the previous section, the band council must give consent for expenditures of the band's capital and revenue moneys. The band's electors also control decisions about the surrender of band lands which are owned collectively by all band members. Second, the band council controls the allotment of land and by-laws relating to trespass and residence, which affect in important ways the ability to return and live on the reserve. Third, the council makes decisions about the availability of services that may be important to non-residents, particularly those who may live near the reserve. Also important is the role of band leadership in the work of the Assembly of First Nations and other Aboriginal organizations at the regional, national and international levels. All these factors show that the *functions and powers* of the band council have important significance for the lives of off-reserve band members. Denying them voting rights when band leadership is chosen through a system of democracy affects significant interests they have in band governance.

81 The importance many band members place on maintaining a connection to their cultural roots is also particularly significant. Maintaining one's cultural identity will mean different things to different off-reserve band members, but to many it will entail an identification of interests with their band. When band leadership is chosen through a democratic system, one of the most powerful expressions of identification with that band is through the exercise of voting. When certain band members are not given any say in that system, the denial of that voice affects their belonging and connection to the band of which they are members.

82 Moreover, the band council has the power to affect directly the cultural interests of those off-reserve band members who identify with their band and reserve. The Royal Commission on Aboriginal Peoples stated that sources of traditional Aboriginal culture include "contact with the land, elders, Aboriginal languages and spiritual ceremonies" (*Perspectives and Realities, supra*, at p. 522). As outlined in the previous section, the band council has many powers affecting access to the reserve, management of the reserve lands, and the expenditure of money for the welfare of the band. Furthermore, the "electors" of the band can vote on the surrender of band lands. The band council therefore has considerable power to safeguard, develop and promote the sources of traditional Aboriginal culture and to affect the access of off-reserve band members to these sources.

83 Historical circumstances that have had and continue to have repercussions for the members of this group add to the reasons why the interest affected by this legislation is of important societal significance for those in the position of the claimants. Indeed, the creation of the group of off-reserve Aboriginal people can be seen as a consequence, in part, of historic policies toward Aboriginal peoples. The Royal Commission on Aboriginal Peoples describes the relationship between the federal government and Aboriginal peoples during the period from the early 1800s to 1969 as one of "displacement and assimilation" (*Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back*, at pp. 137-91).

84 Maintaining a connection with the band of which they are members is of particular importance to those in the position of the claimants because they often live apart from reserves due to factors that are likely largely beyond their control. Lack of land, what are often scarce job opportunities on reserves, and the need to go far from the community for schooling, are among the reasons that members left the reserve in the past, and continue to leave. There are also particular issues affecting Aboriginal women's migration: *Perspectives and Realities, supra*, at pp. 575-76. The fact that those affected or their ancestors may well have had no choice but to leave the reserve signals that the interest in keeping a connection with the band of which they are members is particularly important to them because the separation from other members of the band and the reserve may well have been undesired or unchosen.

85 A considerable number of the band members who live off-reserve recently gained or regained this status under Bill C-31. This legislation modified sections of the *Indian Act* that denied Indian status to various categories of band members, though not all those who were restored to status became members of a band. It is, therefore, helpful to examine the history of the legislation that removed Indian status from them or from their ancestors. I must emphasize that this discussion is in no way related to the constitutionality of Bill C-31, in general or in the context of particular bands. Rather, I refer to it for the purpose of examining the context underlying the current legislative distinction and showing why the interest affected is an important one for band members.

86 Many of those affected are women, and the descendants of women, who lost their Indian status because they married men who did not have Indian status (see Indian and Northern Affairs Canada, *Impacts of the 1985 Amendments to the Indian Act (Bill C-31): Summary Report* (1990)). Aboriginal women who married outside their band became members of their husband's band. See, for example, *The Indian Act*, S.C. 1951, c. 29, ss. 12 and 14, now repealed. Legislation depriving Aboriginal women of Indian status has a long history. The involuntary loss of status by Aboriginal women and children began in Upper and Lower Canada with the passage of *An Act to encourage the gradual Civilization of the Indian Tribes in the Province, and to amend the Laws respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26. A woman whose husband "enfranchised" had her status removed along with his. This legislation introduced patriarchal concepts into many Aboriginal societies which did not exist before: see Public Inquiry into the Administration of Justice and

Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (1991), vol.1, *The Justice System and Aboriginal People*, at pp. 476-79. As the Royal Commission stated in *Perspectives and Realities, supra*, at p. 26:

In the pre-Confederation period, concepts were introduced that were foreign to Aboriginal communities and that, wittingly or unwittingly, undermined Aboriginal cultural values. In many cases, the legislation displaced the natural, community-based and self-identification approach to determining membership — which included descent, marriage, residency, adoption and simple voluntary association with a particular group — and thus disrupted complex and interrelated social, economic and kinship structures. Patrilineal descent of the type embodied in the *Gradual Civilization Act*, for example, was the least common principle of descent in Aboriginal societies, but through these laws, it became predominant. From this perspective, the *Gradual Civilization Act* was an exercise in government control in deciding who was and was not an Indian.

This continued in the *Gradual Enfranchisement Act*, S.C. 1869, c. 6. This legislation, for the first time, instituted the policy that women who married men without Indian status lost their own status, and their children would not receive status. The rationale for these policies, given at the time, focussed on concerns about control over reserve lands, and the need to prevent non-Indian men from gaining access to them (*Perspectives and Realities, supra*, at p. 27). These policies were continued and expanded upon with the passage of the *Indian Act* in 1876, and amendments to it in subsequent years, particularly a major revision that took place in 1951.

87 The 1951 legislation was challenged under the *Canadian Bill of Rights*, S.C. 1960, c. 44 (reprinted in R.S.C., 1985, App. III), in *Canada (Attorney General) v. Lavell* (1973), [1974] S.C.R. 1349 (S.C.C.). The majority of this Court, using an approach to equality that was later rejected in *Andrews, supra*, held that the provisions did not violate the right to equality in the *Canadian Bill of Rights* and that even if they did, they could not be struck down as inconsistent with it.

88 These were not the only people who lost their status. The enfranchisement provisions of the *Indian Act* were designed to encourage Aboriginal people to renounce their heritage and identity, and to force them to do so if they wished to take a full part in Canadian society. In order to vote or hold Canadian citizenship, status Indians had to "voluntarily" enfranchise. They were then given a portion of the former reserve land in fee simple, and they lost their Indian status. At various times in history, status Indians who received higher education, or became doctors, lawyers, or ministers were automatically enfranchised. Those who wanted to be soldiers in the military during the two World Wars were required to enfranchise themselves and their whole families, and those who left the country for more than five years without permission also lost Indian status. (See L. Gilbert, *Entitlement to Indian Status and Membership Codes in Canada* (1996), at pp. 23-30.)

89 This history shows that Aboriginal policy, in the past, often led to the denial of status and the severing of connections between band members and the band. It helps show why the interest in feeling and maintaining a sense of belonging to the band free from barriers imposed by Parliament is an important one for all band members, and especially for those who constitute a significant portion of the group affected, who have been directly affected by these policies and are now living away from reserves, in part, because of them.

90 All these facts emphasize the importance, for band members living off-reserve, of having their voices included when band leadership is chosen through a process of common suffrage as set out in this legislation. They show why the interest in s. 77(1) is a fundamental one, and why the denial of voting rights in this context has serious consequences from the perspective of those affected. They show why there is not only economic, but also important societal significance to the interests affected by the differential treatment contained in s. 77(1): *Law, supra*, at para. 74.

(d) *Conclusions on the Third Stage of Analysis*

91 In summary, therefore, a contextual view of the people affected and the differential treatment in question leads to the conclusion that this legislative distinction conflicts with the purposes of s. 15(1). The people affected by this distinction, in general, are vulnerable and disadvantaged. They experience stereotyping and disadvantage as Aboriginal

people and band members living away from reserves. They form part of a "discrete and insular minority" defined by race and residence, and it is more likely that further disadvantage will have a discriminatory impact upon them. Second, the distinction in question does not correspond with the characteristics or circumstances of the claimants and on-reserve band members in a manner which "respects and values their dignity and difference": *Law, supra*, at para. 28. The powers of the band council affect cultural, political, and financial interests and needs that are shared by band members living on and off the reserve. Third, the nature of the interests affected is fundamental. Given the form of representative democracy provided for in the *Indian Act*, failure to give any voice in that process to certain members of the band affects an important attribute of membership, and places a barrier between them and a community which has particular importance to them. The council and electors also make decisions about important financial, cultural, and political interests of the members that have important significance within the band and Canadian society. Finally, the interest affected is also significant because of the ways in which, in the past, ties between band members and the band or reserve have been involuntarily or reluctantly severed. Those affected or their parents may have left the reserve for many reasons that do not signal a lack of interest in the reserve given the various historical circumstances surrounding reserve communities in Canada such as an often inadequate land base, a serious lack of economic opportunities and housing, and the operation of past Indian status and band membership rules imposed by Parliament.

92 In the context of this vulnerable group, and these important interests, this distinction reinforces the stereotype that band members who do not live on reserves are "less Aboriginal", and less valuable members of their bands than those who do. A reasonable person in the position of the claimants, fully apprised of the context, would see the differential treatment contained in s. 77(1) as suggesting that off-reserve band members are less worthy or valuable as band members and members of Canadian society, and giving them less concern, respect and consideration than band members living on reserves. Based upon this finding of discriminatory impact, the third stage of analysis, the identification of discrimination based on a violation of substantive equality and human dignity in the circumstances of this case, has been satisfied.

93 The factors discussed above outline the context surrounding the differential treatment contained in s. 77(1) of the *Indian Act*. This case involves people who have generally experienced significant historical disadvantage, and interests that are particularly important to those affected by the legislation. Taken together, they lead to a finding that from a subjective-objective perspective, the differential treatment in question violates off-reserve band members' equality rights. Yet neither of these factors should be seen as essential to my conclusions. I would also note that my discussion of the general history of off-reserve band members does not suggest that the conclusion that this legislation violates s. 15(1) would not apply to a band affected by s. 77(1) whose off-reserve members had a different composition or history from that of the general population of off-reserve band members in Canada. Every case of alleged discrimination, of course, must be considered in its own legislative and social context to determine whether it violates the constitutional rights of those affected, but in this case, both the general disadvantage and vulnerability of those affected, and the importance to all band members of the affected interests are compelling factors in my conclusions at the third stage of analysis.

94 The above analysis also does not suggest that *any* distinction between on-reserve and off-reserve band members would be stereotypical, interfere with off-reserve members' dignity, or conflict with the purposes of s. 15(1). There are clearly important differences between on-reserve and off-reserve band members, which Parliament could legitimately recognize. Taking into account, recognizing, and affirming differences between groups in a manner that respects and values their dignity and difference are not only legitimate, but necessary considerations in ensuring that substantive equality is present in Canadian society. The current powers of the band council, as discussed earlier, include some powers that are purely local, affecting matters such as taxation on the reserve, the regulation of traffic, etc. In addition, those living on the reserve have a special interest in many decisions made by the band council. For example, if the reserve is surrendered, they must leave their homes, and this affects them in a direct way it does not affect non-residents. Though non-residents may have an important interest in using them, educational or recreational services on the reserve are more likely to serve residents, particularly if the reserve is isolated or the non-residents live far from it. Many other examples can be imagined.

95 Recognizing non-residents' right to substantive equality in accordance with the principle of respect for human dignity, therefore, does not require that non-residents have identical voting rights to residents. Rather, what is necessary is a system that recognizes non-residents' important place in the band community. It is possible to think of many ways this might be done, while recognizing, respecting, and valuing the different positions, needs, and interests of on-reserve and off-reserve band members. One might be to divide the "local" functions which relate purely to residents from those that affect all band members and have different voting regimes for these functions. A requirement of a double majority, or a right of veto for each group might also respect the full participation and belonging of non-residents. There might be special seats on a band council for non-residents, which give them meaningful, but not identical, rights of participation. The solution may be found in the customary practices of Aboriginal bands. There may be a separate solution for each band. Many other possibilities can be imagined, which would respect non-residents' rights to meaningful and effective participation in the voting regime of the community, but would also recognize the somewhat different interests of residents and non-residents. However, without violating s. 15(1), the voting regime cannot, as it presently does, completely deny non-resident band members participation in the electoral system of representation. Nor can that participation be minimal, insignificant, or merely token.

96 Therefore, I conclude that the present wording of s. 77(1) violates the right to equality without discrimination of the off-reserve members of bands affected by it. This finding is a general one, and is in no way related to the specific situation of the Batchewana Band. Since the provision has been found to be discriminatory as it applies to all bands affected by it, there is no need to consider the specific circumstances of the Batchewana Band.

D. Section 1

97 This Court's approach to s. 1 of the *Charter* was set out by Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). It was refined and summarized by Iacobucci J. in *Egan*, *supra*, at para. 182:

A limitation to a constitutional guarantee will be sustained once two conditions are met. 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. [Emphasis added.]

This articulation of the proper approach was endorsed in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.), at para. 84, in *Vriend*, *supra*, at para. 108, and in *M v. H*, S.C.C., No. 25838, May 20, 1999, at para. 76 [reported (1999), 171 D.L.R. (4th) 577 (S.C.C.)], *per* Iacobucci J.

98 Throughout the s. 1 analysis, it must be remembered that it is the right to *substantive* equality and the accompanying violation of human dignity that has been infringed when a violation of s. 15(1) has been found. Even when the interests of various disadvantaged groups are affected, s. 15(1) mandates that government decisions must be made in a manner that respects the dignity of all of them, recognizing all as equally capable, deserving, and worthy of recognition. The fact that various minorities or vulnerable groups may have competing interests cannot alone constitute a justification for treating any of them in a substantively unequal manner, nor can it relieve the government of its burden to justify a violation of a *Charter* right on a balance of probabilities: see *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (S.C.C.), at para. 88, *per* Bastarache J.

99 The first task is to determine the objective of the impugned law and whether it is pressing and substantial. In *Vriend*, *supra*, Iacobucci J. discussed the proper characterization of the objective of the impugned legislation, at para. 110:

Section 1 of the *Charter* states that it is the limits on *Charter* rights and freedoms that must be demonstrably justified in a free and democratic society. It follows that under the first part of the *Oakes* test, the analysis must focus upon the objective of the impugned limitation, or in this case, the omission....

However, in my opinion, the objective of the omission cannot be fully understood in isolation. It seems to me that some consideration must also be given to both the purposes of the Act as a whole and the specific impugned provisions so as to give the objective of the omission the context that is necessary for a more complete understanding of its operation in the broader scheme of the legislation. [Emphasis in original.]

100 Therefore, it is the objective of the *restriction* of voting rights to band members ordinarily resident on the reserve that must be considered in this case, although this must be considered along with the purpose of the Act as a whole for a complete understanding of the broader scheme of the legislation. It must be remembered that in the case of equality rights, the legislative objective must be sufficiently pressing and substantial to justify a law that has been found to violate the essential human dignity and freedom of those possessed of similar characteristics to the claimants. In this case, Parliament's objective is properly classified as ensuring that those with the most immediate and direct connection with the reserve have a special ability to control its future. This objective, in my opinion, is pressing and substantial. It accords with *Charter* values, by recognizing the important dignity and autonomy interest in one's home and livelihood, and the connection band members feel to their land. Through this provision, Parliament is also moderating the interests of groups with different and possibly conflicting interests.

101 Turning to the proportionality analysis, restricting the vote to those living on the reserve is rationally connected to Parliament's objective. Although both band members living on- and off-reserve have interests in many of the functions determined by voting rights, those living on the reserve do have a more direct interest in many of the band council's functions. In terms of the "local" functions of the band council, they are the only people with an interest. In relation to functions that affect the future of the land or the building of facilities on the reserve, on-reserve band members, in general, have a more direct interest in the decisions of the band council. Decisions about reserve lands affect their current living space, and a decision to surrender the reserve would mean that they would be forced to move from their homes and, in many cases, from their source of earning a livelihood. This statement is not meant to suggest that non-residents would be more likely to surrender the reserve or to make decisions that are not in the interest of the band as a whole, but rather to recognize that those who live on the reserve have particular interests in the land, given current circumstances.

102 By ensuring that only those who live on the reserve can vote in relation to all of the band council's functions, s. 77(1) gives them control over the future directions that the band will take, and over decisions about the reserve land on which they live. Excluding non-residents from voting is connected to the objective because, by denying all others a vote, the legislation ensures that those with the most direct and immediate interest, residents, maintain voting control over the decisions that will affect the future of the reserve.

103 However, those seeking to uphold this law have not demonstrated that a *complete* exclusion of non-residents from the right to vote, which violates their equality rights, constitutes a minimal impairment of these rights. Indeed, they have not shown that *any* infringement of the respondents' equality rights is necessary to achieve this purpose. As I outlined earlier, the guarantee of equality does not require that on- and off-reserve band members be treated the same, and respecting the rights of dignity and belonging of off-reserve band members need not mean ignoring the particular interest of residents in decisions affecting the reserve. I discussed several possible solutions above, which would respect the dignity of off-reserve band members, but would not stereotype them or otherwise violate their right to substantive equality. The appellants have not shown why solutions like special majorities, representative band councils not based directly on population, dividing the local functions from the broader powers of the band council, or other solutions that would not have the effect of suggesting off-reserve band members are less worthy of concern, respect, and consideration could not accomplish this objective.

104 The appellant Her Majesty the Queen suggests that the current model meets the criterion of minimal impairment because of the administrative difficulties and costs involved in setting up, for example, a two-tiered council where one tier would deal with local issues and the other with issues affecting all band members, or in maintaining a voter's list and conducting elections where the electorate may be widely dispersed. Even assuming that such costs could legitimately constitute a s. 1 justification, these arguments are unconvincing. It must be remembered that the burden of justifying limitations on constitutional rights is upon the government. The government has presented no evidence to show that a system that would respect equality rights is particularly expensive or difficult to implement. Rather, there are many possible solutions that would not be difficult to administer, but would require a creative design of an electoral system that would balance the rights involved. Change to any administrative scheme so it accords with equality rights will always entail financial costs and administrative inconvenience. The refusal to come up with new, different, or creative ways of designing such a system, and to find cost-effective ways to respect equality rights cannot constitute a minimal impairment of these rights. Though the government argues that these costs should not be imposed on small communities such as the Batchewana Band, the possible failure, in the future, of the government to provide Aboriginal communities with additional resources necessary to implement a regime that would ensure respect for equality rights cannot justify a violation of constitutional rights in its legislation.

105 Since this legislation does not minimally impair the respondents' equality rights, I agree with Strayer J. and the Court of Appeal that it is not justified under s. 1 of the *Charter*.

E. Remedy

106 I turn now to the question of the appropriate remedy. The remedial question raises four issues:

- (1) whether the appropriate remedy is one that should apply to the Batchewana Band, or to the section in its general application across Canada;
- (2) whether the appropriate declaration is one of invalidity or "reading in";
- (3) whether the declaration should be suspended for a period of time, and, if so, for how long;
- (4) if there is a suspension of the declaration, whether the Batchewana Band will be exempted from this suspension.

107 Both courts below confined their remedy to the Batchewana Band. Strayer J.'s order applied only to the Batchewana Band, and specified that s. 77(1) was unconstitutional only in its effects on certain of the provisions of the *Indian Act*. The Court of Appeal granted a constitutional exemption from the application of the words "and is ordinarily resident on the reserve" in s. 77(1), for all purposes, to the Batchewana Band. This remedy was granted under s. 24(1) of the *Charter*. The reasons for each of these decisions were different. Strayer J. confined his declaration to the Batchewana Band because the pleadings and evidence related only to that band. The Court of Appeal, in contrast, held that a constitutional exemption was the appropriate remedy, because other bands might be able to demonstrate the existence of an Aboriginal right to control their own voting procedures under s. 35 of the *Constitution Act, 1982*, which would, in the case of those bands, make s. 77(1) a valid codification of Aboriginal rights.

108 There have been various positions taken before this Court as to the appropriate remedy. The respondents support the constitutional exemption granted by the Court of Appeal, and in the alternative, they ask that the offending words in s. 77(1) be declared invalid, that the effect of the declaration be suspended for two years, and that the Batchewana Band be granted an exemption from the suspension of the declaration. Most interveners who support the position of the respondents argue that the appropriate remedy is a general declaration of invalidity, suspended for a period of time, and an exemption from the suspension for the Batchewana Band.

109 The appellant Her Majesty the Queen argues that if relief is to be given, the proper remedy is a general declaration of invalidity, together with a suspension of the effect of the declaration for a period of time, rather than a constitutional

exemption. The Batchewana Band, too, argues that a constitutional exemption is inappropriate in this case. If the legislation is found to be unconstitutional, the band argues, the appropriate remedy is to make an "interim ruling" that the legislation is unconstitutional. The band asks that the Court make no order in relation to the validity of the legislation at this time, but rather declare the legislation unconstitutional, and order the band, in conjunction with its on and off-reserve members and with the Minister, to develop its own customary voting rules that would respect the principles of the *Charter*. It argues that at the end of a reporting period, if the legislation has not been changed in the appropriate way, the Court should then make a formal order. In the alternative, it suggests, a suspended declaration of invalidity is appropriate. Finally, the intervener the Lesser Slave Lake Indian Regional Council argues for a remedy confined to this band, but suggests that if a general declaration of invalidity is made, its effect should be suspended for a period of time, and the government should be ordered to re-negotiate, in good faith, existing treaties with Aboriginal people in order to give them more land and resources to deal with the increase in membership caused by Bill C-31.

110 In determining the appropriate remedy, the Court must be guided by the principles of respect for the purposes and values of the *Charter*, and respect for the role of the legislature: *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.), at pp. 700-701; *Vriend*, *supra*, at para. 148. The first principle was well expressed by Sopinka J. in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 (S.C.C.), at p. 104:

In selecting an appropriate remedy under the *Charter* the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the *Charter* and to provide the form of remedy to those whose rights have been violated that best achieves that objective. This flows from the court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of Canada.

111 The first question is whether the appropriate remedy is a constitutional exemption, or one that applies in general. The finding of invalidity above relates not only to the Batchewana Band, but to the legislation in general as it applies to all bands. Therefore, in principle there is no reason that the remedy should be confined to the circumstances of the Batchewana Band. A remedy should normally be as extensive as the violation of equality rights which has been found. The constitutional exemption may apply when it has not been proven that legislation is unconstitutional in general, but that it is unconstitutional in its application to a small subsection of those to whom the legislation applies: *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.), at p. 783; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.), at p. 629; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), at pp. 572-73, *per* Lamer C.J., dissenting. This is not the case here.

112 However, the Court of Appeal held that it would be appropriate to grant a constitutional exemption, since other bands may be able to demonstrate an Aboriginal right to exclude non-residents from decision making, which would affect the analysis of the constitutionality of this provision. With all due respect, a constitutional exemption is not an appropriate remedy in this case. If certain bands can demonstrate an Aboriginal or treaty right to restrict non-residents from voting, this in no way affects the constitutionality of the impugned section of the *Indian Act*. It is the order in council made pursuant to s. 74(1), bringing the band within the application of the *Indian Act's* electoral rules, which would have to be challenged under such a claim. In analysing such a case, it would have to be determined whether an Aboriginal right had been proven, whether the legislation as it then stands infringes that right, and whether that infringement is justified: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.); *Vanderpeet*, *supra*. A court would also be required to examine how s. 25 functions when Aboriginal rights are challenged, and how it interacts with other interpretive provisions of the *Charter*.

113 Nor would such a remedy be the order most respectful of the equality rights of off-reserve band members. If a constitutional exemption were granted, this would place a heavy burden on off-reserve band members, since it would require those in each band to take legal action to put forward their claim. Equality within bands does not require such a heavy burden on claimants. In addition, establishing as a principle that where s. 35 Aboriginal rights might be involved, equality rights must be determined on a band-by-band basis would make the equality rights of Aboriginal people much harder to uphold than those of others, in certain cases. For these reasons, the appropriate remedy is one that applies to the legislation in general, under s. 52(1) of the *Constitution Act, 1982*, and not one confined to the Batchewana Band.

114 The next issue is what form the general remedy will take. The nature of the violation of equality rights that has been found in this case is different than any that this Court has addressed before. It has been found that, though it would be legitimate for Parliament to create *different* voting rights for reserve residents and people living off-reserve, in a manner that recognizes non-residents' place in the community, it is *not* legitimate for Parliament to *completely* exclude them from voting rights. This is also a situation where the primary effects of this decision will not be felt by the government, but by the bands themselves. In respecting the role of Parliament, these factors should be critical.

115 In my opinion, it would be inappropriate for this Court to "read in" to the Act voting rights for non-residents so that they would be voters for certain purposes but not others. This would involve considerable detailed changes to the legislative scheme. Designing such a detailed scheme, and choosing among various possible options, is not an appropriate role for the Court in this case (see *M v. H*, *supra*, at para. 142, *per* Iacobucci J.).

116 There are a number of ways this legislation may be changed so that it respects the equality rights of non-resident band members. Because the regime affects band members most directly, the best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal people affected by it. The link between public discussion and consultation and the principles of democracy was recently reiterated by this Court in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), at para. 68: "a functioning democracy requires a continuous process of discussion". The principle of democracy underlies the Constitution and the *Charter*, and is one of the important factors guiding the exercise of a court's remedial discretion. It encourages remedies that allow the democratic process of consultation and dialogue to occur. In P.W. Hogg and A.A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" (1997), 35 *Osgoode Hall L.J.* 75, the authors characterize judicial review under the *Charter* as a "dialogue" between courts and legislatures. The remedies granted under the *Charter* should, in appropriate cases, encourage and facilitate the inclusion in that dialogue of groups particularly affected by legislation. In determining the appropriate remedy, a court should consider the effect of its order on the democratic process, understood in a broad way, and encourage that process. As Iacobucci J. observed in *Vriend*, *supra*, at para. 176:

[T]he concept of democracy means more than majority rule as Dickson C.J. so ably reminded us in *Oakes*, *supra*. In my view, a democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make.

117 Constitutional remedies should encourage the government to take into account the interests, and views, of minorities. In this way, the principle of democracy that was recognized as an underlying principle of the Constitution in *Reference re Secession of Quebec*, *supra*, and was emphasized as an important remedial consideration in *Schachter*, *supra*, and *Vriend*, *supra*, will best be given expression.

118 The above principles suggest, in my view, that the appropriate remedy is a declaration that the words "and is ordinarily resident on the reserve" in s. 77(1) are invalid, and that the effect of this declaration of invalidity be suspended for 18 months. The suspension is longer than the period that would normally be allotted in order to give legislators the time necessary to carry out extensive consultations and respond to the needs of the different groups affected. It will also allow Parliament, if it wishes, to modify s. 77(2) at the same time, which contains the same residency requirement for bands whose councillors are elected in electoral sections, and which, given the values espoused in this decision, will also require revision to conform with s. 15(1). Severing the offending words from the rest of the statute will ensure that, should Parliament choose not to act, all non-residents will be included as voters under s. 77(1), but the nature of band governance and the requirements for voting will otherwise remain the same.

119 I recognize that suspending the effect of the declaration, combined with the extension of the suspension for such a long period is, in the words of the Chief Justice in *Schachter*, *supra*, at p. 716, "a serious matter from the point of view of the *Charter*. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation". However, this best embodies the principles of respect for *Charter*

rights and respect for democracy that should guide remedial considerations. Should Parliament decide to change the scheme, it will have an extended period of time in which to consult with those affected by the legislation and balance the affected interests in a manner that respects Aboriginal rights and all band members' equality interests. Should Parliament not change the scheme, off-reserve band members will gain voting rights within the existing scheme.

120 I also recognize that some may see the section, with the words "and is ordinarily residence on the reserve" no longer included, as possibly giving rise to other constitutional issues. In ordering this remedy, the Court does not foreclose the possibility that, if Parliament does not act to change the legislation, s. 77(1) or related sections of the Act may be the subject of a constitutional challenge by on-reserve band members or others.

121 This suspension of the effect of the declaration, along with the extended period of suspension, is ordered to enable Parliament to consult with the affected groups, and to redesign the voting provisions of the *Indian Act* in a nuanced way that respects equality rights and all affected interests, should it so choose. However, should decisions be made during that period without non-residents' involvement that directly affect their interests and which directly prejudice them, it may be that the decisions themselves could be challenged as violations of non-residents' equality rights. The suspension of the effect of the declaration, in other words, is not a suspension of non-residents' equality rights. Decisions must still be made with respect for those rights.

122 The final determination is whether the Batchewana Band will be exempted from the suspension of the effect of the declaration. In general, litigants who have brought forward a *Charter* challenge should receive the immediate benefits of the ruling, even if the effect of the declaration is suspended: see *R. v. Campbell*, [1998] 1 S.C.R. 3 (S.C.C.), at para. 20. In my opinion, however, this is one of the exceptional cases where immediate relief should not be given to those who brought the action.

123 Professor Roach in *Constitutional Remedies in Canada* (loose-leaf), at pp. 14-85 and 14-86, has identified two possible reasons for which, in general, the claimant in a particular case may have the right to an exemption from the suspension of the effect of the declaration of invalidity, and therefore an immediate remedy:

Corrective justice would suggest that the successful applicant has a right to a remedy, while regulatory or public law approaches would only be concerned with giving the applicants enough incentive to bring their case to court.

However, I do not believe that either of these considerations applies in the case at bar. What is at issue in this Court is not a remedy affecting band councils elected under the previous regime, but rather a declaration that will have the effect of changing future election rules. If Parliament chooses either not to act, or to change the legislation to conform with this ruling, the respondents will receive a remedy after the period of suspension expires or when the new legislation comes into effect. This both gives them a personal remedy, and gives applicants in analogous situations an incentive to bring their case forward.

124 Unlike in other cases where this Court has granted an exemption from the suspension, there are strong administrative reasons not to grant immediate relief to the members of the Batchewana Band. If an exemption from the suspension is given, the Batchewana Band will have to adapt to the inclusion of all non-residents as voters within the existing scheme in the short term. This will require some administrative adjustment. If Parliament then decides to amend the legislation, the Batchewana Band and its members will be required to adapt to a third voting system in a short period of time. This would be inappropriate, and inconsistent with the principles underlying constitutional remedies.

125 Since writing these reasons, I have had the advantage of reading the opinion of my colleagues McLachlin and Bastarache JJ. To the extent that their reasons suggest a departure from the approach to defining analogous grounds taken in *Andrews*, *Turpin*, *Egan*, *Miron*, and *Law*, I must respectfully disagree with their analysis. However, this being said, in my view there is no substantive difference in our respective reasons in the approach to the case at bar.

VI. Disposition

126 Therefore, I would dismiss the appeal, but modify the remedy designed by the Court of Appeal. I would declare invalid the words "and is ordinarily resident on the reserve" in s. 77(1) of the *Indian Act* and suspend the effect of this declaration for 18 months. I would award costs to the respondents. I would answer the restated constitutional questions as follows:

1. Do the words "and is ordinarily resident on the reserve" contained in s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5, contravene s. 15(1) of the *Canadian Charter of Rights and Freedoms*, either generally or with respect only to members of the Batchewana Indian Band?

Yes, in their general application.

2. If the answer to question 1 is in the affirmative, is s. 77(1) of the *Indian Act* demonstrably justified as a reasonable limit pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

Appeal dismissed with costs but remedy modified.

Appeal dismissed.

Pourvoi rejeté.

TAB 9

Most Negative Treatment: Not followed

Most Recent Not followed: [Girgenti v. Etobicoke Regional Assessment Commissioner, Region 12](#) || (Ont. Gen. Div., Feb 2, 1993)

1989 CarswellBC 16
Supreme Court of Canada

Andrews v. Law Society (British Columbia)

1989 CarswellBC 16, 1989 CarswellBC 701, [1989] 1 S.C.R. 143, [1989] 2 W.W.R. 289,
[1989] S.C.J. No. 6, 10 C.H.R.R. D/5719, 13 A.C.W.S. (3d) 347, 25 C.C.E.L. 255, 34 B.C.L.R.
(2d) 273, 36 C.R.R. 193, 56 D.L.R. (4th) 1, 91 N.R. 255, J.E. 89-259, EYB 1989-66977

LAW SOCIETY OF BRITISH COLUMBIA et al. v. ANDREWS et al.

Dickson C.J.C., McIntyre, Lamer, Wilson, Le Dain^{*}, La Forest and L'Heureux-Dubé JJ.

Heard: October 5 and 6, 1987

Judgment: February 2, 1989

Docket: Nos. 19955, 19956

Counsel: *I. Nathanson, Q.C.*, and *R. Davies*, for appellant Law Society of British Columbia.

J.J. Arvay, for appellant Attorney General of British Columbia.

E.C. Goldberg and *D. Lepofsky*, for intervener Attorney General of Ontario.

J. Bernard and *J. Hudon*, for intervener Attorney General of Quebec.

A. Scott, for intervener Attorney General of Nova Scotia.

R.G. Richards, for intervener Attorney General of Saskatchewan.

R.F. Taylor, for intervener Attorney General of Alberta.

P.B.C. Pepper, Q.C., for Federation of Law Societies of Canada.

D.G. Cowper and *W.S. Martin*, for respondents Andrews and Kinersly.

M. Eberts and *G. Brodsky*, for Women's Legal Education and Action Fund (Leaf).

J.D. Baker, for Coalition of Provincial Organizations of the Handicapped.

S. Barrett, for Canadian Association of University Teachers and the Ontario Confederation of University Faculty Associations.

Subject: Employment; Civil Practice and Procedure

Related Abridgment Classifications

Professions and occupations

IX Barristers and solicitors

IX.1 Organization and regulation of profession

IX.1.b Practice of law

IX.1.b.i Admission to practice

IX.1.b.i.B Being Canadian citizen or British subject

Headnote

Barristers and Solicitors --- Organization and regulation of profession — Practice of law — Admission to practice — Being Canadian citizen or British subject

Civil liberties and human rights — Equality rights — Discrimination on basis of race or national or ethnic origin — British Columbia Barristers and Solicitors Act, s. 42, restricting right to practise law in province to Canadian citizens — Section creating distinction between citizens and non-citizens and discriminating against persons on basis of personal

characteristics — Citizenship being personal characteristic — Section infringing equality rights under Charter and not justified as reasonable limit under s. 1.

Barristers and solicitors — Regulation of profession — Admission to practice — Qualifications — Requirement of Canadian citizenship as prerequisite to practice of law violating s. 15 of Charter and not justified under s. 1.

Civil liberties and human rights — Enforcement under Charter of Rights and Freedoms — Scope and interpretation of Charter — Limitations on guaranteed rights and freedoms — British Columbia Barristers and Solicitors Act, s. 42, containing citizenship requirement as prerequisite to practice of law — Section infringing equality rights under Charter and not justified as reasonable limit under s. 1.

Constitutional law — Constitution Act, 1982 — Charter of Rights and Freedoms — Validity of legislation — Section 42 of British Columbia Barristers and Solicitors Act containing citizenship requirement as prerequisite to practice of law — Section infringing equality rights under Charter and not justified under s. 1.

Civil liberties and human rights — Equality rights — Equality before the law — British Columbia Barristers and Solicitors Act, s. 42, containing citizenship requirement as prerequisite to practice of law — Section infringing equality rights under Charter and not justified under s. 1.

A., a citizen of the United Kingdom permanently resident in Canada, wished to practise law in British Columbia without first becoming a Canadian citizen as required by s. 42 of the British Columbia Barristers and Solicitors Act. He unsuccessfully sought a declaration that the citizenship requirement violated s. 15 of the Charter of Rights and Freedoms. His appeal was allowed and the law society appealed. K., a citizen of the United States permanently resident in Canada and an articling student in British Columbia, was added as a co-respondent on the appeal.

Held:

Appeal dismissed.

Per WILSON J. (DICKSON C.J.C. and L'HEUREUX-DUBÉ J. (concurring)): Section 42 of the British Columbia Barristers and Solicitors Act, restricting the right to practise law to Canadian citizens, infringes the equality provisions of s. 15 of the Charter. A rule which bars an entire class of persons from certain forms of employment solely on the ground that they are not Canadian citizens violates the equality rights of that class and discriminates against them on the ground of their personal characteristics. Non-citizens are a group lacking in political power, vulnerable to having their interests overlooked and their rights to equal concern and respect violated. Accordingly, they are in a category analogous to those categories specifically enumerated in s. 15, and are entitled to protection under the section.

Section 42 is not justified under s. 1 of the Charter. In order to be saved under s. 1, an impugned law must relate to concerns which are pressing and substantial in a free and democratic society. As not every distinction between individuals and groups will violate s. 15, and as s. 15 is designed to protect those groups who suffer social, political and legal disadvantage, the burden resting on the government to justify the discrimination is appropriately an onerous one. Furthermore, the means chosen to attain the objectives must be proportional to those ends. In assessing proportionality, the court must balance a number of factors and consider the nature of the right, the extent of its infringement and the degree to which the limitation furthers the objectives. Here there was not a sufficiently rational connection between citizenship and the governmental interests in ensuring lawyers are familiar with Canadian institutions, are committed to Canadian society, and are capable of playing a role in our system of democratic government. Although it is desirable that lawyers are familiar with Canadian institutions and customs, the requirement of citizenship affords no such assurance, and this objective could be better achieved by an examination of the particular qualifications of the applicant. Similarly, citizenship does not ensure commitment to Canadian society, while non-citizens may be deeply committed. Finally, even if it could be contended that the practice of law involves performing a government function, a citizenship requirement does not provide any guarantee that lawyers will honourably and conscientiously carry out their public duties.

Per LA FOREST J.: Section 42 infringes the equality provisions of s. 15 of the Charter. Citizenship is a personal characteristic which shares many similarities with those enumerated in s. 15: it is typically not within the control of the individual, and non-citizens are a group of persons, relatively powerless politically, whose interests are likely to be compromised by legislative decisions. Moreover, discrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin. These are all enumerated in s. 15. Finally, while in some circumstances citizenship may be used as a defining characteristic for certain types

of legitimate governmental objectives, it is, in general, irrelevant to the legitimate work of government. Accordingly, legislative discrimination on the basis of citizenship requires justification.

While in this case the question was whether s. 42 discriminated on the basis of irrelevant personal differences such as those listed in s. 15, it was not necessary to accept, at this point, that the only significance of the opening words of the section was to restrict the protection to discrimination through the application of law. However, s. 15 was not intended to be a tool for the wholesale subjection of legislative choices not infringing on values fundamental to a free and democratic society to judicial scrutiny, and not all legislative classifications must be rationally supportable before the courts.

Section 42 does not meet the test of proportionality and is not justified under s. 1 of the Charter. Citizenship neither guarantees familiarity with Canadian institutions and customs, nor ensures commitment to Canadian society, and there are means which are less intrusive and less drastic which would achieve these objectives. Finally, it is only in the most unreal sense true that a lawyer working for a private client plays a role in the administration of justice that would require citizenship as a condition of participation, and citizenship has not been shown to bear any correlation to professional competency or qualification.

Per MCINTYRE J. (dissenting) (LAMER J. concurring): The rights in s. 15(1) apply to all persons whether they are citizens or not, and a rule which bars an entire class of persons from certain forms of employment solely on the grounds of lack of citizenship and without considering qualifications or other attributes or merits of individuals in the group infringes the equality rights under s. 15(1). As s. 42 of the Barristers and Solicitors Act distinguishes between citizens and non-citizens, and imposes a burden in the form of some delay on permanent residents who have acquired all or some of their legal training abroad, it is discriminatory under s. 15(1).

However, s. 42 is justifiable as a reasonable limit under s. 1 of the Charter. In assessing the legislative objectives of the legislation, the "pressing and substantial" standard may be too stringent for application in all cases. There is no single test under s. 1, and the court must carefully engage in the balancing of many factors in determining whether an infringement is reasonable and demonstrably justified. The goal of s. 42 is one aspect of the regulation and qualification of the legal profession, which is an objective of importance, and the measure is not disproportionate to this object. Section 15(1) is the broadest of all guarantees, and in making laws for the whole community the legislature must make innumerable legislative distinctions and must not be held to an unattainable standard of perfection.

The legal profession plays a fundamentally important role in the administration of justice, and the powers, duties and responsibilities involved in the practice of law are vital to this role. Moreover, the lawyer has a public function. It is entirely reasonable that the legislature consider and adopt measures designed to maintain within the legal profession a body of qualified professionals with a commitment to the country and to the fulfilment of these important tasks. Although a citizenship requirement does not ensure familiarity with Canadian institutions and customs, or a commitment to Canada, no law will ever ensure anything. However, citizenship may reasonably be said to conduce the desired result. Moreover, public policy, such as the citizenship requirement here, is for the legislature to establish — it is not for the courts to legislate or substitute their views on public policy for those of the legislature. The role of the courts is only to ensure that in applying public policy the legislature does not adopt measures which are not sustainable under the Charter. The essence of s. 1 is in the expression "reasonable" and, unless the court can find the policy unreasonable, it cannot strike it down.

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Dickenson v. Law Soc. of Alta. (1978), 5 Alta. L.R. (2d) 136, 84 D.L.R. (3d) 189, 10 A.R. 120 (T.D.) — applied

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Graham v. Richardson, 403 U.S. 365, 29 L. Ed. (2d) 534, 91 S. Ct. 1848 (1971) — *referred to*

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Plessy v. Ferguson, 163 U.S. 537, 41 L. Ed. 256 (1896) — *considered*

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Ref. re Fam. Benefits Act (N.S.) (1986), 26 C.R.R. 336, 75 N.S.R. (2d) 338, (sub nom. *Ref. re Fam. Benefits Act (N.S.) S. 5*) 186 A.P.R. 338 (C.A.) — *referred to*

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Statutes considered:

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s. 42

Canadian Bill of Rights, R.S.C. 1970, App. III

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s. 1

s. 2(a)

s. 7

s. 15

s. 25 [am. S1/84-102, s. 1]

s. 27

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s. 1 "age"

s. 22

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s. 17

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s. 2(f) "Canadian citizen"

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s. 38(a) "age" [re-en. 1985, c. 15, s. 14]

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s. 1

U.S. Constitution Fourteenth Amendment

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Ely, *Democracy and Distrust* (1980), p. 151.

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Head, "The Stranger in Our Midst: A Sketch of the Legal Status of the Alien in Canada", [1964] *Can. Yearbook of International Law* 107, pp. 127-28.

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Lenoir, "Citizenship as a Requirement for the Practice of Law in Ontario" (1981), 13 *Ottawa L. Rev.* 527, p. 534.

Lepofsky and Schwartz, case note (1988), 67 *Can. Bar Rev.* 115, pp. 119-20.

Mill, *On Liberty and Considerations on Representative Government*, Bk. 3.

Schaar, "Equality of Opportunity and Beyond", in *Nomos IX: Equality* (1967), Pennock and Chapman eds., p. 228.

Tarnopolsky, *Discrimination and the Law*, revised ed. (1985).

Tussman and tenBroek, "The Equal Protection of Laws" (1949), 37 *California L. Rev.* 341.

Words and phrases considered:

DISCRIMINATION

. . . discrimination [under s. 15 of the *Charter*] may be described as a distinction, whether intentional or not, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group but based on grounds relating to personal characteristics of the individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

REASONABLE AND DEMONSTRABLY JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY

The Chief Justice stated at pp. 138-39 [in *R. v. Oakes*, [1986] 1 S.C.R. 103]:

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 The standard must be high in order to ensure that objectives which

are trivial or discordant with the principles intergral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

.....

The second step in a s. 1 inquiry involves the application of a proportionality test . . . As the Chief Justice stated in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 768:

Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights.

Appeal of judgment of the [British Columbia Court of Appeal](#), [1986] 4 W.W.R. 242, 2 B.C.L.R. (2d) 305, 27 D.L.R. (4th) 600 , allowing appeal from dismissal by Taylor J., [1986] 1 W.W.R. 252, 66 B.C.L.R. 363, 22 D.L.R. (4th) 9 , of application for order declaring s. 42 of British Columbia Barristers and Solicitors Act unconstitutional.

McIntyre J. (dissenting) (Lamer J. concurring):

1 This appeal raises only one question. Does the citizenship requirement for entry into the legal profession contained in s. 42 of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26 (the "Act"), contravene s. 15(1) of the Canadian Charter of Rights and Freedoms? Section 42 provides:

42. The benchers may call to the Bar of the Province and admit as solicitor of the Supreme Court

(a) a Canadian citizen with respect to whom they are satisfied that he ...

and s. 15 of the Charter states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(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.

2 The respondent Andrews was a British subject permanently resident in Canada at the time these proceedings were commenced. He had taken law degrees at Oxford and had fulfilled all the requirements for admission to the practice of law in British Columbia, except that of Canadian citizenship. He commenced proceedings for a declaration that s. 42 of the Act violates the Charter. He also sought an order in the nature of mandamus requiring the benchers of the Law Society of British Columbia to consider his application for call to the bar and admission as a solicitor. His action was dismissed at trial before [Taylor J. in the Supreme Court of British Columbia in a judgment reported at \[1986\] 1 W.W.R. 252, 66 B.C.L.R. 363, 22 D.L.R. \(4th\) 9](#) . An appeal was allowed in the Court of Appeal (Hinkson, Craig and McLachlin JJ.A. at [1986] 4 W.W.R. 242, 2 B.C.L.R. (2d) 305, 27 D.L.R. (4th) 600) , and this appeal is taken by the Law Society of British Columbia, by leave granted 27th November 1986. Pursuant to an order of this court on 28th January 1987, Gorel Elizabeth Kinersly, an American citizen who was at the time a permanent resident of Canada articling in the province of British Columbia, was added as a co-respondent in this appeal. On 28th January 1987 the Chief Justice stated constitutional questions in the following terms:

(1) Does the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26 infringe or deny the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

(2) If the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in s. 42 of the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26 infringes or denies the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*, is it justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

Following the judgment in his favour, the respondent Andrews was called to the bar and admitted as a solicitor in the province of British Columbia and is now a Canadian citizen. The co-respondent, Kinersly, who had expressed an intention to become a Canadian citizen, became eligible to do so on 15th March 1988.

Disposition in the courts below

3 Taylor J., at trial, defined discrimination under s. 15(1) of the Charter as the drawing of an irrational distinction between people based on some irrelevant personal characteristic for the purpose, or having the effect, of imposing upon the victim of the discrimination some penalty, disadvantage or indignity, or denying some advantage. He did not consider that the enumerated heads of discrimination in s. 15(1), race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, were a complete listing of the proscribed bases of discrimination, and said at p. 16:

Thus, in order to amount to discrimination under s. 15(1), the personal characteristic on which a distinction is based must either be one which is entirely irrelevant in the context in which the distinction is made or one which is given a significance clearly beyond that which could reasonably be justified in such a context — the distinction must in this sense be irrational.

He said that the test would be the same whether or not the discrimination was on the basis of a characteristic enumerated in s. 15(1) of the Charter. Citizenship, in his view, while not within the term, national origin, is nonetheless a characteristic which could form a basis for discrimination under s. 15(1). He adopted a broad view of the concept of citizenship. He said at p. 20:

Citizenship is, I think, a privilege which is understood to carry with it commitments to promote the security and welfare of the country, and to protect the way of life in which Canadians have come to believe, which are not expected of a permanent resident, even a resident sworn to allegiance. A citizen is a part of the country, a resident non-citizen never really more than an attachment to it.

In determining the relevance of citizenship to entry into the legal profession, he referred to the wide powers accorded to lawyers in the administration of justice and the judicial process which give rise to a duty to protect the system from abuse and to respect the laws of the land. He said at pp. 20-21:

It cannot in my view be said that there is anything irrational in the view which has been taken by the Legislature that only Canadian citizens ought to exercise such powers in this province and be entrusted with such responsibilities.

He did not consider that any burden imposed on non-citizens by the citizenship requirement was disproportionate to the relevance of citizenship in view of the nature of the duties and responsibilities of members of the legal profession. He concluded that neither s. 15(1) nor s. 7 of the Charter was infringed by the Canadian citizenship requirement in s. 42 of the Act.

4 McLachlin J.A. (as she then was) wrote the judgment for a unanimous Court of Appeal. She expressed the view, at p. 605, that the real meaning of the concept of equal protection and benefit before and under the law is that:

... persons who are "similarly situated be similarly treated" and conversely, that persons who are "differently situated be differently treated".

She referred to two competing approaches which have been adopted in dealing with discrimination under s. 15(1). One view is that any distinction is sufficient to establish discrimination, and when discrimination is found the courts should immediately turn to s. 1 of the Charter for a determination of its constitutional validity. The other view is that discrimination under s. 15(1) must be "invidious or pejorative" in nature, in that it must result from an unreasonable classification or unjustifiable differentiation. The second view, then, incorporates principles of justification and reasonableness into s. 15(1) independently of s. 1. She adopted essentially the second view rejecting the proposition that any differentiation would result in a resort to s. 1 of the Charter, arguing that it could not have been intended to give a guarantee in s. 15(1) against every legislative classification. To do so, she asserted, would be to trivialize the fundamental rights guaranteed by the Charter and deprive the words "without discrimination" in s. 15(1) of any content and, in effect, to replace s. 15(1) with s. 1. This approach, in her opinion, would mean that many important and socially accepted distinctions, such as restrictions on drunken driving and special provisions for the care, protection and education of children, would be subject to automatic review under s. 1. To equate the provisions of s. 15(1) with a guarantee against all distinction would, in effect, "elevate s. 15 to the position of subsuming the other rights and freedoms defined by the Charter". She said that there must be an initial determination of the reasonableness and fairness of the impugned legislation under s. 15(1). Therefore, she saw two questions emerge: what degree of evaluation of the legislation should be done under s. 15(1), and what role, if any, remained for s. 1 when legislation is attacked under s. 15(1)?

5 In dealing with the first question, she said that the court should determine whether the impugned distinction is reasonable or fair, having regard to its purposes and aims and to its effect on the person concerned. She said at pp. 609-10:

My response to the first question is that the question to be answered under s. 15 should be whether the impugned distinction is reasonable or fair, having regard to the purposes and aims and its effect on persons adversely affected. I include the word "fair" as well as "reasonable" to emphasize that the test is not one of pure rationality but one connoting the treatment of persons in ways which are not unduly prejudicial to them. The test must be objective, and the discrimination must be proved on a balance of probabilities: *R. v. Oakes*, *supra*, (applying this test to s. 1). The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.

She went on to state that s. 1 would apply to permit discrimination in extraordinary circumstances, such as the internment of enemy aliens in war time which would create discrimination not to be tolerated in peace time.

6 She concluded that the citizenship requirement in the Act discriminated against the respondent. She rejected the law society's argument that the importance of the legal profession in the general scheme of the administration of the legal system justified the citizenship requirement. She reached the conclusion that the distinction deprived the respondent of the equal benefit of the law guaranteed under s. 15, and she concluded on this point by saying, at p. 616:

In summary, none of the reasons offered for the requirement of citizenship for the practice of law offer a convincing justification for it. On the other hand, the requirement is clearly prejudicial to the appellant and those similarly placed. Having met all the other requirements for the admission to the bar, the appellant is nevertheless unable to gain admission to practise because he is not yet a Canadian citizen. I find that the appellant has discharged the onus upon him of showing that the requirement of citizenship for admission to the practice of law is unreasonable or unfair.

The concept of equality

7 Section 15(1) of the Charter provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination. This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application

of the law. No problem regarding the scope of the word "law", as employed in s. 15(1), can arise in this case because it is an Act of the legislature which is under attack. Whether other governmental or quasi-governmental regulations, rules or requirements may be termed laws under s. 15(1) should be left for cases in which the issue arises.

8 The concept of equality has long been a feature of Western thought. As embodied in s. 15(1) of the Charter, it is an elusive concept and, more than any of the other rights and freedoms guaranteed in the Charter, it lacks precise definition. As has been stated by John H. Schaar, "Equality of Opportunity and Beyond", in *Nomos IX: Equality* (1967), J. Roland Pennock and John W. Chapman eds., at p. 228:

Equality is a protean word. It is one of those political symbols — liberty and fraternity are others — into which men have poured the deepest urgings of their heart. Every strongly held theory or conception of equality is at once a psychology, an ethic, a theory of social relations, and a vision of the good society.

It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises. It must be recognized at once, however, 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. This proposition has found frequent expression in the literature on the subject but, as I have noted on a previous occasion, nowhere more aptly than in the well-known words of Frankfurter J. in *Dennis v. U.S.*, 339 U.S. 162 at 184, 94 L. Ed. 736 (1950):

It was a wise man who said that there is no greater inequality than the equal treatment of unequals.

The same thought has been expressed in this court in the context of s. 2(b) of the Charter in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 85 C.L.L.C. 14,023, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81, where Dickson J. said at p. 347:

The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.

In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

9 McLachlin J.A. in the Court of Appeal expressed the view, at p. 605, that:

... the essential meaning of the constitutional requirement of equal protection and equal benefit is that persons who are "similarly situated be similarly treated" and conversely, that persons who are "differently situated be differently treated" ...

In this, she was adopting and applying as a test a proposition which seems to have been widely accepted with some modifications in both trial and appeal court decisions throughout the country on s. 15(1) of the Charter. See, for example, *Re Fam. Benefits Act (N.S.)* (1986), 26 C.R.R. 336, 75 N.S.R. (2d) 338 at 351, (sub nom. *Ref. re Fam. Benefits Act (N.S.) S. 5*) 186 A.P.R. 338 (C.A.); *Ref. re French Language Rights of Accused in Sask. Criminal Proceedings*, [1987] 5 W.W.R. 577, (sub nom. *Ref. re Use of French in Criminal Proceedings in Sask.*) 36 C.C.C. (3d) 353, 44 D.L.R. (4th) 16 at 46, 58 Sask. R. 161 (C.A.); *Smith, Kline & French Laboratories Ltd. v. Can. (A.G.)*, [1987] 2 F.C. 359 at 366, 11 C.I.P.R. 181, 34 D.L.R. (4th) 584 at 590, 12 C.P.R. (3d) 385, 27 C.R.R. 286, 78 N.R. 30 (C.A.); *R. v. Ertel* (1987), 58

C.R. (3d) 252, 35 C.C.C. (3d) 398 at 419, 30 C.R.R. 209, 20 O.A.C. 257 (C.A.) . The reliance on this concept appears to have derived, at least in recent times, from J.T. Tussman and J. tenBroek, "The Equal Protection of Laws" (1949), 37 California L. Rev. 341. The similarly situated test is a restatement of the Aristotelian principle of formal equality — that "things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood": *Ethica Nichomacea* (1925), trans. W. Ross, Book VC, at p. 1131a-6.

10 The test as stated, however, is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremberg laws of Adolf Hitler. Similar treatment was contemplated for all Jews. The similarly situated test would have justified the formalistic separate but equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537, 41 L. Ed. 256 (1896), a doctrine that incidentally was still the law in the United States at the time that Professor Tussman and J. tenBroek wrote their much cited article: see M. David Lepofsky and H. Schwartz, case note (1988), 67 Can. Bar Rev. 115, at pp. 119-20. The test, somewhat differently phrased, was applied in the British Columbia Court of Appeal in *R. v. Gonzales* (1962), 37 W.W.R. 257, 37 C.R. 56, 132 C.C.C. 237, 32 D.L.R. (2d) 290 . The court upheld, under s. 1(b) of the Canadian Bill of Rights, R.S.C. 1970, s. 1(b), a section of the Indian Act, R.S.C. 1970, c. I-6, which made it an offence for an Indian to have intoxicants in his possession off a reserve. In his locality there were no reserves. Tysoe J.A. said that equality before the law could not mean "the same laws for all persons", and defined the right in these words, at p. 243:

... in its context s. 1(b) means in a general sense that there has existed and there shall continue to exist in Canada a right in every person *to whom a particular law relates or extends*, no matter what may be a person's race, national origin, colour, religion or sex, to stand on an equal footing with every other person to whom that particular law relates or extends, and a right to the protection of the law.

This approach was rejected in this court by Ritchie J. in *R. v. Drybones*, [1970] S.C.R. 282, 71 W.W.R. 161, 10 C.R.N.S. 334, [1970] 3 C.C.C. 355, 9 D.L.R. (3d) 473 [N.W.T.], in a similar case involving a provision of the Indian Act making it an offence for an Indian to be intoxicated off a reserve. He said at p. 297:

... I cannot agree with this interpretation pursuant to which it seems to me that the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members "to equality before the law", so long as all the other members are being discriminated against in the same way.

Thus, mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.

11 A similarly situated test focusing on the equal application of the law to those to whom it has application could lead to results akin to those in *Bliss v. A.G. Can.*, [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711, 78 C.L.L.C. 14,175, 92 D.L.R. (3d) 417, 23 N.R. 527 [Fed.]. In *Bliss*, a pregnant woman was denied unemployment benefits to which she would have been entitled had she not been pregnant. She claimed that the Unemployment Insurance Act violated the equality guarantees of the Canadian Bill of Rights because it discriminated against her on the basis of her sex. Her claim was dismissed by this court on the grounds that there was no discrimination on the basis of sex, since the class into which she fell under the Act was that of pregnant persons, and within that class, all persons were treated equally. This case, of course, was decided before the advent of the Charter.

12 I would also agree with the following criticism of the similarly situated test made by Kerans J.A. in *Mahe v. Alta. (Govt.)*, [1987] 6 W.W.R. 331, 54 Alta. L.R. (2d) 212 at 244, 42 D.L.R. (4th) 514, 33 C.R.R. 207, 80 A.R. 161 (C.A.) :

... the test accepts an idea of equality which is almost mechanical, with no scope for considering the reason for the distinction. In consequence, subtleties are found to justify a finding of dissimilarity which reduces the test to a categorization game. Moreover, the test is not helpful. After all, most laws are enacted for the specific purpose

of offering a benefit or imposing a burden on some persons and not on others. The test catches every conceivable difference in legal treatment.

For the reasons outlined above, the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the Charter. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.

13 It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the Charter. It is, of course, obvious that legislatures may — and to govern effectively — must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions. What kinds of distinctions will be acceptable under s. 15(1) and what kinds will violate its provisions?

14 In seeking an answer to these questions, the provisions of the Charter must have their full effect. In *R. v. Big M Drug Mart Ltd.*, this court emphasized this point at p. 344, where Dickson C.J.C. stated:

This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts. [emphasis in original]

These words are not inconsistent with the view I expressed in *Ref. re Pub. Service Employee Rel. Act (Alta.)*, [1987] 1 S.C.R. 313, [1987] 3 W.W.R. 577, 51 Alta. L.R. (2d) 97, 87 C.L.L.C. 14,021, 38 D.L.R. (4th) 161, (sub nom. *A.U.P.E. v. Alta. (A.G.)*) 28 C.R.R. 305, 78 A.R. 1, (sub nom. *Ref. re Compulsory Arbitration*) 74 N.R. 99.

15 The principle of equality before the law has long been recognized as a feature of our constitutional tradition and it found statutory recognition in the Canadian Bill of Rights. However, unlike the Canadian Bill of Rights, which spoke only of equality before the law, s. 15(1) of the Charter provides a much broader protection. Section 15 spells out four basic rights: (1) the right to equality before the law; (2) the right to equality under the law; (3) the right to equal protection of the law; and (4) the right to equal benefit of the law. The inclusion of these last three additional rights in s. 15 of the Charter was an attempt to remedy some of the shortcomings of the right to equality in the Canadian Bill of Rights. It also reflected the expanded concept of discrimination being developed under the various Human Rights Codes since the enactment of the Canadian Bill of Rights. The shortcomings of the Canadian Bill of Rights as far as the right to equality is concerned are well known. In *A.G. Can. v. Lavell; Isaac v. Bedard*, [1974] S.C.R. 1349, 23 C.R.N.S. 197, 11 R.F.L. 333,

38 D.L.R. (3d) 481 [Fed.], for example, this court upheld s. 12(1)(b) of the Indian Act which deprived women, but not men, of their membership in Indian bands if they married non-Indians. The provision was held not to violate equality *before* the law although it might, the court said, violate equality *under* the law if such were protected. In *Bliss*, supra, this court held that the denial of unemployment insurance benefits to women because they were pregnant did not violate the guarantee of equality before the law because any inequality in the protection and benefit of the law was "not created by legislation but by nature" (p. 190). The case was distinguished from the court's earlier decision in *Drybones*, supra, as not involving (pp. 191-92) the imposition of a penalty on a racial group to which other citizens are not subjected, but as involving rather "a definition of the qualifications required for entitlement to benefits". It is readily apparent that the language of s. 15 was deliberately chosen in order to remedy some of the perceived defects under the Canadian Bill of Rights. The antecedent statute is part of the "linguistic, philosophic and historical context" of s. 15 of the Charter.

16 It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. 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. It has a large remedial component. Chief Justice Howland (with Robins J.A. dissenting in the result but not with respect to this comment) in *Ref. re An Act to Amend the Education Act* (1986), 53 O.R. (2d) 513, 25 D.L.R. (4th) 1, 23 C.R.R. 193, 13 O.A.C. 241 (C.A.), attempts to articulate the broad range of values embraced by s. 15. He states at p. 554:

In our view, s. 15(1) read as a whole constitutes a compendious expression of a positive right to equality in both the substance and the administration of the law. It is an all-encompassing right governing all legislative action. Like the ideals of "equal justice" and "equal access to the law", the right to equal protection and equal benefit of the law now enshrined in the Charter rests on the moral and ethical principle fundamental to a truly free and democratic society that all persons should be treated by the law on a footing of equality with equal concern and equal respect.

It must be recognized, however, as well that the promotion of equality under s. 15 has a much more specific goal than the mere elimination of distinctions. If the Charter was intended to eliminate all distinctions, then there would be no place for sections such as s. 27 (multicultural heritage); s. 2(a) (freedom of conscience and religion); s. 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do "not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups ..."

Discrimination

17 The right to equality before and under the law, and the rights to the equal protection and benefit of the law contained in s. 15, are granted with the direction contained in s. 15 itself that they be without discrimination. Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee.

18 Discrimination as referred to in s. 15 of the Charter must be understood in the context of pre-Charter history. Prior to the enactment of s. 15(1), the legislatures of the various provinces and the federal Parliament had passed during the previous 50 years what may be generally referred to as Human Rights Acts. With the steady increase in population from the earliest days of European emigration into Canada and with the consequential growth of industry, agriculture and commerce and the vast increase in national wealth which followed, many social problems developed. The contact of the European immigrant with the indigenous population, the steady increase in immigration bringing those of neither French nor British background, and in more recent years the greatly expanded role of women in all forms of industrial, commercial and professional activity led to much inequality and many forms of discrimination. In great part these developments, in the absence of any significant legislative protection for the victims of discrimination, called into being the Human Rights Acts. In 1944 the Racial Discrimination Act, 1944, S.O. 1944, c. 51, was passed, to be followed in 1947 by the Saskatchewan Bill of Rights Act, 1947, S.S. 1947, c. 35, and in 1960 by the Canadian Bill of Rights. Since then every

jurisdiction in Canada has enacted broad-ranging Human Rights Acts which have attacked most of the more common forms of discrimination found in society. This development has been recorded and discussed by Walter Tarnopolsky, now Mr. Justice Tarnopolsky, in *Discrimination and the Law*, revised ed. (1985).

19 What does discrimination mean? The question has arisen most commonly in a consideration of the Human Rights Acts and the general concept of discrimination under those enactments has been fairly well settled. There is little difficulty, drawing upon the cases in this court, in isolating an acceptable definition. In *Ont. Human Rights Comm. v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at 551, 17 Admin. L.R. 89, 9 C.C.E.L. 185, 86 C.L.L.C. 17,002, 23 D.L.R. (4th) 321, 7 C.H.R.R. D/3102, 12 O.A.C. 241, 64 N.R. 161, discrimination (in that case, adverse effect discrimination) was described in these terms:

It arises where an employer ... adopts a rule or standard ... 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.

It was held in that case, as well, that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint. At p. 547, this proposition was expressed in these terms:

The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

In *C.N.R. v. Can. (Can. Human Rights Comm.)*, [1987] 1 S.C.R. 1114, 27 Admin. L.R. 172, 87 C.L.L.C. 17,022, 40 D.L.R. (4th) 193, 8 C.H.R.R. D/4210, (sub nom. *Action Travail des Femmes v. C.N.R.*) 76 N.R. 161 [Fed.], better known as the *Action Travail des Femmes* case, where it was alleged that the Canadian National Railway was guilty of discriminatory hiring and promotion practices contrary to s. 10 of the Canadian Human Rights Code, S.C. 1976-77, c. 33, in denying employment to women in certain unskilled positions, Dickson C.J.C., in giving the judgment of the court, said at pp. 1138-39:

A thorough study of "systemic discrimination" in Canada is to be found in the Abella Report on equality in employment. The terms of reference of the Royal Commission instructed it "to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis." (Order in Council P.C. 1983-1924 of 24 June 1983). Although Judge Abella chose not to offer a precise definition of systemic discrimination, the essentials may be gleaned from the following comments, found at p. 2 of the Abella Report.

Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ...

It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

There are many other statements which have aimed at a short definition of the term "discrimination". In general, they are in accord with the statements referred to above. I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others,

or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

20 The court in the case at bar must address the issue of discrimination as the term is used in s. 15(1) of the Charter. In general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1). Certain differences arising from the difference between the Charter and the Human Rights Acts must, however, be considered. To begin with, discrimination in s. 15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply also to private activities. Furthermore, and this is a distinction of more importance, all the Human Rights Acts passed in Canada specifically designate a certain limited number of grounds upon which discrimination is forbidden. Section 15(1) of the Charter is not so limited. The enumerated grounds in s. 15(1) are not exclusive and the limits, if any, on grounds for discrimination which may be established in future cases await definition. The enumerated grounds do, however, reflect the most common and probably the most socially destructive and historically practised bases of discrimination and must, in the words of s. 15(1), receive particular attention. Both the enumerated grounds themselves and other possible grounds of discrimination recognized under s. 15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a "continuing framework for the legitimate exercise of governmental power" and, at the same time, for "the unremitting protection" of equality rights: see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155, (sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*) [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 9 C.R.R. 355, 84 D.T.C. 6467, 2 C.P.R. (3d) 1, 11 D.L.R. (4th) 641, 55 A.R. 291, 55 N.R. 241 .

21 It should be noted as well that when the Human Rights Acts create exemptions or defences, such as a bona fide occupational requirement, an exemption for religious and political organizations, or definitional limits on age discrimination, these generally have the effect of completely removing the conduct complained of from the reach of the Act. See, for example, exemptions for special interest organizations contained in the Human Rights Code, R.S.B.C. 1979, c. 186, as amended, s. 22; the Human Rights Act, S.M. 1974, c. 65 (also C.C.S.M., c. H175), as amended, s. 6(7); and the Human Rights Code, 1981, S.O. 1981, c. 53, s. 17. "Age" is often restrictively defined in the Human Rights Acts; in British Columbia, it is defined in s. 1 of the Code to mean an age between 45 and 65; in s. 38 of the Individual's Rights Protection Act, R.S.A. 1980, c. I-2, it is defined as 18 and over. For an example of the application of a bona fide occupational requirement, see *Bhinder v. C.N.R.*, [1985] 2 S.C.R. 561, 9 C.C.E.L. 135, 17 Admin. L.R. 111, 86 C.L.L.C. 17,003, 23 D.L.R. (4th) 481, 7 C.H.R.R. D/3093, 63 N.R. 185 [Fed.]. Where discrimination is forbidden in the Human Rights Acts, it is done in absolute terms, and where a defence or exception is allowed, it, too, speaks in absolute terms and the discrimination is excused. There is, in this sense, no middle ground. In the Charter, however, while s. 15(1), subject always to subs. (2), expresses its prohibition of discrimination in absolute terms, s. 1 makes allowance for a reasonable limit upon the operation of s. 15(1). A different approach under s. 15(1) is therefore required. While discrimination under s. 15(1) will be of the same nature and in descriptive terms will fit the concept of discrimination developed under the Human Rights Acts, a further step will be required in order to decide whether discriminatory laws can be justified under s. 1. The onus will be on the state to establish this. This is a distinct step called for under the Charter which is not found in most Human Rights Acts because in those Acts justification for or defence to discrimination is generally found in specific exceptions to the substantive rights.

Relationship between s. 15(1) and s. 1 of the Charter

22 In determining the extent of the guarantee of equality in s. 15(1) of the Charter, special consideration must be given to the relationship between s. 15(1) and s. 1. It is indeed the presence of s. 1 in the Charter and the interaction between these sections which has led to the differing approaches to a definition of the s. 15(1) right, and which has made necessary a judicial approach differing from that employed under the Canadian Bill of Rights. Under the Canadian Bill of Rights, a test was developed to distinguish between justified and unjustified legislative distinctions within the concept

of equality before the law itself in the absence of anything equivalent to the s. 1 limit: see *MacKay v. R.*, [1980] 2 S.C.R. 370, [1980] 5 W.W.R. 385, 54 C.C.C. (2d) 129, 114 D.L.R. (3d) 393, 33 N.R. 1 [Fed.], where it was said at p. 407:

... and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective. Inequalities created for such purposes may well be acceptable under the *Canadian Bill of Rights*.

It may be noted as well that the 14th Amendment to the American Constitution, which provides that no state shall deny to any person within its jurisdiction the "equal protection of the laws", contains no limiting provisions similar to s. 1 of the Charter. As a result, judicial consideration has led to the development of varying standards of scrutiny of alleged violations of the equal protection provision which restrict or limit the equality guarantee within the concept of equal protection itself. Again, art. 14 of the European Convention on Human Rights, 213 U.N.T.S. 222, which secures the rights guaranteed therein without discrimination, lacks a s. 1 or its equivalent and has also developed a limit within the concept itself. In the *Belgian Linguistic Case* (1968), 1 E.H.R.R. 252 at 284, the court enunciated the following test:

... the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to principles which normally prevail in democratic societies. A difference in treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

The distinguishing feature of the Charter, unlike the other enactments, is that consideration of such limiting factors is made under s. 1. This court has described the analytical approach to the Charter in *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87; *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713, (sub nom. *R. v. Videoflicks Ltd.*) 55 C.R. (3d) 193, (sub nom. *R. v. Edwards Books & Art Ltd.*; *R. v. Nortown Foods Ltd.*) 30 C.C.C. (3d) 385, 87 C.L.L.C. 14,001, 35 D.L.R. (4th) 1, 28 C.R.R. 1, 19 O.A.C. 239, 71 N.R. 161, and other cases, the essential feature of which is that the right guaranteeing sections be kept analytically separate from s. 1. In other words, when confronted with a problem under the Charter, the first question which must be answered will be whether or not an infringement of a guaranteed right has occurred. Any justification of an infringement which is found to have occurred must be made, if at all, under the broad provisions of s. 1. It must be admitted at once that the relationship between these two sections may well be difficult to determine on a wholly satisfactory basis. It is, however, important to keep them analytically distinct if for no other reason than the different attribution of the burden of proof. It is for the citizen to establish that his or her Charter right has been infringed and for the state to justify the infringement.

Approaches to s. 15(1)

23 Three main approaches have been adopted in determining the role of s. 15(1), the meaning of discrimination set out in that section, and the relationship of s. 15(1) and s. 1. The first one, which was advanced by Professor Peter Hogg in *Constitutional Law of Canada*, 2nd ed. (1985), would treat every distinction drawn by law as discrimination under s. 15(1). There would then follow a consideration of the distinction under the provisions of s. 1 of the Charter. He said at pp. 800-801:

I conclude that s. 15 should be interpreted as providing for the universal application of every law. When a law draws a distinction between individuals, on any ground, that distinction is sufficient to constitute a breach of s. 15, and to move the constitutional issue to s. 1. The test of validity is that stipulated by s. 1, namely, whether the law comes within the phrase "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

He reached this conclusion on the basis that, where the Charter right is expressed in unqualified terms, s. 1 supplies the standard of justification for any abridgment of the right. He argued that the word "discrimination" in s. 15(1) could be read as introducing a qualification in the section itself, but he preferred to read the word in a neutral sense because this reading would immediately send the matter to s. 1, which was included in the Charter for this purpose.

24 The second approach put forward by McLachlin J.A. in the Court of Appeal involved a consideration of the reasonableness and fairness of the impugned legislation under s. 15(1). She stated, as has been noted above, at p. 610:

The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.

She assigned a very minor role to s. 1 which would, it appears, be limited to allowing in times of emergency, war or other crises the passage of discriminatory legislation which would normally be impermissible.

25 A third approach, sometimes described as an "enumerated or analogous grounds" approach, adopts the concept that discrimination is generally expressed by the enumerated grounds. Section 15(1) is designed to prevent discrimination based on these and analogous grounds. The approach is similar to that found in human rights and civil rights statutes which have been enacted throughout Canada in recent times. The following excerpts from the judgment of Hugessen J.A. in *Smith, Kline & French Laboratories v. Can. (A.G.)*, supra, for Canada, [1987] 2 F.C., at pp. 367-69, illustrate this approach:

The rights which it [s. 15] guarantees are not based on any concept of strict, numerical equality amongst all human beings. If they were, virtually all legislation, whose function it is, after all, to define, distinguish and make categories, would be in *prima facie* breach of section 15 and would require justification under section 1. This would be to turn the exception into the rule. Since courts would be obliged to look for and find section 1 justification for most legislation, the alternative being anarchy, there is a real risk of paradox: the broader the reach given to section 15 the more likely it is that it will be deprived of any real content.

The answer, in my view, is that the text of the section itself contains its own limitations. It only proscribes discrimination amongst the members of categories which are themselves similar. Thus the issue, for each case, will be to know which categories are permissible in determining similarity of situation and which are not. It is only in those cases where the categories themselves are not permissible, where equals are not treated equally, that there will be a breach of equality rights ...

As far as the text of section 15 itself is concerned, one may look to whether or not there is "discrimination", in the pejorative sense of that word, and as to whether the categories are based upon the grounds enumerated or grounds analogous to them. The inquiry, in effect, concentrates upon the personal characteristics of those who claim to have been unequally treated. Questions of stereotyping, of historical disadvantage, in a word, of prejudice, are the focus and there may even be a recognition that for some people equality has a different meaning than for others.

The analysis of discrimination in this approach must take place within the context of the enumerated grounds and those analogous to them. The words "without discrimination" require more than a mere finding of distinction between the treatment of groups or individuals. Those words are a form of qualifier built into s. 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage.

26 I would accept the criticisms of the first approach made by McLachlin J.A. in the Court of Appeal. She noted that the labelling of every legislative distinction as an infringement of s. 15(1) trivializes the fundamental rights guaranteed by the Charter and, secondly, that to interpret "without discrimination" as "without distinction" deprives the notion of discrimination of content. She continued at p. 607:

Third, it cannot have been the intention of Parliament that the government be put to the requirement of establishing under s. 1 that all laws which draw distinction between people are "demonstrably justified in a free and democratic society". If weighing of the justifiability of unequal treatment is neither required or permitted under s. 15, the result will be that such universally accepted and manifestly desirable legal distinctions as those prohibiting children or drunk persons from driving motor vehicles will be viewed as violations of fundamental rights and be required to run the gauntlet of s. 1.

Finally, it may further be contended that to define discrimination under s. 15 as synonymous with unequal treatment on the basis of personal classification will be to elevate s. 15 to the position of subsuming the other rights and freedoms defined by the Charter.

In rejecting the Hogg approach, I would say that it draws a straight line from the finding of a distinction to a determination of its validity under s. 1, but my objection would be that it virtually denies any role for s. 15(1).

27 I would reject, as well, the approach adopted by McLachlin J.A. She seeks to define discrimination under s. 15(1) as an unjustifiable or unreasonable distinction. In so doing, she avoids the mere distinction test but also makes a radical departure from the analytical approach to the Charter which has been approved by this court. In the result, the determination would be made under s. 15(1) and virtually no role would be left for s. 1.

28 The third or "enumerated and analogous grounds" approach most closely accords with the purposes of s. 15 and the definition of discrimination outlined above and leaves questions of justification to s. 1. However, in assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

29 Where discrimination is found, a breach of s. 15(1) has occurred and — where s. 15(2) is not applicable — any justification, any consideration of the reasonableness of the enactment, indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1. This approach would conform with the directions of this court in earlier decisions concerning the application of s. 1 and at the same time would allow for the screening out of the obviously trivial and vexatious claim. In this, it would provide a workable approach to the problem.

30 It would seem to me apparent that a legislative distinction has been made by s. 42 of the Barristers and Solicitors Act between citizens and non-citizens with respect to the practice of law. The distinction would deny admission to the practice of law to non-citizens who in all other respects are qualified. Have the respondents because of s. 42 of the Act been denied equality before and under the law or the equal protection of the law? In practical terms it should be noted that the citizenship requirement affects only those non-citizens who are permanent residents. The permanent resident must wait for a minimum of three years from the date of establishing permanent residence status before citizenship may be acquired. The distinction therefore imposes a burden in the form of some delay on permanent residents who have acquired all or some of their legal training abroad and is, therefore, discriminatory.

31 The rights guaranteed in s. 15(1) apply to all persons whether citizens or not. 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. Non-citizens, lawfully permanent residents of Canada, are — in the words of the United States Supreme Court in *U.S. v. Carolene Prod. Co.*, 304 U.S. 144 at 152-53, n. 4, 82 L. Ed. 1234 (1938),

subsequently affirmed in *Graham v. Richardson*, 403 U.S. 365 at 372, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971) — a good example of a "discrete and insular minority" who come within the protection of s. 15.

Section 1

32 Having accepted the proposition that s. 42 has infringed the right to equality guaranteed in s. 15, it remains to consider whether, under the provisions of s. 1 of the Charter, the citizenship requirement which is clearly prescribed by law is a reasonable limit which can be "demonstrably justified in a free and democratic society".

33 The onus of justifying the infringement of a guaranteed Charter right must, of course, rest upon the parties seeking to uphold the limitation, in this case, the Attorney General of British Columbia and the Law Society of British Columbia. As is evident from the decisions of this court, there are two steps involved in the s. 1 inquiry. First, the importance of the objective underlying the impugned law must be assessed. In *Oakes*, it was held that to override a Charter-guaranteed right the objective must relate to concerns which are "pressing and substantial" in a free and democratic society. However, given the broad ambit of legislation which must be enacted to cover various aspects of the civil law dealing largely with administrative and regulatory matters and the necessity for the legislature to make many distinctions between individuals and groups for such purposes, the standard of "pressing and substantial" may be too stringent for application in all cases. To hold otherwise would frequently deny the community-at-large the benefits associated with sound social and economic legislation. In my opinion, in approaching a case such as the one before us, the first question the court should ask must relate to the nature and the purpose of the enactment, with a view to deciding whether the limitation represents a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights. The second step in a s. 1 inquiry involves a proportionality test whereby the court must attempt to balance a number of factors. The court must examine the nature of the right, the extent of its infringement and the degree to which the limitation furthers the attainment of the desirable goal embodied in the legislation. Also involved in the inquiry will be the importance of the right to the individual or group concerned, and the broader social impact of both the impugned law and its alternatives. As the Chief Justice has stated in *R. v. Edwards Books & Art Ltd.*, supra, at pp. 768-69:

Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards.

I agree with this statement. There is no single test under s. 1; rather, the court must carefully engage in the balancing of many factors in determining whether an infringement is reasonable and demonstrably justified.

34 The s. 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the Charter. However, it must be recognized that Parliament and the legislatures have a right and a duty to make laws for the whole community: in this process, they must make innumerable legislative distinctions and categorizations in the pursuit of the role of government. When making distinctions between groups and individuals to achieve desirable social goals, it will rarely be possible to say of any legislative distinction that it is clearly the right legislative choice or that it is clearly a wrong one. As stated by the Chief Justice in *R. v. Edwards Books & Art Ltd.*, at pp. 781-82:

A "reasonable limit" is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

In dealing with the many problems that arise, legislatures must not be held to the standard of perfection, for in such matters perfection is unattainable. I would repeat the words of my colleague, La Forest J., in *R. v. Edwards Books & Art Ltd.*, at p. 795:

By the foregoing, I do not mean to suggest that this Court should as a general rule, defer to legislative judgments when those judgments trench upon rights considered fundamental in a free and democratic society. Quite the contrary, I would have thought the *Charter* established the opposite regime. On the other hand, having accepted

the importance of the legislative objective, one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected.

In seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures.

Disposition

35 I now turn to the case at bar. The appellant law society in oral argument stressed three points. It argued that the Court of Appeal was correct in its analysis of the relationship between s. 15(1) and s. 1 of the Charter but that it erred in applying criteria properly to be considered in s. 1, in deciding whether there was a breach of s. 15(1). This argument has been discussed and disposed of above. It was further argued that the Court of Appeal erred in its consideration of the citizenship requirement in s. 42 of the Barristers and Solicitors Act, in failing to give proper weight to the importance of the role of the legal profession in the legal and governmental processes of the country and in failing to consider that Canadian citizenship could reasonably be regarded by the legislature as a requirement for the practice of law. The law society argued as well that because of the important duties and powers accorded to lawyers, they do indeed play a vital role in the governmental processes of the country and that, while generally citizenship requirements are discriminatory in nature, the involvement of lawyers in the administration of justice justified the citizenship requirement. The Attorney General of British Columbia supported these arguments and, as well, argued that for the court to intervene and strike down the citizenship requirement would exceed the proper limits of judicial review.

36 The respondents in general supported the judgment of the Court of Appeal. They argued that citizenship bears no clear relationship to an individual's personal and professional characteristics, and questioned the classification of lawyers as significant actors in the state, or governmental process. While conceding that a citizenship requirement for many intimately concerned with the governing processes of the country would be proper and sustainable, it was argued that the relationship of the legal profession to government and the administration of justice was not such that the citizenship requirement could be considered as a reasonable requirement and that any "general helpfulness" of the citizenship requirement, in attaining the objectives of the Barristers and Solicitors Act, could not suffice to justify this form of discrimination against an individual. In essence, the difference between the parties centred on the question of the importance of the legal profession in the government of the country.

37 There is no difficulty in determining that in general terms the Barristers and Solicitors Act of British Columbia is a statute enacted for a valid and desirable social purpose, the creation and regulation of the legal profession and the practice of law. The narrower question, however, is whether the requirement that only citizens be admitted to the practice of law in British Columbia serves a desirable social purpose of sufficient importance to warrant overriding the equality guarantee. It is incontestable that the legal profession plays a very significant — in fact, a fundamentally important — role in the administration of justice, both in the criminal and the civil law. I would not attempt to answer the question arising from the judgments below as to whether the function of the profession may be termed judicial or quasi-judicial, but I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state. In the performance of what may be called his private function, that is, in advising on legal matters and in representing clients before the courts and other tribunals, the lawyer is accorded great powers not permitted to other professionals. As pointed out by Taylor J. at first instance, by the use of the subpoena which he alone can procure on behalf of another, he can compel attendance upon examinations before trial and at trial upon pain of legal sanction for refusal. He may, as well, require the production of documents and records for examination and use in the proceedings. He may in some cases require the summoning of jurors, the sittings of courts and, in addition, he may make the fullest inquiry into the matters before the court with a full privilege against actions for slander arising out of his conduct in the court. The solicitor is also bound by the solicitor-and-client privilege against the disclosure of communications with his client concerning legal matters. This is said to be the only absolute privilege known to the law. Not only may the solicitor decline to disclose solicitor-and-client

communications, the courts will not permit him to do so. This is a privilege against all comers, including the Crown, save where the disclosure of a crime would be involved. The responsibilities involved in its maintenance and in its breach where crimes are concerned are such that citizenship with its commitment to the welfare of the whole community is not an unreasonable requirement for the practice of law. While it may be arguable whether the lawyer exercises a judicial, quasi-judicial or governmental role, it is clear that at his own discretion he can invoke the full force and authority of the state in procuring and enforcing judgments or other remedial measures which may be obtained. It is equally true that in defending an action he has the burden of protecting his client from the imposition of such state authority and power. By any standard, these powers and duties are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community.

38 The lawyer has, as well, what may be termed a public function. Governments at all levels, federal, provincial and municipal, rely extensively upon lawyers, both in technical and policy matters. In the drafting of legislation, regulations, treaties, agreements and other governmental documents and papers, lawyers play a major role. In various aspects of this work they are called upon to advise upon legal and constitutional questions which frequently go to the very heart of the governmental role. To discharge these duties, familiarity is required with Canadian history, constitutional law, regional differences and concerns within the country and, in fact, with the whole Canadian governmental and political process. It is entirely reasonable, then, that legislators consider and adopt measures designed to maintain within the legal profession a body of qualified professionals with a commitment to the country and to the fulfilment of the important tasks which fall to it.

39 McLachlin J.A. was of the view that the citizenship requirement would not ensure familiarity with Canadian institutions and customs, nor would it ensure a commitment to Canada going beyond one involved in the concept of allegiance, as recognized by the taking of an oath of allegiance. I would agree with her that the desired results would not be insured by the citizenship requirement but I would observe, at the same time, that no law will ever ensure anything. To abolish the requirement of citizenship on the basis that it would fail to ensure the attainment of its objectives would, in my view, be akin to abolishing the law against theft, for it has certainly not ensured the elimination of that crime. Citizenship, however, which requires the taking on of obligations and commitments to the community, difficult sometimes to describe but felt and understood by most citizens, as well as the rejection of past loyalties, may reasonably be said to conduce to the desired result.

40 I would observe, as well, that the comment of McLachlin J.A. that the citizenship requirement was first adopted in British Columbia in 1971 requires some explanation. I do not think that the historical argument should be pushed too far: things need not always remain as once they were although, as noted in *R. v. Big M Drug Mart Ltd.* and *Ref. re Pub. Service Employee Rel. Act (Alta.)*, supra, Charter construction should be consistent with the history, traditions and social philosophies of our society. The concept of citizenship has been a requirement for entry into the legal profession in British Columbia from its earliest days. When the law society was formed in 1874 the profession was open to British subjects. At that time, the idea of a separate Canadian citizenship, as distinct from the general classification of British subject which included Canadians, was scarcely known — though as early as 1910, Immigration Act, S.C. 1910, c. 27, the term "Canadian citizen" was defined for the purposes of the Immigration Act as a "British subject who has Canadian domicile". The concept of citizenship in those early days was embodied in the expression, British subject, and thus it was recognized as a requirement for entry into the legal profession in British Columbia. As Canada moved away from its colonial past, a separate identity for Canadians emerged and in 1946 with the passage of the Canadian Citizenship Act, S.C. 1946, c. 15, the term, Canadian citizen, was formally recognized, giving effect to what had long been felt and accepted by most Canadians. In adopting the term as a qualification for entry into the legal profession in British Columbia, the legislature was merely continuing its earlier requirement that the concept of citizenship, as then recognized in the term "British subject", be necessary for entry into the profession.

41 Public policy, of which the citizenship requirement in the Barristers and Solicitors Act is an element, is for the legislature to establish. The role of the Charter, as applied by the courts, is to ensure that in applying public policy the legislature does not adopt measures which are not sustainable under the Charter. It is not, however, for the courts to

legislate or to substitute their views on public policy for those of the legislature. I would repeat for ease of reference the words of the Chief Justice in *R. v. Edwards Books & Art*, supra, at pp. 781-82:

A "reasonable limit" is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

The function of the court is to measure the legislative enactment against the requirements of the Charter and where the enactment infringes the Charter, in this case the provisions of s. 15(1), and is not sustainable under s. 1, the remedial power of the court is set out in s. 52 of the Constitution Act, 1982: "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".

42 The essence of s. 1 is found in the expression "reasonable" and it is for the court to decide if s. 42 of the Barristers and Solicitors Act of British Columbia is a reasonable limit. In reaching the conclusion that it is, I would say that the legislative choice in this regard is not one between an answer that is clearly right and one that is clearly wrong. Either position may well be sustainable and, as noted by the Chief Justice, above, the court is not called upon to substitute its opinion as to where to draw the line. The legislature, in fixing public policy, has chosen the citizenship requirement and, unless the court can find that choice unreasonable, it has no power under the Charter to strike it down or, as has been said, no power to invade the legislative field and substitute its views for that of the legislature. In my view, the citizenship requirement is reasonable and sustainable under s. 1. It is chosen for the achievement of a desirable social goal: one aspect of the due regulation and qualification of the legal profession. This is an objective of importance and the measure is not disproportionate to the object to be attained. The maximum delay imposed upon the non-citizen from the date of acquisition of permanent resident status is three years. It will frequently be less. No impediment is put in the way of obtaining citizenship. In fact, the policy of the Canadian government is to encourage the newcomer to become a citizen. It is reasonable, in my view, to expect that the newcomer who seeks to gain the privileges and status within the land and the right to exercise the great powers that admission to the practice of law will give should accept citizenship and its obligations as well as its advantages and benefits. I would therefore allow the appeal and restore the judgment at trial. I would answer the constitutional questions as follows:

43 Q.

(1) does the canadian citizenship requirement to be a lawyer in the province of british columbia as set out in s. 42 of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26 infringe or deny the rights guaranteed by s. 15(1) of the Canadian Charter of Rights and Freedoms?

44 A. Yes.

45 Q.

(2) If the Canadian citizenship requirement to be a lawyer in the province of British Columbia as set out in s. 42 of the Barristers and Solicitors act, R.S.B.C. 1979, c. 26 infringes or denies the rights guaranteed by s. 15(1) of the Canadian Charter of Rights and Freedoms, is it justified by s. 1 of the Canadian Charter of Rights and Freedoms?

46 A. Yes.

Wilson J. (Dickson C.J.C. and L'Heureux-Dubé concurring):

47 I have had the benefit of the reasons of my colleague, Justice McIntyre, and I am in complete agreement with him as to the way in which s. 15(1) of the Canadian Charter of Rights and Freedoms should be interpreted and applied. I also agree with my colleague as to the way in which s. 15(1) and s. 1 of the Charter interact. I differ from him, however, on the application of s. 1 to this particular case.

48 As my colleague points out, s. 42 of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, differentiates between citizens and non-citizens with respect to admission to the practice of law. The distinction denies admission to non-citizens who are in all other respects qualified. While the citizenship requirement applies only to those non-citizens who are permanent residents, it has the effect of requiring those permanent residents to wait for a minimum of three years from the date of establishing their permanent residence before they can be considered for admission to the bar. It imposes a burden in the form of some delay in obtaining admission on permanent residents who have acquired all or some of their legal training abroad.

49 I agree with my colleague that a rule which bars an entire class of persons from certain forms of employment solely on the ground that they are not Canadian citizens violates the equality rights of that class. I agree with him also that it discriminates against them on the ground of their personal characteristics, i.e., their non-citizen status. I believe, therefore, that they are entitled to the protection of s. 15.

50 Before turning to s. 1, I would like to add a brief comment to what my colleague has said concerning non-citizens permanently resident in Canada forming the kind of "discrete and insular minority" to which the Supreme Court of the United States referred in *U.S. v. Carolene Prod. Co.*, 304 U.S. 144 at 152-53, n. 4, 82 L. Ed. 1234 (1938).

51 Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending": see J.H. Ely, *Democracy and Distrust* (1980), at p. 151. Non-citizens, to take only the most obvious example, do not have the right to vote. Their vulnerability to becoming a disadvantaged group in our society is captured by John Stuart Mill's observation in Book III of *Considerations on Representative Government* that "in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked ..." I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15. I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.

52 I believe also that it is important to note that the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances. For example, Stone J., writing in 1938, was concerned with religious, national and racial minorities. In enumerating the specific grounds in s. 15, the framers of the Charter embraced these concerns in 1982 but also addressed themselves to the difficulties experienced by the disadvantaged on the grounds of ethnic origin, colour, sex, age and physical and mental disability. It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure the "unremitting protection" of equality rights in the years to come.

53 While I have emphasized that non-citizens are, in my view, an analogous group to those specifically enumerated in s. 15 and, as such, are entitled to the protection of the section, I agree with my colleague that it is not necessary in this case to determine what limit, if any, there is on the grounds covered by s. 15 and I do not do so.

Section 1

54 Having found an infringement of s. 15 of the Charter, I turn now to the question whether the citizenship requirement for entry into the legal profession in British Columbia constitutes a reasonable limit which can be "demonstrably justified in a free and democratic society" under s. 1.

55 As my colleague has pointed out, the onus of justifying the infringement rests upon those seeking to uphold the legislation, in this case the Attorney General of British Columbia and the Law Society of British Columbia, and the

analysis to be conducted is that set forth by Chief Justice Dickson in *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87 .

56 The first hurdle to be crossed in order to override a right guaranteed in the Charter is that the objective sought to be achieved by the impugned law must relate to concerns which are "pressing and substantial" in a free and democratic society. The Chief Justice stated at pp. 138-39:

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra* , at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

This, in my view, remains an appropriate standard when it is recognized that not every distinction between individuals and groups will violate s. 15. If every distinction between individuals and groups gave rise to a violation of s. 15, then this standard might well be too stringent for application in all cases and might deny the community at large the benefits associated with sound and desirable social and economic legislation. This is not a concern, however, once the position that every distinction drawn by law constitutes discrimination is rejected as indeed it is in the judgment of my colleague, McIntyre J. Given that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.

57 The second step in a s. 1 inquiry involves the application of a proportionality test which requires the court to balance a number of factors. The court must consider the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the attainment of the legitimate goal reflected in the legislation. As the Chief Justice stated in *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 at 768, (sub nom. *R. v. Videoflicks Ltd.*) 55 C.R. (3d) 193, (sub nom. *R. v. Edwards Books & Art Ltd.*; *R. v. Nortown Foods Ltd.*) 30 C.C.C. (3d) 385, 87 C.L.L.C. 14,001, 35 D.L.R. (4th) 1, 28 C.R.R. 1, 19 O.A.C. 239, 71 N.R. 161 :

Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights.

58 The appellant law society submitted that the Court of Appeal [[1986] 4 W.W.R. 242, 2 B.C.L.R. (2d) 305, 27 D.L.R. (4th) 600] erred in its consideration of the citizenship requirement by failing to accord proper recognition to the role of the legal profession in the governmental process of the country and in failing to consider that Canadian citizenship could reasonably be regarded by the legislature as a requirement for the practice of law. The respondents, on the other hand, argued that the Court of Appeal was right in concluding that there was not a sufficiently rational connection between the required personal characteristic of citizenship and the governmental interest in ensuring that lawyers in British Columbia are familiar with Canadian institutions, are committed to Canadian society, and are capable of playing a role in our system of democratic government. I am in general agreement with the reasoning of the Court of Appeal on this aspect of the case for the following reasons.

59 The trial judge in this case [[1986] 1 W.W.R. 252, 66 B.C.L.R. 363, 22 D.L.R. (4th) 9] concluded that the discrimination against non-citizens in s. 42 of the *Barristers and Solicitors Act* was justified under s. 1 of the Charter. He said (22 D.L.R. (4th) 9) at p. 21:

I find citizenship to be a personal characteristic which is relevant to the practice of law on account of the special commitment to the community which citizenship involves and not merely because the practical familiarity with the country necessary for that occupation can generally be expected in the case of citizens.

On appeal McLachlin J.A. found that the exclusion of non-citizens was not rationally connected to the governmental interest in ensuring that lawyers had a sufficient knowledge of local affairs and institutions for the competent practice of law. [She stated \(27 D.L.R. \(4th\) 600 \) at p. 612:](#)

Citizenship does not ensure familiarity with Canadian institutions and customs. Only citizens who are not natural-born Canadians are required to have resided in Canada for a period of time. Natural-born Canadians may reside in whatever country they wish and still retain their citizenship. In short, citizenship offers no assurance that a person is conscious of the fundamental traditions and rights of our society. The requirement of citizenship is not an effective means of ensuring that the persons admitted to the bar are familiar with this country's institutions and customs: see *Re Dickenson and Law Society of Alberta* (1978), 84 D.L.R. (3d) 189 at p. 195, 5 Alta. L.R. (2d) 136, 10 A.R. 120 .

60 I appreciate the desirability of lawyers being familiar with Canadian institutions and customs but I agree with McLachlin J.A. that the requirement of citizenship is not carefully tailored to achieve that objective and may not even be rationally connected to it. McDonald J. pointed out in *Dickenson v. Law Soc. of Alta.* (1978), 5 Alta. L.R. (2d) 136, 84 D.L.R. (3d) 189 at 195, 10 A.R. 120 (T.D.) , that such a requirement affords no assurance that citizens who want to become lawyers are sufficiently familiar with Canadian institutions and "it could better be achieved by an examination of the particular qualifications of the applicant, whether he is a Canadian citizen, a British subject, or something else".

61 The second justification advanced by the appellants in support of the citizenship requirement is that citizenship evidences a real attachment to Canada. Once again I find myself in agreement with the following observations of McLachlin J.A. at pp. 612-13:

The second reason for the distinction — that citizenship implies a commitment to Canadian society — fares little better upon close examination. Only those citizens who are not natural-born Canadians can be said to have made a conscious choice to establish themselves here permanently and to opt for full participation in the Canadian social process, including the right to vote and run for public office. While no doubt most citizens, natural-born or otherwise, are committed to Canadian society, citizenship does not ensure that that is the case. Conversely, non-citizens may be deeply committed to our country.

62 The third ground advanced to justify the requirement relates to the role lawyers are said to play in the governance of our country. McLachlin J.A. disputed the extent to which the practice of law involves the performance of a governmental function. She stated at p. 614:

While lawyers clearly play an important role in our society, it cannot be contended that the practice of law involves performing a state or government function. In this respect, the role of lawyers may be distinguished from that of legislators, judges, civil servants and policemen. The practice of law is first and foremost a private profession. Some lawyers work in the courts, some do not. Those who work in the courts may represent the Crown or act against it. It is true that all lawyers are officers of the court. That term, in my mind, implies allegiance and certain responsibilities to the institution of the court. But it does not mean that lawyers are part of the process of government.

Although I am in general agreement with her characterization of the role of lawyers qua lawyers in our society, my problem with this basis of justification is more fundamental. To my mind, even if lawyers do perform a governmental function, I do not think the requirement that they be citizens provides any guarantee that they will honourably and conscientiously carry out their public duties. They will carry them out, I believe, because they are good lawyers and not because they are Canadian citizens.

63 In my view, the reasoning advanced in support of the citizenship requirement simply does not meet the tests in Oakes for overriding a constitutional right, particularly, as in this case, a right designed to protect "discrete and insular minorities" in our society. I would respectfully concur in the view expressed by McLachlin J.A. at p. 617 that the citizenship requirement does not "appear to relate clearly to those ends, much less to have been carefully designed to achieve them with minimum impairment of individual rights".

Disposition

64 I would dismiss the appeal with costs. I would answer the constitutional questions as follows:

65 Q.

(1) does the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in s. 42 of the *Barristers and Solicitors act*, R.S.B.C. 1979, c. 26 infringe or deny the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

66 A. Yes.

67 Q.

(2) if the Canadian citizenship requirement to be a lawyer in the Province of British Columbia as set out in s. 42 of the *Barristers and Solicitors act*, R.S.B.C. 1979, c. 26 infringes or denies the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*, is it justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

68 A. No.

La Forest J.:

69 This case concerns the application to aliens of the "equality" provision of the Canadian Charter of Rights and Freedoms, s. 15(1), which for convenience of reference I reproduce here:

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.

70 At issue is whether s. 42 of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, by restricting admission to the bar of British Columbia to Canadian citizens, violates s. 15(1).

71 My colleague, Justice McIntyre, has set forth the facts and the judicial history of this appeal and it is unnecessary for me to repeat them. Nor need I enter into an extensive examination of the law regarding the meaning of s. 15(1) because insofar as it is relevant to this appeal, I am in substantial agreement with the views of my colleague. I hasten to add that the relevant question as I see it is restricted to whether the impugned provision amounts to discrimination in the sense in which my colleague has defined it, i.e., on the basis of "irrelevant personal differences" such as those listed in s. 15 and, traditionally, in human rights legislation.

72 I am not prepared to accept at this point that the only significance to be attached to the opening words that refer more generally to equality is that the protection afforded by the section is restricted to discrimination through the application of law. It is possible to read s. 15 in this way and I have no doubt that on any view redress against that kind of discrimination will constitute the bulk of the courts' work under the provision. Moreover, from the manner in which it was drafted, I also have no doubt that it was so intended. However, it can reasonably be argued that the opening words, which take up half the section, seem somewhat excessive to accomplish the modest role attributed to them, particularly having regard to the fact that s. 32 already limits the application of the Charter to legislation and governmental activity.

It may also be thought to be out of keeping with the broad and generous approach given to other Charter rights, not the least of which is s. 7, which like s. 15 is of a generalized character. In the case of s. 7, it will be remembered, the court has been at pains to give real meaning to each word of the section so as to ensure that the rights to life, liberty and security of the person are separate, if closely related rights.

73 That having been said, I am convinced that it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society. Like my colleague, I am not prepared to accept that *all* legislative classifications must be rationally supportable before the courts. Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second-guess policy decisions.

74 I realize that it is no easy task to distinguish between what is fundamental and what is not and that in this context this may demand consideration of abstruse theories of equality. For example, there may well be legislative or governmental differentiation between individuals or groups that is so grossly unfair to an individual or group and so devoid of any rational relationship to a legitimate state purpose as to offend against the principle of equality before and under the law as to merit intervention pursuant to s. 15. For these reasons I would think it better at this stage of Charter development to leave the question open. I am aware that in the United States, where Holmes J. has referred to the equal protection clause there as the "last resort of constitutional arguments" (*Buck v. Bell*, 274 U.S. 200 at 208, 71 L. Ed. 1000 (1927)), the courts have been extremely reluctant to interfere with legislative judgment. Still, as I stated, there may be cases where it is indeed the last constitutional resort to protect the individual from fundamental unfairness. Assuming there is room under s. 15 for judicial intervention beyond the traditionally established and analogous policies against discrimination discussed by my colleague, it bears repeating that considerations of institutional functions and resources should make courts extremely wary about questioning legislative and governmental choices in such areas.

75 As I have indicated, however, this issue does not arise here. For we are concerned in this case with whether or not the legislation amounts to discrimination of a kind similar to those enumerated in s. 15. It was conceded that the impugned legislation does distinguish the respondents from other persons on the basis of a personal characteristic which shares many similarities with those enumerated in s. 15. The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs.

76 Moreover, non-citizens are an example without parallel of a group of persons who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions. History reveals that Canada did not for many years resist the temptation of enacting legislation the animating rationale of which was to limit the number of persons entering into certain employment. Discrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin, which are listed in s. 15. Professor Ivan L. Head traces the history of this intolerance in Canada, from early common law restrictions on inheritance and landowning to more modern developments: see "The Stranger in Our Midst: A Sketch of the Legal Status of the Alien in Canada", [1964] Can. Yearbook of International Law 107. Especially germane to this issue are the many instances Professor Head recites of provincial legislation aimed at reducing the opportunities available to aliens in the workplace (pp. 127-28). Since some impediment to these strategies existed by reason of the federal legislative power over naturalization and aliens (see *Union Colliery Co. of B.C. Ltd. v. Bryden*, [1899] A.C. 580 (P.C.)), the provinces had recourse to a number of devices to achieve its objectives. Thus, as Head points out at p. 128, "inclusion on the voter's list became a prerequisite for all sorts of economic activity: for admission to professional societies, for obtaining land logger's licences; for obtaining a beer licence". Restrictions regarding professions and trades were not limited to the legal profession; they extended to pharmacists, optometrists, bankers and others.

77 As Professor Head observes, the nation has gained maturity in this area and legislation aimed at creating "closed-door types of labour legislation" respecting aliens has tended to disappear. Here there was no allegation that the purpose of the legislation was based on discriminatory considerations; the argument centred rather around the adverse effects of

the legislation. There is no real dispute that such adverse effects exist. The trial judge [[1986] 1 W.W.R. 252, 66 B.C.L.R. 363, 22 D.L.R. (4th) 9], Taylor J., set forth a number of situations, and there are certainly others, where this legislation could detrimentally affect a permanent resident of Canada who has not yet attained citizenship, the group which would normally be affected by the legislation. It can seriously delay them, frequently as they await the period necessary to acquire citizenship, in entering into the profession of their choice, a matter which, of course, may have important long-term implications for their future careers.

78 There is no question that citizenship may, in some circumstances, be properly used as a defining characteristic for certain types of legitimate governmental objectives. I am sensitive to the fact that citizenship is a very special status that not only incorporates rights and duties but serves a highly important symbolic function as a badge identifying people as members of the Canadian polity. Nonetheless, it is, in general, irrelevant to the legitimate work of government in all but a limited number of areas. By and large, the use in legislation of citizenship as a basis for distinguishing between persons, here for the purpose of conditioning access to the practice of a profession, harbours the potential for undermining the essential or underlying values of a free and democratic society that are embodied in s. 15. Our nation has throughout its history drawn strength from the flow of people to our shores. Decisions unfairly premised on citizenship would be likely to "inhibit the sense of those who are discriminated against that Canadian society is not free or democratic as far as they are concerned and ... such persons are likely not to have faith in social and political institutions which enhance the participation of individuals and groups in society, or to have confidence that they can freely and without obstruction by the state pursue their and their families' hopes and expectations of vocational and personal development": *Kask v. Shimizu*, [1986] 4 W.W.R. 154 at 161, 44 Alta. L.R. (2d) 293, 28 D.L.R. (4th) 64, 69 A.R. 343 (Q.B.), per McDonald J.

79 While it cannot be said that citizenship is a characteristic which "bears no relation to ability to perform or contribute to society" (*Frontiero v. Richardson*, 411 U.S. 677 at 686, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973)), it certainly typically bears an attenuated sense of relevance to these. That is not to say that no legislative conditioning of benefits (for example) on the basis of citizenship is acceptable in the free and democratic society that is Canada, merely that legislation purporting to do so ought to be measured against the touchstone of our Constitution. It requires justification.

80 I turn then to a consideration of the justifiability, fairness or proportionality of the scheme. I agree with McIntyre J. that any such justification must be found under s. 1 of the Charter, essentially because, in matters involving infringements of fundamental rights, it is entirely appropriate that government sustain the constitutionality of its conduct. I am in general agreement with what he has to say about the manner in which legislation must be approached under the latter provision, in particular the need for a proportionality test involving a sensitive balancing of many factors in weighing the legislative objective. If I have any qualifications to make, it is that I prefer to think in terms of a single test for s. 1, but one that is to be applied to vastly differing situations with the flexibility and realism inherent in the word "reasonable" mandated by the Constitution.

81 The degree to which a free and democratic society such as Canada should tolerate differentiation based on personal characteristics cannot be ascertained by an easy calculus. There will rarely, if ever, be a perfect congruence between means and ends, save where legislation has discriminatory purposes. The matter must, as earlier cases have held, involve a test of proportionality. In cases of this kind, the test must be approached in a flexible manner. The analysis should be functional, focusing on the character of the classification in question, the constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest.

82 With deference, however, I am unable to agree with McIntyre J.'s application of these principles to the present case. I therefore turn to the task of balancing the objectives sought to be accomplished by the legislation against the means sought to achieve that objective. On this issue (though she performed the task under s. 15), I largely share the views expressed by McLachlin J.A. (now C.J.S.C.) in the Court of Appeal: see [1986] 4 W.W.R. 242, 2 B.C.L.R. (2d) 305, 27 D.L.R. (4th) 600.

83 While there is no evidence on this point, the Attorney General offers three purposes sought to be attained by the legislation. These are:

84 1. Citizenship ensures a familiarity with Canadian institutions and customs;

85 2. Citizenship implies a commitment to Canadian society;

86 3. Lawyers play a fundamental role in the Canadian system of democratic government and as such should be citizens.

87 With respect to the first touted objective, McLachlin J.A., speaking for the Court of Appeal, had this to say at p. 612:

Citizenship does not ensure familiarity with Canadian institutions and customs. Only citizens who are not natural-born Canadians are required to have resided in Canada for a period of time. Natural-born Canadians may reside in whatever country they wish and still retain their citizenship. In short, citizenship offers no assurance that a person is conscious of the fundamental traditions and rights of our society. The requirement of citizenship is not an effective means of ensuring that the persons admitted to the bar are familiar with this country's institutions and customs: see *Re Dickenson and Law Society of Alberta* (1978), 84 D.L.R. (3d) 189 at p. 195 ...

I agree. As Robert L. Lenoir in his article "Citizenship as a Requirement for the Practice of Law in Ontario" (1981), 13 Ottawa L. Rev. 527, put it at p. 534: "It should not be supposed that any missing 'necessary tradition' will simply be acquired immediately upon receipt of citizenship papers".

88 One can understand the law society's argument that while the citizenship requirement does not ensure familiarity with Canada or its laws, "There can be no doubt 'it helps'". But such a familiarity really usually arises from residence in Canada or close contact with relatives. At all events, the simple fact, in my view, is that far less intrusive means exist to ensure such knowledge, if this is indeed the goal. Training in Canadian law and institutions is an obvious answer. As Lenoir, at p. 534, states:

Another reason suggested in support of a nationality requirement is that only citizens from Commonwealth countries come with a tradition and knowledge which will fit into Ontario's system. If an individual does not possess a proper knowledge of law, this should be indicated in law school and bar admission course work.

As counsel for the respondents observes, someone who is wholly unfamiliar and incapable of dealing with the circumstances and customs of Canadian society might not be able to pass the examinations required of him by the law society. In respect of a lawyer's abilities, it is notable that the law society requires additional educational requirements of foreign-trained lawyers, whether they are Canadian citizens or not. In the present case, the respondent Andrews passed all the examinations required of Canadian-trained lawyers as well as the additional examinations required of foreign-trained lawyers.

89 Similar logic applies with respect to the second proffered objective, that of ensuring commitment to Canadian society. On this the Court of Appeal had this to say at pp. 612-13:

The second reason for the distinction — that citizenship implies a commitment to Canadian society — fares little better upon close examination. Only those citizens who are not natural-born Canadians can be said to have made a conscious choice to establish themselves here permanently and to opt for full participation in the Canadian social process, including the right to vote and run for public office. While no doubt most citizens, natural-born or otherwise, are committed to Canadian society, citizenship does not ensure that that is the case. Conversely, non-citizens may be deeply committed to our country. Moreover, the requirement of commitment to our country is arguably satisfied by the oath of allegiance which lawyers are required to take. An alien may swear that oath. In any event an alien may owe allegiance to the Crown if he is resident within this country, even if he does not take the oath of allegiance: *Re Dickenson and Law Society of Alberta*.

90 It is to my mind clear that were these the sole objectives, the means chosen, namely, the restriction of access to the profession to citizens, would quite simply be unnecessarily, and so impermissibly, overinclusive.

91 As I noted earlier, the people principally affected by this are permanent residents of Canada. Many would have applied for citizenship, and the naturalization process would ensure the necessary familiarity and commitment to Canada. That less drastic methods for achieving these objectives are available is evident from the fact that some provincial law societies simply require a declaration of an intention to become a citizen. And even this could cause serious hardship in some cases where a person could lose his existing citizenship and incur important resulting disadvantages by acquiring Canadian citizenship unless the bar or the courts have a discretion to exempt a person from such requirement: see *Re Howard*, [1976] 1 N.S.W.L.R. 641 (C.A.). In truth, I think the familiarity and commitment to Canada alleged to be sought could be achieved by restricting admission to those who are Canadian citizens *or* who permanently reside in Canada. If we allow people to come to live in Canada, I cannot see why they should be treated differently from anyone else. Section 15 speaks of every individual. There will be exceptions no doubt, but these require the rigorous justification provided by s. 1.

92 It seems to me that the preceding objectives are, in this case, legitimate, but could easily be accomplished by means that would not impair a person's ability to practise law in the province to as great an extent. It is still an open question whether the right to earn a livelihood is a value constitutionally protected under the Charter, perhaps under s. 7. But whether or not such constitutional protection exists, no one would dispute that the "right" to earn a livelihood is an interest of fundamental importance to the individuals affected, and as such should not lightly be overridden.

93 The third objective advanced by the Attorney General has more substance. It is that certain state activities should for both symbolic and practical reasons be confined to those who are full members of our political society. The Attorney General reduced his arguments regarding this objective to the following syllogism:

94 (a) persons who are involved in the processes or structure of government, broadly defined, should be citizens;

95 (b) lawyers are involved in the processes or structure of government;

96 (c) lawyers, therefore, should be citizens.

97 I do not quarrel with the first assertion as a general proposition. The Court of Appeal accepted it, noting that this rationale underlies the common requirement that legislators, voters, judges, police and senior public servants be citizens. However, it rejected the second proposition that lawyers play a vital role in the administration of law and justice and are themselves as much a part of the government processes as are judges, legislators and so on. It rejected the notion that the practice of law itself involved performing a state or government function. It stated at p. 614:

In this respect, the role of lawyers may be distinguished from that of legislators, judges, civil servants and policemen. *The practice of law is first and foremost a private profession.* Some lawyers work in the courts, some do not. Those who work in the courts may represent the Crown or act against it. It is true that all lawyers are officers of the court. That term, to my mind, implies allegiance and certain responsibilities to the institution of the court. But it does not mean that lawyers are part of the process of government.

It was urged before us that society accords lawyers special powers and privileges as members of the legal profession which ally them with the governmental process. However, the only privilege lawyers are given is the right to charge fees for representing clients. The power to issue writs, discover documents and subpoena witnesses is shared by every member of our society. No one suggests that a private person who exercises these powers on his own behalf is playing a role in the government of our country, nor that citizenship should be a prerequisite of so doing. The fact that lawyers do these things on behalf of others can offer no justification of the requirement that they be Canadian citizens. [emphasis added.]

98 I agree with this statement. It is only in the most unreal sense that it can be said that a lawyer working for a private client plays a role in the administration of justice that would require him or her to be a citizen in order to be allowed to participate therein. Obviously lawyers occupy a position of trust and responsibility in our society, but that is true of all professions, and the members of some of these, like that of chartered accountants, for instance, are privy to matters of the most serious import.

99 On a more mundane level, the essential purpose behind occupational licensing is to protect the public from unqualified practitioners. But as Lenoir points out (at p. 547), citizenship has not been shown to bear any correlation to one's professional or vocational competency or qualification. Like him, I see no sufficient additional dimension to the lawyer's function to insist on citizenship as a qualification for admission to this profession.

100 It is not without significance that a requirement of citizenship has not been found to be necessary to the practice of law in either the United States (see *Re Griffiths*, 413 U.S. 717, 37 L. Ed. 2d 910, 93 S. Ct. 2851 (1973)), or England (see Solicitors (Amendment) Act, 1974, 1974 (U.K.), c. 26, s. 1); see also *Re Howard*, supra, at p. 647. The doctrine of privileged communications was pressed into service, but that doctrine exists for the protection of the client. I fail to see what this has to do with the requirement of citizenship.

101 A requirement of citizenship would be acceptable if limited to Crown attorneys or lawyers directly employed by government and, therefore, involved in policy-making or administration, so that it could be said that the lawyer was an architect or instrumentality of government policy: see *Reyners v. Belgium*, [1974] 2 C.M.L.R. 305, [1974] E.C.R. 631 (European Ct.). But ordinary lawyers are not privy to government information any more than, say, accountants, and there are rules to restrict lawyers from obtaining confidential governmental information.

102 I would conclude that although the governmental objectives, as stated, may be defensible, it is simply misplaced vis-à-vis the legal profession as a whole. However, even accepting the legitimacy and importance of the legislative objectives, the legislation exacts too high a price on persons wishing to practise law in that it may deprive them, albeit perhaps temporarily, of the "right" to pursue their calling.

103 I would, therefore, dismiss the appeal with costs. I would answer the first constitutional question in the affirmative and the second in the negative.

Appeal dismissed.

Footnotes

* Le Dain J. took no part in the judgment.

TAB 10

Most Negative Treatment: Check subsequent history and related treatments.

2011 SCC 12
Supreme Court of Canada

Withler v. Canada (Attorney General)

2011 CarswellBC 379, 2011 CarswellBC 380, 2011 SCC 12, [2011] 1 S.C.R. 396, [2011] 4 W.W.R. 383, [2011] B.C.W.L.D. 2259, [2011] B.C.W.L.D. 2425, [2011] B.C.W.L.D. 2426, [2011] S.C.J. No. 12, 15 B.C.L.R. (5th) 1, 199 A.C.W.S. (3d) 1130, 229 C.R.R. (2d) 329, 300 B.C.A.C. 120, 329 D.L.R. (4th) 193, 412 N.R. 149, 509 W.A.C. 120, 87 C.C.P.B. 161, J.E. 2011-461, D.T.E. 2011T-181

Hazel Ruth Withler and Joan Helen Fitzsimonds (Appellants) and Attorney General of Canada (Respondent) and Attorney General of Ontario and Women's Legal Education and Action Fund (Interveners)

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

Heard: March 17, 2010
Judgment: March 4, 2011
Docket: 33039

Proceedings: affirmed *Withler v. Canada (Attorney General)* (2008), 2008 CarswellBC 2750, 173 A.C.W.S. (3d) 1223, 263 B.C.A.C. 257, [2009] B.C.W.L.D. 706, [2009] B.C.W.L.D. 707, [2009] B.C.W.L.D. 806, [2009] B.C.W.L.D. 807, 72 C.C.P.B. 161, 2008 C.E.B. & P.G.R. 8324, 183 C.R.R. (2d) 301, 302 D.L.R. (4th) 193, 443 W.A.C. 257, [2009] 3 W.W.R. 628, 87 B.C.L.R. (4th) 197 ((B.C.C.A.)); affirmed *Withler v. Canada (Attorney General)* (2006), 2006 C.E.B. & P.G.R. 8184, 2006 CarswellBC 86, 2006 BCSC 101, 137 C.R.R. (2d) 224, 51 C.C.P.B. 19 ((B.C. S.C.))

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Daphne Gilbert, Joanna Radbord, Joanna Birenbaum for Intervener, Women's Legal Education and Action Fund

Subject: Constitutional; Corporate and Commercial; Civil Practice and Procedure; Human Rights

Related Abridgment Classifications

Constitutional law

[XI Charter of Rights and Freedoms](#)

[XI.3 Nature of rights and freedoms](#)

[XI.3.h Equality rights](#)

[XI.3.h.i General principles](#)

Pensions

[I Private pension plans](#)

[I.2 Payment of pension](#)

[I.2.c Effect of Charter of Rights and Freedoms](#)

Pensions

[III Public service superannuation](#)

[III.3 Military pensions](#)

[III.3.c Miscellaneous](#)

Headnote

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Equality rights — General principles

Section 47(1) of Public Service Superannuation Act ("PSSA") and s. 60(1) of Canadian Forces Superannuation Act ("CFSA") both provide supplementary death benefit ("SDB") which decreases upon age of participant at his or her death ("reduction provisions") — Recipients of SDB benefits under PSSA and CFSA to whom reduction provisions applied brought actions against Crown for declaration that reduction provisions contravene s. 15(1) of Canadian Charter of Rights and Freedoms on basis of age discrimination — Trial judge dismissed actions and recipients appealed, claiming that trial judge erred in failing to properly analyze contextual factors and in consistently applying wrong comparator group — Appeal was dismissed — Recipients appealed — Appeal dismissed — Reasons of trial judge and majority of Court of Appeal disclosed no error in methodology — Nor was there any error in assessment of evidence — Trial judge therefore found that recipients had failed to prove that, as group, they suffered from pre-existing disadvantage, stereotyping, prejudice or vulnerability based on their economic well-being — No basis on which to fault trial judge's contextual analysis and its affirmation by majority of Court of Appeal.

Pensions --- Payment of pension — Effect of Charter of Rights and Freedoms

Section 47(1) of Public Service Superannuation Act ("PSSA") and s. 60(1) of Canadian Forces Superannuation Act ("CFSA") both provide supplementary death benefit ("SDB") which decreases upon age of participant at his or her death ("reduction provisions") — Recipients of SDB benefits under PSSA and CFSA to whom reduction provisions applied brought actions against Crown for declaration that reduction provisions contravene s. 15(1) of Canadian Charter of Rights and Freedoms on basis of age discrimination — Trial judge dismissed actions and recipients appealed, claiming that trial judge erred in failing to properly analyze contextual factors and in consistently applying wrong comparator group — Appeal was dismissed — Recipients appealed — Appeal dismissed — Reasons of trial judge and majority of Court of Appeal disclosed no error in methodology — Nor was there any error in assessment of evidence — Trial judge therefore found that recipients had failed to prove that, as group, they suffered from pre-existing disadvantage, stereotyping, prejudice or vulnerability based on their economic well-being — No basis on which to fault trial judge's contextual analysis and its affirmation by majority of Court of Appeal.

Pensions --- Military pensions — Miscellaneous

Section 47(1) of Public Service Superannuation Act ("PSSA") and s. 60(1) of Canadian Forces Superannuation Act ("CFSA") both provide supplementary death benefit ("SDB") which decreases upon age of participant at his or her death ("reduction provisions") — Recipients of SDB benefits under PSSA and CFSA to whom reduction provisions applied brought actions against Crown for declaration that reduction provisions contravene s. 15(1) of Canadian Charter of Rights and Freedoms on basis of age discrimination — Trial judge dismissed actions and recipients appealed, claiming that trial judge erred in failing to properly analyze contextual factors and in consistently applying wrong comparator group — Appeal was dismissed — Recipients appealed — Appeal dismissed — Reasons of trial judge and majority of Court of Appeal disclosed no error in methodology — Nor was there any error in assessment of evidence — Trial judge therefore found that recipients had failed to prove that, as group, they suffered from pre-existing disadvantage, stereotyping, prejudice or vulnerability based on their economic well-being — No basis on which to fault trial judge's contextual analysis and its affirmation by majority of Court of Appeal.

Droit constitutionnel --- Charte des droits et libertés — Nature des droits et libertés — Droit à l'égalité — Principes généraux

Article 47(1) de la Loi sur la pension dans la fonction publique (« LPFP ») et l'art. 60(1) de la Loi sur la pension de retraite des Forces canadiennes (« LPRFC ») prévoient toutes les deux des prestations supplémentaires de décès (« PSD ») qui décroissent avec l'âge du participant au moment de son décès (« dispositions concernant la réduction ») — Prestataires des PSD sous les régimes de la LPFP et de la LPRFC à l'égard desquels les dispositions concernant la réduction s'appliquaient ont déposé des actions à l'encontre du gouvernement visant à faire déclarer que les dispositions concernant la réduction contrevenaient à l'art. 15(1) de la Charte canadienne des droits et libertés en ce qu'elles constituaient une discrimination fondée sur l'âge — Juge de première instance a rejeté les actions et les prestataires ont interjeté appel, faisant valoir que la juge de première instance avait commis une erreur en ne procédant pas à un examen adéquat des facteurs contextuels et en utilisant constamment un groupe de comparaison inapproprié — Appel a été rejeté — Prestataires ont formé un pourvoi — Pourvoi rejeté — Il n'y avait aucune erreur de méthodologie dans les motifs de la juge de première instance et des juges majoritaires de la Cour d'appel — Il n'y avait pas non plus d'erreur dans l'appréciation de la preuve — Juge de première instance a ainsi conclu que les prestataires n'avaient pas prouvé la préexistence d'un désavantage, de

stéréotypes, de préjugés ou d'une situation de vulnérabilité découlant de leur situation économique, qu'ils subiraient en tant que groupe — Il n'existait aucun motif de désapprouver l'analyse contextuelle effectuée par la juge de première instance ni sa confirmation par la majorité des juges de la Cour d'appel.

Régimes de retraite --- Paiement de la rente — Effet de la Charte des droits et libertés

Article 47(1) de la Loi sur la pension dans la fonction publique (« LPFP ») et l'art. 60(1) de la Loi sur la pension de retraite des Forces canadiennes (« LPRFC ») prévoient toutes les deux des prestations supplémentaires de décès (« PSD ») qui décroissent avec l'âge du participant au moment de son décès (« dispositions concernant la réduction ») — Prestataires des PSD sous les régimes de la LPFP et de la LPRFC à l'égard desquels les dispositions concernant la réduction s'appliquaient ont déposé des actions à l'encontre du gouvernement visant à faire déclarer que les dispositions concernant la réduction contrevenaient à l'art. 15(1) de la Charte canadienne des droits et libertés en ce qu'elles constituaient une discrimination fondée sur l'âge — Juge de première instance a rejeté les actions et les prestataires ont interjeté appel, faisant valoir que la juge de première instance avait commis une erreur en ne procédant pas à un examen adéquat des facteurs contextuels et en utilisant constamment un groupe de comparaison inapproprié — Appel a été rejeté — Prestataires ont formé un pourvoi — Pourvoi rejeté — Il n'y avait aucune erreur de méthodologie dans les motifs de la juge de première instance et des juges majoritaires de la Cour d'appel — Il n'y avait pas non plus d'erreur dans l'appréciation de la preuve — Juge de première instance a ainsi conclu que les prestataires n'avaient pas prouvé la préexistence d'un désavantage, de stéréotypes, de préjugés ou d'une situation de vulnérabilité découlant de leur situation économique, qu'ils subiraient en tant que groupe — Il n'existait aucun motif de désapprouver l'analyse contextuelle effectuée par la juge de première instance ni sa confirmation par la majorité des juges de la Cour d'appel.

Régimes de retraite --- Pensions militaires — Divers

Article 47(1) de la Loi sur la pension dans la fonction publique (« LPFP ») et l'art. 60(1) de la Loi sur la pension de retraite des Forces canadiennes (« LPRFC ») prévoient toutes les deux des prestations supplémentaires de décès (« PSD ») qui décroissent avec l'âge du participant au moment de son décès (« dispositions concernant la réduction ») — Prestataires des PSD sous les régimes de la LPFP et de la LPRFC à l'égard desquels les dispositions concernant la réduction s'appliquaient ont déposé des actions à l'encontre du gouvernement visant à faire déclarer que les dispositions concernant la réduction contrevenaient à l'art. 15(1) de la Charte canadienne des droits et libertés en ce qu'elles constituaient une discrimination fondée sur l'âge — Juge de première instance a rejeté les actions et les prestataires ont interjeté appel, faisant valoir que la juge de première instance avait commis une erreur en ne procédant pas à un examen adéquat des facteurs contextuels et en utilisant constamment un groupe de comparaison inapproprié — Appel a été rejeté — Prestataires ont formé un pourvoi — Pourvoi rejeté — Il n'y avait aucune erreur de méthodologie dans les motifs de la juge de première instance et des juges majoritaires de la Cour d'appel — Il n'y avait pas non plus d'erreur dans l'appréciation de la preuve — Juge de première instance a ainsi conclu que les prestataires n'avaient pas prouvé la préexistence d'un désavantage, de stéréotypes, de préjugés ou d'une situation de vulnérabilité découlant de leur situation économique, qu'ils subiraient en tant que groupe — Il n'existait aucun motif de désapprouver l'analyse contextuelle effectuée par la juge de première instance ni sa confirmation par la majorité des juges de la Cour d'appel.

Section 47(1) of the Public Service Superannuation Act ("PSSA") and s. 60(1) of the Canadian Forces Superannuation Act ("CFSA") both provide a supplementary death benefit ("SDB") which decreases upon the age of the participant at his or her death ("reduction provisions"). Recipients of the SDB benefits under the PSSA and CFSA to whom reduction provisions applied brought actions against the Crown for a declaration that the reduction provisions contravened s. 15(1) of the Canadian Charter of Rights and Freedoms on the basis of age discrimination.

The trial judge dismissed the actions and the recipients appealed, claiming that the trial judge erred in failing to properly analyze contextual factors and in consistently applying the wrong comparator group.

The appeal was dismissed. The recipients appealed.

Held: The appeal was dismissed.

Per McLachlin C.J.C., Abella J. (Binnie, LeBel, Deschamps, Fish, Charron, Rothstein, Cromwell JJ. concurring): The reasons of the trial judge and majority of the Court of Appeal disclosed no error in methodology. Nor was there any error in the assessment of the evidence.

The trial judge therefore found that the recipients had failed to prove that, as a group, they suffered from a pre-existing disadvantage, stereotyping, prejudice or vulnerability based on their economic well-being. There was no basis on which to fault the trial judge's contextual analysis and its affirmation by the majority of the Court of Appeal.

L'article 47(1) de la Loi sur la pension dans la fonction publique (« LPFP ») et l'art. 60(1) de la Loi sur la pension de retraite des Forces canadiennes (« LPRFC ») prévoient toutes les deux des prestations supplémentaires de décès (« PSD ») qui décroissent avec l'âge du participant au moment de son décès (« dispositions concernant la réduction »). Les prestataires des PSD sous les régimes de la LPFP et de la LPRFC à l'égard desquels les dispositions concernant la réduction s'appliquaient ont déposé des actions à l'encontre du gouvernement visant à faire déclarer que les dispositions concernant la réduction contrevenaient à l'art. 15(1) de la Charte canadienne des droits et libertés en ce qu'elles constituaient une discrimination fondée sur l'âge.

La juge de première instance a rejeté les actions et les prestataires ont interjeté appel, faisant valoir que la juge de première instance avait commis une erreur en ne procédant pas à un examen adéquat des facteurs contextuels et en utilisant constamment un groupe de comparaison inapproprié.

L'appel a été rejeté. Les prestataires ont formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

McLachlin, J.C.C., Abella, J. (Binnie, LeBel, Deschamps, Fish, Charron, Rothstein, Cromwell, JJ., souscrivant à leur opinion) : Il n'y avait aucune erreur de méthodologie dans les motifs de la juge de première instance et des juges majoritaires de la Cour d'appel. Il n'y avait pas non plus d'erreur dans l'appréciation de la preuve.

La juge de première instance a ainsi conclu que les prestataires n'avaient pas prouvé la préexistence d'un désavantage, de stéréotypes, de préjugés ou d'une situation de vulnérabilité découlant de leur situation économique, qu'ils subiraient en tant que groupe. Il n'existait aucun motif de désapprouver l'analyse contextuelle effectuée par la juge de première instance ni sa confirmation par la majorité des juges de la Cour d'appel.

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Ardoch Algonquin First Nation & Allies v. Ontario (2000), 255 N.R. 1, (sub nom. *Lovelace v. Ontario*) 188 D.L.R. (4th) 193, (sub nom. *Lovelace v. Ontario*) [2000] 4 C.N.L.R. 145, 134 O.A.C. 201, (sub nom. *Lovelace v. Ontario*) 75 C.R.R. (2d) 189, (sub nom. *Lovelace v. Ontario*) [2000] 1 S.C.R. 950, 2000 SCC 37, 2000 CarswellOnt 2460, 2000 CarswellOnt 2461, (sub nom. *Lovelace v. Ontario*) 48 O.R. (3d) 735 (headnote only) (S.C.C.) — considered

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s. 16 — referred to

APPEAL by recipients from judgment reported at *Withler v. Canada (Attorney General)* (2008), 87 B.C.L.R. (4th) 197, [2009] 3 W.W.R. 628, 72 C.C.P.B. 161, 2008 BCCA 539, 2008 CarswellBC 2750, 443 W.A.C. 257, 302 D.L.R. (4th) 193, 263 B.C.A.C. 257, 183 C.R.R. (2d) 301, 2008 C.E.B. & P.G.R. 8324 (B.C. C.A.), which upheld trial judge's decision to dismiss actions.

POURVOI des prestataires à l'encontre d'un jugement publié à *Withler v. Canada (Attorney General)* (2008), 87 B.C.L.R. (4th) 197, [2009] 3 W.W.R. 628, 72 C.C.P.B. 161, 2008 BCCA 539, 2008 CarswellBC 2750, 443 W.A.C. 257, 302 D.L.R. (4th) 193, 263 B.C.A.C. 257, 183 C.R.R. (2d) 301, 2008 C.E.B. & P.G.R. 8324 (B.C. C.A.), ayant confirmé la décision de la juge de première instance de rejeter les actions.

McLachlin C.J.C., Abella J.:

I. Introduction

1 The plaintiffs are widows whose federal supplementary death benefits were reduced because of the age of their husbands at the time of death. They argue that the legislation reducing their benefits discriminates on the basis of age, violating the equality guarantee in s. 15(1) of the *Canadian Charter of Rights and Freedoms*. We agree with the trial judge and the majority of the Court of Appeal that it does not.

2 To resolve this appeal, we must consider comparison and the role of "mirror" comparator groups under s. 15(1), an issue that divided the courts below. In our view, the central issue in this and other s. 15(1) cases is whether the impugned law violates the animating norm of s. 15(1), substantive equality: *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.). To determine whether the law violates this norm, the matter must be considered in the full context of the case, including the law's real impact on the claimants and members of the group to which they belong. The central s. 15(1) concern is substantive, not formal, equality. A formal equality analysis based on mirror comparator groups can be detrimental to the analysis. Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the "proper" comparator group. At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?

3 Where, as here, the impugned distinction is the denial of a benefit that is part of a statutory benefit scheme that applies to a large number of people, the discrimination assessment must focus on the object of the measure alleged to be discriminatory in the context of the broader legislative scheme, taking into account the universe of potential beneficiaries. The question is whether, having regard to all relevant factors, the impugned measure perpetuates disadvantage or stereotypes the claimant group, contrary to s. 15(1) of the *Charter*.

II. The Legislation

4 The appellants challenge the constitutionality of benefit provisions of the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36, and the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17. These two statutes provide federal civil servants and members of the Canadian Forces, and their families with a suite of workrelated benefits both during employment and after retirement, including a package of survivor benefits provided to the surviving spouse and dependants of a plan member after his or her death.

5 The package of survivor benefits offered under both the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act* includes a "supplementary death benefit". This benefit is akin to life insurance. It provides for a lump sum payment to be made to a plan member's designated beneficiary at the time of the member's death. For younger plan members, the purpose of the supplementary death benefit is to insure against unexpected death at a time when the deceased member's surviving spouse would be unprotected by a pension or entitled to limited pension funds. For older members, the purpose of the supplementary death benefit is to assist surviving spouses with the costs of the plan member's last illness and death. This death benefit is not intended to be a long-term income stream for the spouses of older plan members.

6 Under both Acts, the amount of the supplementary death benefit is equal to twice the plan member's salary at the time of death or termination of employment. Each Act, however, contains "Reduction Provisions" which take effect when the plan member reaches a certain age. For civil servants, the value of the supplementary death benefit is reduced by ten percent for every year by which the plan member exceeds the age of 65 (*Public Service Superannuation Act*, s. 47(1)). For members of the armed forces, the value of the benefit is reduced by ten percent for every year by which the plan member exceeds age 60 (*Canadian Forces Superannuation Act*, s. 60(1)). It is these Reduction Provisions that are at issue in this appeal.

7 Most federal civil servants and members of the armed forces must participate in the supplementary death benefit plan while they are employed, and may, at their option, participate in the plan after retirement. The average retirement age of civil servants is 58 or 59, and the average retirement age for members of the armed forces is 45, after 25 years of service.

8 The supplementary death benefit is only one part of a package of survivor benefits available under the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act*. The package of survivor benefits also includes a survivor's pension (a defined benefit plan, indexed, adjusted annually and backed by the solvency of the federal government, paying 50 percent of the plan member's unreduced pension); a health care plan (which reimburses 80 percent of a surviving spouse's extended health care expenses); a dental care plan (which covers a tariff amount for a surviving spouse's dental procedures); a children's allowance (which pays a plan member's surviving spouse one-fifth of the member's pension if the plan member died leaving minor children); and a student's allowance (payable to the children aged 18 to 25 of a deceased plan member while they are enrolled in full-time post-secondary education).

9 Participants in the civil service and Canadian Forces pension and benefits plans, along with their spouses, are also eligible for benefits available to all Canadians, such as those provided for under the *Canada Pension Plan*, R.S.C. 1985, c. C-8.

III. The Claims

10 The appellants, Hazel Ruth Withler and Joan Helen Fitzsimonds, are the representative plaintiffs in two class actions. They contend that the Reduction Provisions discriminate on the basis of age contrary to s. 15(1) of the *Charter* and are not justified under s. 1. They seek a declaration that the Reduction Provisions infringe s. 15(1) of the *Charter* and are therefore of no force or effect. They also seek a monetary judgment for the amount by which their supplementary death benefits were reduced by virtue of the Reduction Provisions. According to actuarial evidence presented at trial, the monetary judgments sought amounted to \$2,308,000,000 in the civil service action and \$285,000,000 in the armed forces action.

11 The class in each action is comprised of the surviving spouses of former federal government employees or members of the Canadian Forces who died between April 17, 1985 (when s. 15 of the *Charter* came into force) and November 2, 2001 (when the class proceedings were certified). Each class member received a reduced supplementary death benefit by operation of the Reduction Provisions.

12 Within each plaintiff class, the level of economic well-being varies. Each class member, however, receives a survivor's pension and each is ineligible for the federal government's guaranteed income supplement because his or her income is too high.

IV. The Arguments

13 Ms. Withler and Ms. Fitzsimonds argue that the Reduction Provisions create distinctions and impose disadvantages based on age or grounds analogous to age, contrary to s. 15(1) of the *Charter*, which provides:

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.

14 The claimants acknowledge that statutory age-based distinctions may be valid if the age chosen is reasonably related to the statute's legislative goal. They argue, however, that the Reduction Provisions are wholly unrelated to any legitimate legislative goal. It is arbitrary, they contend, to reduce the supplementary death benefit on the basis of age because most, if not all, persons over 65 (or 60) need the supplementary death benefit, and that need increases over time. The claimants contend that the Reduction Provisions are based on an uninformed and inaccurate stereotype that the older one gets the less one needs financial assistance and that the Reduction Provisions do not correspond to their actual needs and circumstances. Finally, the claimants submit that the Reduction Provisions discriminate against them on the basis of age because they perpetuate the belief that as a person ages, he or she becomes less deserving of the benefit or worthy of the state's care and concern.

15 The Attorney General of Canada submits that there is no evidence that the age-based distinction set out in the Reduction Provisions perpetuates historical disadvantage, prejudice or stereotyping. The supplementary death benefit is, in its view, merely one component of a suite of benefits. The entire suite operates in tandem to provide a reasonable measure of protection for plan members and their families. The failure of the plans to meet the needs of all members at all times, the Attorney General submits, does not render the Reduction Provisions discriminatory.

V. Judicial History

16 The trial judge, Garson J., dismissed both class actions (2006 BCSC 101, 137 C.R.R. (2d) 224 (B.C. S.C.)). She found it difficult to identify an appropriate comparator group, because the claimant classes were composed of many different people in many different situations and economic circumstances. She reluctantly accepted the comparator group proposed by the claimants — civil servants and members of the armed forces who received an unreduced supplementary death benefit — as the basis for the analysis.

17 Garson J. went on to apply a contextual discrimination analysis, and concluded that the Reduction Provisions were not discriminatory:

The design of the whole benefit package is a balancing exercise that takes into account the whole population of civil servants, and members of the armed forces. It is integrated with all the other benefits and also balances the interests of the public to ensure that the civil service is treated equitably but not over generously. [para. 155]

18 When the Reduction Provisions were considered in relation to the entire benefit plan provided for by the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act*, they corresponded to the claimants' needs and circumstances. The legislative scheme as a whole accounted for each claimant's need for a continued income stream, as well as for life insurance coverage at the time of his or her spouse's death. The plans did not bear any of the hallmarks of discrimination and did not demean the claimants' dignity.

19 On appeal to the British Columbia Court of Appeal, Ryan J.A. (Newbury J.A. concurring) upheld the trial decision (2008 BCCA 539, 87 B.C.L.R. (4th) 197 (B.C. C.A.)). Like the trial judge, they saw the real issue as whether, viewing the case in its entire context, discrimination under s. 15(1) of the *Charter* had been established.

20 Ryan J.A. rejected the claimants' submission that the appropriate comparator group should be narrowed to consist only of surviving spouses who received both an unreduced supplementary death benefit and a survivor's pension. Narrowing the comparator group in this way would, in Ryan J.A.'s view, deprive the court of the ability to fully analyse whether the impugned legislative distinction was discriminatory. The proper comparator group was, as the trial judge had found, all recipients of an unreduced supplementary death benefit.

21 Ryan J.A. held that the trial judge had properly considered the discrimination claim with reference to the benefits package as a whole and correctly concluded that discrimination had not been made out. Finding no error of fact or law in the trial judge's reasoning, she dismissed the appeal, commenting:

This case demonstrates the difficulty that arises when one attempts to isolate for criticism a single aspect of a comprehensive insurance and pension package designed to benefit an employee's different needs over the course of his or her working life... The comprehensive plan, while not a perfect fit for each individual, did not meet the hallmarks of discrimination given that it was a broad-based scheme meant to cover the competing interests of the various age groups covered by the plan. [para. 181]

22 Rowles J.A., dissenting, would have allowed the appeal. In her view, the trial judge erred by failing to fully state and consistently apply the appropriate comparator group. Rowles J.A. accepted the claimants' submission that, pursuant to the mirror comparator approach, the appropriate comparator group was comprised of surviving spouses who both received an unreduced supplementary death benefit and were eligible for a survivor's pension. She cautioned that a "contextual analysis" did not invite a "broad, generalized examination of the facts in evidence", but rather entailed a "directed inquiry" focussed through the application of the four factors set out in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.).

23 Rowles J.A. concluded that seniors suffer from disadvantage and vulnerability based on their economic well-being, and that the Reduction Provisions did not account for the claimants' actual circumstances. The claimants clearly had greater needs than the younger surviving spouses, whose benefits were unreduced. Concluding that the Reduction Provisions served no ameliorative purpose and the interest affected was significant, Rowles J.A. held that a reasonable person in the claimants' circumstances would feel ignored and devalued on account of the Reduction Provisions. This amounted to an affront to the claimants' dignity and, consequently, a breach of s. 15(1) of the *Charter*, which was not justified under s. 1.

VI. Issues

24 The first issue is whether the appellants lack standing because their claim is based on the age of the deceased plan members rather than their own ages.

25 The second and main issue is whether the Reduction Provisions discriminate against the claimants. The appeal, viewed broadly, calls for clarification of the role of mirror comparator groups and comparison in the s. 15(1) analysis. More precisely, the issue is how an analysis under s. 15(1) is to proceed where the impugned law is part of a wide-reaching legislative scheme of government benefits.

VII. Analysis

A. Standing

26 The Attorney General has asserted throughout that the appellants lack standing because their claim is based on the age of the deceased plan members rather than their own age. Only those who suffer discrimination may bring a s.

15 claim, and in this case, it is the age of the plan member, not the surviving spouse, which is the basis for differential treatment. The Attorney General submits that this is not an instance where the legislation would be insulated from *Charter* scrutiny by denying the appellants standing. A plan member who has reached the age at which he or she is affected by the Reduction Provisions would have standing to bring a challenge.

27 The majority of the Court of Appeal chose not to address standing, given its conclusion on the substantive issue. Because we agree with the trial judge and the majority of the Court of Appeal that there was no discrimination, it is technically unnecessary to decide the standing issue. That said, we find the trial judge's reasoning generally persuasive.

28 Garson J. concluded, "in this specific case, where the target of the impugned provision is the plaintiff and it is the plaintiff who suffers the discrimination associated with her spouse's age, the plaintiff should have standing" (para. 92). The result is a just one, because in reality it is the plaintiffs who experience the impact of the Reduction Provisions. The Attorney General's approach ignores the fact that, as Garson J. found, the impugned provisions are targeted at benefits payable to the plan members' beneficiaries. As will be seen, it is the interests of the surviving spouses at various stages of the plan member's working life that the benefit provisions attempt to address. No one is more directly affected by the Reduction Provisions than the surviving spouses. It is highly unlikely that the challenge would be mounted by the plan members themselves. There is also, as the trial judge found, likely to be a strong correlation between the age of the plan member and the age of the surviving spouse. In these circumstances, the trial judge was correct to grant the appellants standing.

B. The Equality Claim

(1) Substantive Equality: Overview

29 Discrimination was defined by McIntyre J. in *Andrews*, as follows:

... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. [pp. 174-75]

(See also *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 (S.C.C.), at para. 17; *Ermineskin Indian Band & Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222 (S.C.C.), at para. 188; *Manitoba (Director of Child & Family Services) v. C. (A.)*, 2009 SCC 30, [2009] 2 S.C.R. 181 (S.C.C.), at para. 109; *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37, [2009] 2 S.C.R. 567 (S.C.C.), at para. 106.)

30 The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (1) does the law create a distinction that is based on an enumerated or analogous ground? and (2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (See *Kapp*, at para. 17.)

31 The two steps reflect the fact that not all distinctions are, in and of themselves, contrary to s. 15(1) of the *Charter* (*Andrews*; *Law*; *Ermineskin Indian Band*, at para. 188). Equality is not about sameness and s. 15(1) does not protect a right to identical treatment. Rather, it protects every person's equal right to be free from discrimination. Accordingly, in order to establish a violation of s. 15(1), a person "must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory" (*Andrews*, at p. 182; *Ermineskin Indian Band*, at para. 188; *Kapp*, at para. 28).

32 McIntyre J. viewed discrimination through the lens of two concepts: (a) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous

grounds; and (b) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics (*Andrews*; *Kapp*, at para. 18).

33 The first step in the s. 15(1) analysis ensures that the courts address only those distinctions that were intended to be prohibited by the *Charter*. In *Andrews*, it was held that s. 15(1) protected only against distinctions made on the basis of the enumerated grounds or grounds analogous to them. An analogous ground is one based on "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity": *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 (S.C.C.), at para. 13. Grounds including sexual orientation, marital status, and citizenship have been recognized as analogous grounds of discrimination.

34 However, a distinction based on an enumerated or analogous ground is not by itself sufficient to found a violation of s. 15(1). At the second step, it must be shown that the law has a discriminatory impact in terms of prejudicing or stereotyping in the sense expressed in *Andrews*.

35 The first way that substantive inequality, or discrimination, may be established is by showing that the impugned law, in purpose or effect, perpetuates prejudice or disadvantage to members of a group on the basis of personal characteristics within s. 15(1). Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. Thus judges have noted that historic disadvantage is often linked to s. 15 discrimination. In *R. v. Turpin*, [1989] 1 S.C.R. 1296 (S.C.C.), for example, Wilson J. identified the purposes of s. 15 as "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society" (p. 1333). See also *Haig v. R.*, [1993] 2 S.C.R. 995 (S.C.C.), at pp. 1043-44; *Andrews*, at pp. 151-53, *per* Wilson J.; *Law*, at paras. 40-51.

36 The second way that substantive inequality may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group. Typically, such stereotyping results in perpetuation of prejudice and disadvantage. However, it is conceivable that a group that has not historically experienced disadvantage may find itself the subject of conduct that, if permitted to continue, would create a discriminatory impact on members of the group. If it is shown that the impugned law imposes a disadvantage by stereotyping members of the group, s. 15 may be found to be violated even in the absence of proof of historic disadvantage.

37 Whether the s. 15 analysis focuses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.

38 Without attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered. Where the claim is that a law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances. Where the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis.

39 Both the inquiries into perpetuation of disadvantage and stereotyping are directed to ascertaining whether the law violates the requirement of substantive equality. Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The

result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.

40 It follows that a formal analysis based on comparison between the claimant group and a "similarly situated" group, does not assure a result that captures the wrong to which s. 15(1) is directed — the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.

(2) *The Role of Comparison Under Section 15: The Jurisprudence*

41 As McIntyre J. explained in *Andrews*, equality is a comparative concept, the condition of which may "only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises" (p. 164). However, McIntyre J. went on to state that formal comparison based on the logic of treating likes alike is not the goal of s. 15(1). What s. 15(1) requires is substantive, not formal equality.

42 Comparison, he explained, must be approached with caution; not all differences in treatment entail inequality, and identical treatment may produce "serious inequality" (p. 164). For that reason, McIntyre J. rejected a formalistic "treat likes alike" approach to equality under s. 15(1), contrasting substantive equality with formal equality.

43 The Court's s. 15(1) jurisprudence has consistently affirmed that the s. 15(1) inquiry must focus on substantive equality and must consider all context relevant to the claim at hand. The central and sustained thrust of the Court's s. 15(1) jurisprudence has been the need for a substantive contextual approach and a corresponding repudiation of a formalistic "treat likes alike" approach. This is evident from *Andrews*, through *Law*, to *Kapp*. When the Court has made comparisons with a similarly situated group, those comparisons have generally been accompanied by insistence that a valid s. 15(1) analysis must consider the full context of the claimant group's situation and the actual impact of the law on that situation. In *Ardoch Algonquin First Nation & Allies v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950 (S.C.C.) [hereinafter *Lovelace*], for example, Iacobucci J., for the Court, having found "that the whole context of the circumstances warrants a refinement in the identification of the comparator group", stated "I find that the s. 15(1) inquiry must proceed on the basis of comparing band and non-band aboriginal communities" (para. 64). However, he emphasized that "we must ask whether the impugned law, program or activity has a purpose or effect that is substantively discriminatory" (para. 53).

44 Against this background, we turn to the s. 15 cases. It is not necessary to canvass every decision. The thrust of the evolving jurisprudence on comparison and the use of mirror comparator groups is revealed by looking at a few pivotal cases.

45 The decisions in the decade that followed *Andrews* viewed comparison as an essential facet of s. 15, without proposing a rigid conception of how it should be approached. The jurisprudence was reviewed in *Law*. While *Law* referred to "relevant comparators", it also recognized that discrimination was the central concern and that the focus should be on the nature of the scheme and the appropriateness of the impugned distinctions having regard to the purpose of the scheme and the situation of the claimant. In the end, it was found that discrimination was negated by the purpose of the scheme of addressing long-term financial needs and ameliorating the situation of older spouses, and the particular circumstances of the claimant's situation as a younger spouse. The claimant neither suffered disadvantage which the pension scheme perpetuated, nor did the distinctions it drew between the younger and the older spouses stereotype or stigmatize young persons. As a result, discrimination was not made out. The Court in *Law* resolved the issue not by a formalistic comparison between particular groups, but by the contextual factors relevant to the case — the nature of the legislation and the situation of the claimant.

46 In *Gosselin c. Québec (Procureur général)*, 2002 SCC 84, [2002] 4 S.C.R. 429 (S.C.C.), a case concerned with assisted living benefits for younger Québécois, the analysis again focussed on the impact of the impugned law on the claimant group. In applying the s. 15(1) test, the Court stated:

... 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.

[Emphasis added; para. 28.]

47 *Law*, *Gosselin* and cases like them, while accepting that comparison is at the heart of a s. 15(1) equality analysis, emphasized a contextual inquiry into whether the impugned law perpetuated disadvantage or negative stereotyping.

48 As for mirror comparator groups, Binnie J., for the Court, summarized the problem in using them in *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357 (S.C.C.), at para. 18:

As is evident, a misidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis. In fact, the seemingly straightforward selection of a comparator group has proven to be the Achilles' heel in a variety of recent cases, including *Granovsky*, [2000 SCC 28, [2000] 1 S.C.R. 703], *Lovelace*, *supra*, and *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54. In other cases, the selection has sparked a good deal of judicial debate, as in *M. v. H.*, [1999] 2 S.C.R. 3, and *Gosselin*, *supra*. The correctness of the "comparator group" contended for by a claimant has thus been an important battleground in much of the s. 15(1) jurisprudence....

The issue in *Hodge* was whether a pension scheme that provided benefits to surviving married spouses (the suggested comparator group) discriminated by denying benefits to separated common law spouses.

49 Binnie J. stated that the comparator group is one that "mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought" except for the personal characteristic on which the claim was based. He concluded that the claimant group was not separated common law spouses, because the claimant was not a common law spouse at the time of the contributor's death: at the date of death she "was not in any sort of relationship at all with the deceased", but was merely a "former common law spouse". Binnie J. went on to justify this result in terms of the purpose of the legislation: "The purpose of the survivor's pension is to deal with the financial dependency of a couple who at the date of death are in a relationship with mutual legal rights and obligations". The claim was dismissed at the first step of the s. 15 analysis because the distinction drawn by the law was not based on the analogous ground of marital status. (See paras. 23, 40, 45 and 47.)

50 The Court again applied a mirror comparator group approach in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657 (S.C.C.). The claim was that the British Columbia government's failure to fund a particular program for autistic children violated s. 15. The Court, *per* McLachlin C.J., held that applying the relevant criteria, the appropriate comparison was with a non-disabled person, or a person suffering from a non-mental disability, who seeks and receives funding for a non-core therapy that is important to her health, is emergent, and has only recently been recognized. On these comparisons, no distinction based on disability was established. Again, the claim was dismissed at the first stage.

51 While the Court in *Hodge* and *Auton* applied a mirror comparator group approach, both judgments emphasized the need to consider contextual factors, in particular the correspondence between the purpose of the legislative scheme and the situation of the claimant group. And both asserted the need, in the final analysis, for the substantive inquiry mandated by *Andrews*. As McLachlin C.J. stated in *Auton*:

Whatever framework is used, an overly technical approach to s. 15(1) is to be avoided. In *Andrews*, *supra*, at pp. 168-69, McIntyre J. warned against adopting a narrow, formalistic analytical approach, and stressed the need to look at equality issues substantively and contextually. The Court must look at the reality of the situation and assess whether there has been discriminatory treatment having regard to the purpose of s. 15(1), which is to prevent the perpetuation of pre-existing disadvantage through unequal treatment. [para. 25]

52 The next key decision was in *Kapp*. While the case turned on s. 15(2), the Court, *per* McLachlin C.J. and Abella J. took the opportunity to summarize the law on s. 15(1) discrimination. Significantly, a mirror comparator group approach was not assigned a role in the analysis. After stressing the importance of the substantive equality approach mandated in *Andrews*, the justices wrote:

While acknowledging that equality is an inherently comparative concept. ..., McIntyre J. [in *Andrews*] warned against a sterile similarly situated test focussed on treating "likes" alike. An insistence on substantive equality has remained central to the Court's approach to equality claims. [para. 15]

53 After discussing *Law* and the contextual factors there proposed, McLachlin C.J. and Abella J. continued:

The analysis in a particular case, as *Law* itself recognizes, more usefully focuses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination.

[Emphasis added; para 23.]

54 In summary, the theme underlying virtually all of this Court's s. 15 decisions is that the Court in the final analysis must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the claimant's situation, the impugned distinction discriminates by perpetuating the group's disadvantage or by stereotyping the group.

(3) Concerns with the Use of Mirror Comparator Groups

55 This brings us to the critical jurisprudential issue in this appeal. Basing the s. 15(1) analysis on a comparison between the claimant group and a mirror comparator group has been criticized on the basis that a comparator group approach to s. 15(1) may substitute a formal "treat likes alike" analysis for the substantive equality analysis that has from the beginning been the focus of s. 15(1) jurisprudence. We agree with the concerns.

56 One concern is that the use of mirror comparator groups as an analytical tool may mean that the definition of the comparator group determines the analysis and the outcome (Peter Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at p. 55-34). As a result, factors going to discriminatio — whether the distinction creates a disadvantage or perpetuates prejudice or stereotyping — may be eliminated or marginalized.

57 Another concern is that the focus on a precisely corresponding, or "like" comparator group, becomes a search for sameness, rather than a search for disadvantage, again occluding the real issue — whether the law disadvantages the claimant or perpetuates a stigmatized view of the claimant.

58 A further concern is that allowing a mirror comparator group to determine the outcome overlooks the fact that a claimant may be impacted by many interwoven grounds of discrimination. Confining the analysis to a rigid comparison between the claimant and a group that mirrors it except for one characteristic may fail to account for more nuanced experiences of discrimination. Thus, in *Lovelace*, the Court contemplated multidimensional comparisons, pointing out that "locating the relevant comparison groups requires an examination of the subject-matter of the law, program or activity and its effects, as well as a full appreciation of the context" (para. 62). See also *Law*, at para. 57, and *Granovsky v. Canada (Minister of Employment & Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703 (S.C.C.), at para. 47. An individual or a group's experience of discrimination may not be discernible with reference to just one prohibited ground of discrimination, but only in reference to a conflux of factors, any one of which taken alone might not be sufficiently revelatory of how keenly the denial of a benefit or the imposition of a burden is felt (Daphne Gilbert, "Time To Regroup: Rethinking Section 15 of the Charter" (2003), 48 *McGill L.J.* 627; Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993), 19 *Queens L.J.* 179; Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001), 13 *C.J. W.L.* 37).

59 Finally, it has been argued that finding the "right" comparator group places an unfair burden on claimants (Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada DooMS Section 15" (2006), 24 *Windsor Y.B. Access Just.* 111, at p. 138). First, finding a mirror group may be impossible, as the essence of an individual or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison. As Margot Young warns:

If there is no counterpart in the experience or profile of those closer to the centre, the marginalization and dispossession of our most unequal will be missed. These cases will seem simple individual instances of personal failure, oddity or happenstance.

"Blissed Out: Section 15 at Twenty", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 45, at p. 63.

Second, it may be difficult to decide what characteristics must be "mirrored". Rational people may differ on what characteristics are relevant, as this case illustrates. The concern with claimants spending time and money in a pre-trial search for the appropriate comparator group is exacerbated by the possibility that trial judges may or may not accept the claimant's choice, and compounded by the fact that appeal courts may adopt a different comparator group later in the proceedings. When the appropriate comparator group is re-defined by a court, the claimant may be unable to establish his or her claim because the record was created in anticipation of comparison with a different group.

60 In summary, a mirror comparator group analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply. In all these ways, such an approach may fail to identify — and, indeed, thwart the identification of — the discrimination at which s. 15 is aimed. The question then is how comparison figures in the s. 15(1) analysis.

(4) *The Proper Approach to Comparison*

61 The substantive equality analysis under s. 15(1), as discussed earlier, proceeds in two stages: (i) Does the law create a distinction based on an enumerated or analogous ground? and (ii) Does the distinction create a disadvantage by perpetuating prejudice and stereotyping? (See *Kapp*, at para. 17.) Comparison plays a role throughout the analysis.

62 The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).

63 It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.

64 In some cases, identifying the distinction will be relatively straightforward, because a law will, on its face, make a distinction on the basis of an enumerated or analogous ground (direct discrimination). This will often occur in cases involving government benefits, as in *Law*, *Lovelace* and *Hodge*. In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination: that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds. Thus in *Granovsky*, the Court noted that "[t]he 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" (para. 43). In that kind of case, the claimant will have more work to do at the first step. Historical or sociological disadvantage may assist in demonstrating that the law imposes a burden

or denies a benefit to the claimant that is not imposed on or denied to others. The focus will be on the effect of the law and the situation of the claimant group.

65 The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances. At this step, comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping. The probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances. (See Andrea Wright, "Formulaic Comparisons: Stopping the *Charter* at the Statutory Human Rights Gate", in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006), 409, at p. 432; Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006), 5 *J.L. & Equality* 81; Pothier.)

66 The particular contextual factors relevant to the substantive equality inquiry at the second step will vary with the nature of the case. A rigid template risks consideration of irrelevant matters on the one hand, or overlooking relevant considerations on the other: *Kapp*. Factors such as those developed in *Law* — preexisting disadvantage, correspondence with actual characteristics, impact on other groups and the nature of the interest affected — may be helpful. However, they need not be expressly canvassed in every case in order to fully and properly determine whether a particular distinction is discriminatory (see *Ermineskin Indian Band; Manitoba (Director of Child & Family Services) v. C. (A.)*; *Hutterian Brethren of Wilson Colony v. Alberta*). Just as there will be cases where each and every factor need not be canvassed, so too will there be cases where factors not contemplated in *Law* will be pertinent to the analysis. At the end of the day all factors that are relevant to the analysis should be considered. As Wilson J. said in *Turpin*,

In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. [p. 1331]

67 In cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.

C. Application to the Facts

(1) Step One: An Adverse Distinction Based on an Enumerated or Analogous Ground

68 The first step in the s. 15(1) analysis is to determine whether the law, on its face or in its apparent effect, creates a distinction on the basis of an enumerated or analogous ground. In this case the question is whether the pension schemes at issue deny a benefit to the claimants that others receive. The answer to this question is clear in this case.

69 The Reduction Provisions reduce the supplementary death benefit payable to the surviving spouses of plan members over either 60 or 65 years of age. Surviving spouses of plan members who die before they reach the prescribed ages are not subject to the Reduction Provisions. This age-related reduction in pension legislation constitutes a distinction for purposes of s. 15(1): *Law*. It is obvious that a distinction based on an enumerated or analogous ground is established.

(2) Step Two: Substantive Inequality

70 The issue is whether the Reduction Provisions that reduce the supplementary death benefit for the beneficiaries of older deceased members violate s. 15(1)'s protection of substantive equality. The question is whether, having regard to the relevant context, the impugned law perpetuates disadvantage or prejudice, or stereotypes the claimant group.

71 In approaching this question, it is useful to identify at the outset the relevant contextual factors. As discussed above, a central consideration is the purpose of the impugned provision in the context of the broader pension scheme. It is in the nature of a pension benefit scheme that it is designed to benefit a number of groups in different circumstances and with different interests. The question is whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme. Perfect correspondence is not required. Allocation of resources and legislative policy goals may be matters to consider. The question is whether, having regard to these and any other relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping the group.

72 Writing before *Kapp* was decided, the trial judge in this case, Garson J., addressed the four contextual factors of *Law*, focussing mainly on pre-existing disadvantage or stereotyping, correspondence to actual circumstances and the nature and impact of the pension scheme at issue. Eschewing a formalistic analysis, she conducted a full contextual inquiry into whether these factors established discrimination in the sense discussed in *Andrews* and succeeding cases. While she reluctantly accepted the comparator group preferred by the claimants, she based the bulk of her analysis on a contextual examination of the relevant circumstances and the purpose and impact of the legislative scheme. Garson J.'s sense that comparing the claimants to just one other comparator group would be inadequate, is consistent with the view that where the impugned law is a broad-reaching benefits scheme, comparison with multiple other groups who together compose the universe of potential beneficiaries will be necessary.

73 Garson J. concluded that, when the Reduction Provisions were considered in relation to the entire benefit plan provided by the statutes, they corresponded to the claimants' needs and circumstances. She found that the legislative scheme as a whole accounted for each claimant's need for a continued income stream and life insurance coverage at the time of a spouse's death. In reaching this conclusion, she took into account that it is in the nature of a pension benefits scheme that it must balance different claimants' interests, and cannot be perfectly tailored to every individual's personal circumstances. The reality is that such schemes of necessity must make distinctions on general criteria, including age. The question is whether the criteria used, viewed contextually in light of the general needs of the group involved, perpetuate prejudice or disadvantage or negatively stereotype the individuals. As Ryan J.A. stated in the Court of Appeal:

This case demonstrates the difficulty that arises when one attempts to isolate for criticism a single aspect of a comprehensive insurance and pension package designed to benefit an employee's different needs over the course of his or her working life... The comprehensive plan, while not a perfect fit for each individual, did not meet the hallmarks of discrimination given that it was a broad-based scheme meant to cover the competing interests of the various age groups covered by the plan. [para. 181]

74 Garson J. correctly considered the supplementary death benefit in relation to other benefits that formed part of the comprehensive benefit scheme provided for by the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act* to determine whether the claimants had been denied an equal benefit of the law because the provisions failed to account for the claimants' actual circumstances. Isolating the Reduction Provisions from their legislative context would have led to an artificial understanding of whether an equal benefit of the law had, in fact, been denied. As its name presages, the supplementary death benefit is "supplementary" to other benefits. Consideration of the supplementary death benefit in isolation from the other benefits offered under the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act* would create a decontextualized, and therefore unrealistic, analysis. The plan is a benefit plan, in which people pool resources for the benefit of all. Such plans cannot be looked at without considering the full picture of what they do for all members.

75 Garson J. observed that the costs of last illness and death increase with age, particularly with each decade after 65. While the Public Service Health Care Plan does not cover 100 percent of the surviving spouses' health care costs, the record did not show that the claimant spouses were unable to meet funeral or last illness expenses. Indeed, Garson J. found that the evidence established that the surviving spouses were better equipped than most Canadians to meet their expenses.

76 Garson J. explained that the government's statutory benefit package must account for the whole population of civil servants, members of the armed forces and their families. Each part of the package is integrated with other benefits and balanced against the public interest. The package will often target the same people through different stages of their lives and careers. It attempts to meet the specific needs of the beneficiaries at particular moments in their lives. It applies horizontally to a large population with different needs at a given time, and vertically throughout the lives of the members of this population. For younger employees, it acts as group life insurance by insuring against unexpected death at a time when the surviving spouse would not be protected by a pension. For older employees, it is intended to assist with the costs of last illness and death. While it treats different beneficiaries differently depending on where they find themselves on this vertical scale, it is discriminatory neither in purpose nor effect.

77 Garson J. noted that the supplementary death benefit is not intended to be a long-term stream of income for older surviving spouses. Long-term income security is instead guaranteed by the survivor's pension, which is offered under both the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act*, coupled with the public service's health and dental plans. Any reduction of the supplementary death benefit paid to the spouses of older employees is therefore offset to some degree by the surviving spouse's survivor's pension. Indeed, each member of the claimant class receives a survivor's pension. When the supplementary death benefit is considered in the context of the other pensions and benefits to which the surviving spouses are entitled, therefore, it is clear that its purpose corresponds (albeit sometimes imperfectly) to the claimants' needs:

There is not perfect correspondence between the fact that costs of last illness increase with age and the reducing nature of the [supplementary death benefit], but when combined with the entire benefit package including pension, dental, prescription, and extended health as well as the other universal government programs ... the law does not fail to take into account the plaintiffs' actual situation. [para. 159]

The degree of correspondence between the differential treatment and the claimant group's reality confirms the absence of any negative or invidious stereotyping on the basis of age. The benefit scheme uses age-based rules that, overall, are effective in meeting the actual needs of the claimants, and in achieving important goals such as ensuring that retiree benefits are meaningful.

78 Having considered the factors relevant to a claim such as this, Garson J. concluded:

... the contextual analysis above proves that the Reduction Provisions operate within the context of a much larger employee benefit program which takes into account the need for a continuation of a stream of income and for coverage of medical expenses upon the death of the spouse.

The purpose of the [supplementary death benefit] varies somewhat as the covered employee ages. At the younger ages it provides a limited stream of income for unexpected death where the surviving spouse is not protected by a pension. At older ages the purpose of the [supplementary death benefit] is for the expenses associated with last illness and death. I conclude that the fact that the reduction means those costs may not be fully covered is not discrimination. It does not bear any of the hallmarks of discrimination as set out in the *Law v. Canada* analysis. I do not mean to say I am unsympathetic to the plight of the surviving widows who testified before me. Their loneliness and despair was quite apparent and understandable. The fact that they feel their loneliness and despair was compounded by the receipt of a reduced [supplementary death benefit] does not fulfill the requirement of a claim based on a breach of the *Charter*. In my view, it is within the prerogative of Parliament to enact legislation

that incorporated a plan of life insurance with the usual hallmarks of employee group insurance taking into account the competing interests of the various age groups and the public interest.

I conclude that the Reduction Provisions do not treat the plaintiffs unfairly, taking into account all of the circumstances of the legislative framework of the impugned law. [paras. 169-71]

79 She therefore found that "[t]he plaintiffs have failed to prove that, as a group, they suffer from pre-existing disadvantage, stereotyping, prejudice or vulnerability based on their economic well-being" (para. 158). We see no basis on which to fault the trial judge's contextual analysis and its affirmation by the majority of the Court of Appeal. However, we cannot conclude the matter without considering the dissent of Rowles J.A.

80 Rowles J.A. understood the authorities as mandating an analysis based on a comparator group that precisely corresponded to the claimant group except for the alleged ground of discrimination, the age of the spouse at the time of death. She accepted the claimants' submission that the appropriate comparator group, on this mirror comparator approach, was comprised of spouses who received both an unreduced supplementary death benefit and were eligible for a survivor's pension. On this basis, she concluded that the claimants' reduced benefit treated them unequally. Rowles J.A. acknowledged that this analysis did not constitute a full contextual analysis of the claimants' situation under the legislation. However, in her view, such an analysis would have been in error; a "contextual analysis" did not invite a "broad, generalized examination of the facts on evidence", but rather a "directed inquiry" (para. 58). This directed inquiry, based on a narrowly conceived comparator group, led to the conclusion that discrimination was established. Rowles J.A. went on to conclude that the Reduction Provisions were discriminatory because they provided reduced benefits to seniors, "[exacerbating] their income vulnerability, which is the very harm against which survivor's pensions are meant to protect" (para. 92).

81 In our respectful view, Rowles J.A.'s analysis illustrates how reliance on a mirror comparator group can occlude aspects of the full contextual analysis that s. 15(1) requires. It de-emphasized the operation of the Reduction Provisions on the death benefit in the context of the entire plan and lifetime needs of beneficiaries. The result was a failure to fully appreciate that the package of benefits, viewed as a whole and over time, does not impose or perpetuate discrimination. For the reasons discussed earlier, this approach cannot be sustained.

82 We therefore conclude that the reasons of the trial judge and the majority of the Court of Appeal disclose no error in methodology. Nor, in our view, was there error in their assessment of the evidence.

83 Since the Reduction Provisions do not violate s. 15(1), it is unnecessary to consider whether any infringement is justified under s. 1.

VIII. Conclusion

84 We would dismiss the appeal and answer the constitutional questions as follows:

Do s. 47(1) of the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36, and ss. 15 and 16 of the *Supplementary Death Benefits Regulations*, C.R.C., c. 1360, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

No.

If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

Do s. 60(1) of the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17, and s. 52 of the *Canadian Forces Superannuation Regulations*, C.R.C., c. 396, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

No.

If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

Appeal dismissed.

Pourvoi rejeté.

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TAB 11

Most Negative Treatment: Recently added (treatment not yet designated)

Most Recent Recently added (treatment not yet designated): [Standing v. British Columbia \(Minister of Forests, Lands and Natural Resource Operations\)](#) | 2018 BCSC 1499, 2018 CarswellBC 2338 | (B.C. S.C., Aug 31, 2018)

2008 SCC 41

Supreme Court of Canada

R. v. Kapp

2008 CarswellBC 1312, 2008 CarswellBC 1313, 2008 SCC 41, [2008] 2 S.C.R. 483, [2008] 3 C.N.L.R. 346, [2008] 8 W.W.R. 1, [2008] B.C.W.L.D. 4460, [2008] B.C.W.L.D. 4482, [2008] B.C.W.L.D. 4483, [2008] B.C.W.L.D. 4585, [2008] S.C.J. No. 42, 175 C.R.R. (2d) 185, 232 C.C.C. (3d) 349, 256 B.C.A.C. 75, 294 D.L.R. (4th) 1, 376 N.R. 1, 37 C.E.L.R. (3d) 1, 431 W.A.C. 75, 58 C.R. (6th) 1, 78 W.C.B. (2d) 343, 79 B.C.L.R. (4th) 201, J.E. 2008-1323

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Beml, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theodore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky and Robert Zilcosky (Appellants) v. Her Majesty The Queen (Respondent) and Attorney General of Ontario, Attorney General of Quebec, Attorney General for Saskatchewan, Attorney General of Alberta, Tsawwassen First Nation, Haisla Nation, Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations), Heiltsuk Nation, Musqueam Indian Band, Cowichan Tribes, Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association, United Fishermen and Allied Workers Union, Japanese Canadian Fishermens Association, Atlantic Fishing Industry Alliance, Nee Tahi Buhn Indian Band, Tseshah First Nation and Assembly of First Nations (Intervenors)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: December 11, 2007

Judgment: June 27, 2008

Docket: 31603

Proceedings: affirming *R. v. Kapp* (2006), 141 C.R.R. (2d) 249, 56 B.C.L.R. (4th) 11, 374 W.A.C. 248, [2006] 10 W.W.R. 577, 227 B.C.A.C. 248, 24 C.E.L.R. (3d) 99, [2006] 3 C.N.L.R. 282, [2006] B.C.J. No. 1273, 2006 BCCA 277, 2006 CarswellBC 1407 (B.C. C.A.) Proceedings: affirming *R. v. Kapp* (2004), 121 C.R.R. (2d) 349, 31 B.C.L.R. (4th) 258, 2004 CarswellBC 1607, 2004 BCSC 958, [2004] B.C.J. No. 1440, [2004] 3 C.N.L.R. 269 (B.C. S.C.) Proceedings: reversing *R. v. Kapp* (2003), [2003] 4 C.N.L.R. 238, 2003 BCPC 279, 2003 CarswellBC 1881, [2003] B.C.J. No. 1772 (B.C. Prov. Ct.) Proceedings: additional reasons at *R. v. Kapp* (2004), 2004 CarswellBC 1197, 2004 BCPC 151 (B.C. Prov. Ct.)

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Subject: Public; Constitutional; Natural Resources; Human Rights

Related Abridgment Classifications

Constitutional law

[XI Charter of Rights and Freedoms](#)

[XI.3 Nature of rights and freedoms](#)

[XI.3.h Equality rights](#)

[XI.3.h.i General principles](#)

Natural resources

[I Fish and wildlife](#)

[I.5 Offences](#)

[I.5.f Illegal methods of fishing and hunting](#)

[I.5.f.ii Improper use of fishing nets](#)

[I.5.f.ii.C Miscellaneous](#)

Headnote

Aboriginal law --- Constitutional issues — Aboriginal rights to natural resources — Fishing offences — General principles

Pilot sales program, which was part of Aboriginal Fisheries Strategy, resulted in granting of communal fishing licence pursuant to Aboriginal Communal Fishing Licences Regulations (ACFLR) — Licence granted members of three Aboriginal bands exclusive right to fish for salmon in mouth of Fraser River for 24 hours in August 1998 — Accused were commercial fishers excluded from fishery during that period — Accused participated in protest fishery, and were charged with fishing at prohibited time — Accused filed notice of constitutional question seeking declarations that communal fishing licence, ACFLR and related regulations and Aboriginal Fisheries Strategy were unconstitutional — Provincial court found that communal fishing licence was breach of equality rights of accused under s. 15(1) of Canadian Charter of Rights and Freedoms that was not justified under s. 1 of Charter — Superior court allowed summary convictions appeal by Crown, and court of appeal affirmed superior court's decision — Accused appealed — Appeal dismissed — Test under s. 15(2) of Charter was formulated such that program does not violate s. 15 equality guarantee if government can demonstrate that: (1) program has ameliorative or remedial purpose; (2) program targets disadvantaged group identified by enumerated or analogous grounds — In present case, accused demonstrated distinction imposed on basis of race, which was enumerated ground under s. 15 — Through pilot sales program and communal fishing licence, government

was pursuing goal of promoting band self-sufficiency and redressing social and economic disadvantage of targeted bands — Government program was protected by s. 15(2) as program that had as its object amelioration of conditions of disadvantaged individuals or groups — It followed that program did not violate equality guaranteed by s. 15.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Equality rights — General principles

Pilot sales program, which was part of Aboriginal Fisheries Strategy, resulted in granting of communal fishing licence pursuant to Aboriginal Communal Fishing Licences Regulations (ACFLR) — Licence granted members of three Aboriginal bands exclusive right to fish for salmon in mouth of Fraser River for 24 hours in August 1998 — Accused were commercial fishers excluded from fishery during that period — Accused participated in protest fishery, and were charged with fishing at prohibited time — Accused filed notice of constitutional question seeking declarations that communal fishing licence, ACFLR and related regulations and Aboriginal Fisheries Strategy were unconstitutional — Provincial court found that communal fishing licence was breach of equality rights of accused under s. 15(1) of Canadian Charter of Rights and Freedoms that was not justified under s. 1 of Charter — Superior court allowed summary convictions appeal by Crown, and court of appeal affirmed superior court's decision — Accused appealed — Appeal dismissed — Test under s. 15(2) of Charter was formulated such that program does not violate s. 15 equality guarantee if government can demonstrate that: (1) program has ameliorative or remedial purpose; (2) program targets disadvantaged group identified by enumerated or analogous grounds — In present case, accused demonstrated distinction imposed on basis of race, which was enumerated ground under s. 15 — Through pilot sales program and communal fishing licence, government was pursuing goal of promoting band self-sufficiency and redressing social and economic disadvantage of targeted bands — Government program was protected by s. 15(2) as program that had as its object amelioration of conditions of disadvantaged individuals or groups — It followed that program did not violate equality guaranteed by s. 15.

Natural resources --- Fish and wildlife — Offences — Illegal methods of fishing and hunting — Improper use of fishing nets — Miscellaneous

Pilot sales program, which was part of Aboriginal Fisheries Strategy, resulted in granting of communal fishing licence pursuant to Aboriginal Communal Fishing Licences Regulations (ACFLR) — Licence granted members of three Aboriginal bands exclusive right to fish for salmon in mouth of Fraser River for 24 hours in August 1998 — Accused were commercial fishers excluded from fishery during that period — Accused participated in protest fishery, and were charged with fishing at prohibited time — Accused filed notice of constitutional question seeking declarations that communal fishing licence, ACFLR and related regulations and Aboriginal Fisheries Strategy were unconstitutional — Provincial court found that communal fishing licence was breach of equality rights of accused under s. 15(1) of Canadian Charter of Rights and Freedoms that was not justified under s. 1 of Charter — Superior court allowed summary convictions appeal by Crown, and court of appeal affirmed superior court's decision — Accused appealed — Appeal dismissed — Test under s. 15(2) of Charter was formulated such that program does not violate s. 15 equality guarantee if government can demonstrate that: (1) program has ameliorative or remedial purpose; (2) program targets disadvantaged group identified by enumerated or analogous grounds — In present case, accused demonstrated distinction imposed on basis of race, which was enumerated ground under s. 15 — Through pilot sales program and communal fishing licence, government was pursuing goal of promoting band self-sufficiency and redressing social and economic disadvantage of targeted bands — Government program was protected by s. 15(2) as program that had as its object amelioration of conditions of disadvantaged individuals or groups — It followed that program did not violate equality guaranteed by s. 15.

Droit autochtone --- Questions constitutionnelles — Droits des autochtones aux ressources naturelles — Infractions de pêche — Principes généraux

Programme pilote de vente, qui faisait partie de la stratégie du gouvernement fédéral relative aux pêches autochtones, a donné lieu à la délivrance d'un permis de pêche communautaire, conformément au Règlement sur les permis de pêche communautaires des Autochtones (« RPPCA ») — Permis délivré aux membres de trois bandes autochtones leur accordait le droit exclusif de pêcher le saumon à l'embouchure du fleuve Fraser pendant une période de 24 heures en août 1998 — Accusés étaient des pêcheurs commerciaux à qui il était interdit de pêcher pendant ladite période de 24 heures — Accusés ont participé à une pêche de protestation et ont été accusés d'avoir pêché pendant une période interdite — Accusés ont déposé un avis de question constitutionnelle dans lequel ils demandaient que le permis de pêche communautaire, le RPPCA et les règlements connexes ainsi que la Stratégie relative aux pêches autochtones soient

déclarés inconstitutionnels — Juge de la Cour provinciale a conclu que le permis de pêche communautaire portait atteinte aux droits à l'égalité garantis aux accusés par l'art. 15(1) de la Charte canadienne des droits et libertés, et que cette atteinte n'était pas justifiée au regard de l'article premier de la Charte — Cour supérieure a accueilli l'appel de la Couronne contre les déclarations sommaires de culpabilité et la Cour d'appel a confirmé la décision de la Cour supérieure — Accusés ont formé un pourvoi — Pourvoi rejeté — Critère établi en vertu de l'art. 15(2) de la Charte était formulé de telle façon qu'un programme ne porte pas atteinte au droit à l'égalité garanti par l'art. 15 si le gouvernement peut démontrer (1) que le programme a un objet améliorateur ou réparateur et (2) que le programme vise un groupe défavorisé caractérisé par un motif énuméré ou analogue — En l'espèce, les accusés ont démontré l'existence d'une distinction fondée sur la race, un motif énuméré à l'art. 15 — En introduisant le programme pilote de vente et le permis de pêche communautaire, le gouvernement visait à favoriser l'accession des bandes à l'autosuffisance et espérait remédier au désavantage social et économique dont étaient victimes les bandes visées — Programme gouvernemental était protégé par l'art. 15(2) en tant que programme destiné à améliorer la situation d'individus ou de groupes défavorisés — Il s'ensuivait que le programme ne portait pas atteinte au droit à l'égalité garanti par l'art. 15 de la Charte.

Droit constitutionnel --- Charte des droits et libertés — Nature des droits et libertés — Droits à l'égalité — Principes généraux

Programme pilote de vente, qui faisait partie de la stratégie du gouvernement fédéral relative aux pêches autochtones, a donné lieu à la délivrance d'un permis de pêche communautaire, conformément au Règlement sur les permis de pêche communautaires des Autochtones (« RPPCA ») — Permis délivré aux membres de trois bandes autochtones leur accordait le droit exclusif de pêcher le saumon à l'embouchure du fleuve Fraser pendant une période de 24 heures en août 1998 — Accusés étaient des pêcheurs commerciaux à qui il était interdit de pêcher pendant ladite période de 24 heures — Accusés ont participé à une pêche de protestation et ont été accusés d'avoir pêché pendant une période interdite — Accusés ont déposé un avis de question constitutionnelle dans lequel ils demandaient que le permis de pêche communautaire, le RPPCA et les règlements connexes ainsi que la Stratégie relative aux pêches autochtones soient déclarés inconstitutionnels — Juge de la Cour provinciale a conclu que le permis de pêche communautaire portait atteinte aux droits à l'égalité garantis aux accusés par l'art. 15(1) de la Charte canadienne des droits et libertés, et que cette atteinte n'était pas justifiée au regard de l'article premier de la Charte — Cour supérieure a accueilli l'appel de la Couronne contre les déclarations sommaires de culpabilité et la Cour d'appel a confirmé la décision de la Cour supérieure — Accusés ont formé un pourvoi — Pourvoi rejeté — Critère établi en vertu de l'art. 15(2) de la Charte était formulé de telle façon qu'un programme ne porte pas atteinte au droit à l'égalité garanti par l'art. 15 si le gouvernement peut démontrer (1) que le programme a un objet améliorateur ou réparateur et (2) que le programme vise un groupe défavorisé caractérisé par un motif énuméré ou analogue — En l'espèce, les accusés ont démontré l'existence d'une distinction fondée sur la race, un motif énuméré à l'art. 15 — En introduisant le programme pilote de vente et le permis de pêche communautaire, le gouvernement visait à favoriser l'accession des bandes à l'autosuffisance et espérait remédier au désavantage social et économique dont étaient victimes les bandes visées — Programme gouvernemental était protégé par l'art. 15(2) en tant que programme destiné à améliorer la situation d'individus ou de groupes défavorisés — Il s'ensuivait que le programme ne portait pas atteinte au droit à l'égalité garanti par l'art. 15 de la Charte.

Ressources naturelles --- Poisson et faune — Infractions — Méthodes illégales de chasse et de pêche — Usage inapproprié de filets de pêche — Divers

Programme pilote de vente, qui faisait partie de la stratégie du gouvernement fédéral relative aux pêches autochtones, a donné lieu à la délivrance d'un permis de pêche communautaire, conformément au Règlement sur les permis de pêche communautaires des Autochtones (« RPPCA ») — Permis délivré aux membres de trois bandes autochtones leur accordait le droit exclusif de pêcher le saumon à l'embouchure du fleuve Fraser pendant une période de 24 heures en août 1998 — Accusés étaient des pêcheurs commerciaux à qui il était interdit de pêcher pendant ladite période de 24 heures — Accusés ont participé à une pêche de protestation et ont été accusés d'avoir pêché pendant une période interdite — Accusés ont déposé un avis de question constitutionnelle dans lequel ils demandaient que le permis de pêche communautaire, le RPPCA et les règlements connexes ainsi que la Stratégie relative aux pêches autochtones soient déclarés inconstitutionnels — Juge de la Cour provinciale a conclu que le permis de pêche communautaire portait atteinte aux droits à l'égalité garantis aux accusés par l'art. 15(1) de la Charte canadienne des droits et libertés, et que cette atteinte n'était pas justifiée au regard de l'article premier de la Charte — Cour supérieure a accueilli l'appel de la Couronne contre

les déclarations sommaires de culpabilité et la Cour d'appel a confirmé la décision de la Cour supérieure — Accusés ont formé un pourvoi — Pourvoi rejeté — Critère établi en vertu de l'art. 15(2) de la Charte était formulé de telle façon qu'un programme ne porte pas atteinte au droit à l'égalité garanti par l'art. 15 si le gouvernement peut démontrer (1) que le programme a un objet améliorateur ou réparateur et (2) que le programme vise un groupe défavorisé caractérisé par un motif énuméré ou analogue — En l'espèce, les accusés ont démontré l'existence d'une distinction fondée sur la race, un motif énuméré à l'art. 15 — En introduisant le programme pilote de vente et le permis de pêche communautaire, le gouvernement visait à favoriser l'accession des bandes à l'autosuffisance et espérait remédier au désavantage social et économique dont étaient victimes les bandes visées — Programme gouvernemental était protégé par l'art. 15(2) en tant que programme destiné à améliorer la situation d'individus ou de groupes défavorisés — Il s'ensuivait que le programme ne portait pas atteinte au droit à l'égalité garanti par l'art. 15 de la Charte.

A significant part of the federal Aboriginal Fisheries Strategy was the introduction of three pilot sales programs. One such program resulted in the issuance of the communal fishing licence at issue in this case. The licence was granted pursuant to the Aboriginal Communal Fishing Licences Regulations (ACFLR). The licence granted the members of three Aboriginal bands the exclusive right to fish for salmon in the mouth of the Fraser River for a period of 24 hours in August 1998. The fishers were permitted to use the fish caught for food, social and ceremonial purposes, and for sale. The accused were all commercial fishers (mainly non-Aboriginal) who were excluded from the fishery during the 24 hours in question. The accused participated in a protest fishery during the prohibited period. They were charged with fishing at a prohibited time. The accused filed a notice of a constitutional question seeking declarations that the communal fishing licence, the ACFLR and related regulations and the Aboriginal Fisheries Strategy were unconstitutional. The provincial court judge found that the communal fishing licence granted to the three bands was a breach of equality rights of the accused under s. 15(1) of the Canadian Charter of Rights and Freedoms that was not justified under s. 1 of the Charter. The superior court allowed a summary convictions appeal by the Crown. It held that the pilot sales program did not have a discriminatory purpose or effect. The court of appeal, in five sets of reasons concurring in the result, dismissed the appeal. The accused appealed.

Held: The appeal was dismissed.

Per McLachlin C.J.C. and Abella J. (Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ. concurring): This Court has previously stated two possible approaches to the interpretation of s. 15(2). The Court could either read s. 15(2) as an interpretative aid to s. 15(1) or read it as an exception or exemption from the operation of s. 15(1). However, there was a third option. If the government can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a s. 15(1) analysis. The two sections should be read as working together to promote substantive equality. Once the s. 15 claimant has shown a distinction made on an enumerated ground, it is open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional. If the government fails to demonstrate that its program falls under s. 15(2), the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory. The test is formulated as follows. A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.

The analysis of s. 15(2) and its operation is built around three key phrases in the provision. It protects any law, program or activity that "has as its object" the "amelioration" of conditions of "disadvantaged" individuals or groups. Given the language of the provision and its goal of enabling governments to pro-actively combat discrimination, the purpose-based approach is more appropriate than the effect-based approach. The meaning of amelioration deserves careful attention in evaluating programs under s. 15(2). Laws designed to restrict or punish behaviour would not qualify for s. 15(2) protection. The focus should not be on the effect of the law. However, the fact that a law has no plausible or predictable ameliorative effect may render suspect the state's ameliorative purpose. "Disadvantaged" under s. 15 connotes vulnerability, prejudice and negative social characterization.

In the present case, the government conferred the communal fishing licence to particular Aboriginal bands. Therefore, the accused demonstrated a distinction imposed on the basis of race, an enumerated ground under s. 15. Through the pilot sales program and communal fishing licence, the government was pursuing the goal of promoting band self-sufficiency and redressing the social and economic disadvantage of the targeted bands. The means chosen to achieve the purpose were rationally related to serving that purpose. It followed that the Crown established a credible ameliorative purpose

for the program. The government's aims, and the communal fishing licence, correlated to the actual economic and social disadvantage suffered by members of the three Aboriginal bands. The government program was protected by s. 15(2) as a program that had as its object the amelioration of conditions of disadvantaged individuals or groups. It followed that the program did not violate the equality guaranteed by s. 15 of the Charter.

Having concluded that a breach of s. 15 was not established, it was unnecessary to consider whether s. 25 of the Charter would bar the accused's claim. However there was concern to be expressed with aspects of the reasons of Bastarache J., who would have dismissed the appeal solely on the basis of s. 25 of the Charter. An initial concern was whether the communal fishing licence at issue was within s. 25's compass. The wording of s. 25 and the examples given therein suggest that not every Aboriginal interest or program falls within the provision's scope. Rather, only rights of a constitutional character are likely to benefit from s. 25. A second concern was whether, even if the fishing licence fell under s. 25, the result would constitute an absolute bar to the accused's s. 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting Charter rights. These issues were best left for resolution on a case-by-case basis as they arise before the Court.

Per Bastarache J. (concurring in the result): Section 25 of the Charter provided a complete answer to the question posed in the appeal. There was no need to engage in a full analysis of the application of s. 15 of the Charter. It was sufficient to establish the existence of a potential conflict between the pilot sales program and s. 15. There was complete agreement with the restatement of the test for the application of s. 15 adopted by McLachlin C.J.C. and Abella J. in their reasons. Section 25 serves the purpose of protecting the rights of Aboriginal people where the application of the Charter protection for individuals would diminish the distinctive, collective and cultural identity of an Aboriginal group. It is not reasonable to invoke s. 25 once a Charter violation is established. One reason is that there would be no rationale for invoking s. 25 in the case of a finding of discrimination that could not be justified under s. 1, simply because, in the context of s. 15, considerations that serve to justify that an Act is not discriminatory would have to be relitigated under the terms of s. 25. Another reason is that a true interpretative section would serve to define the substantive guarantee. Section 25 is meant to preserve some distinctions, which are inconsistent with weighing equality rights and native rights. It is contrary to the scheme of the Charter to invoke s. 25 as a factor in applying s. 1. Section 1 does not apply to s. 25 because s. 25 does not create rights. Section 25 is protective and its function must be preserved. Section 25 was not meant to provide for balancing Charter rights against Aboriginal rights.

The first step in the application of s. 25 requires an evaluation of the claim in order to establish the nature of the substantive Charter right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the Charter right and native right. In the present case there was a *prima facie* case of discrimination pursuant to s. 15(1). The unique relationship between British Columbia Aboriginal communities and the fishery should be enough to draw a link between the right to fish given to Aboriginal people pursuant to the pilot sales program and the rights contemplated by s. 25. The right in this case was totally dependent on the exercise of powers given to Parliament under s. 91(24) of the Constitution Act, 1867 which deals with a class of persons, Indians. The Charter cannot be interpreted as rendering unconstitutional the exercise of powers consistent with the purposes of s. 91(24), and it is not rational to believe that every exercise of the s. 91(24) jurisdiction requires a justification under s. 1. Section 25 is a necessary partner to s. 35(1); it protects s. 35(1) purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation.

The right given by the pilot sales program was limited to Aboriginal people and had a detrimental effect on non-Aboriginal commercial fishers operating in the same region as the program's beneficiaries. The disadvantage was related to racial differences. Section 15 of the Charter was *prima facie* engaged. The right to equality afforded to every individual under s. 15 was not capable of application consistently with the rights of Aboriginal fishers holding licences under the pilot sales program. There was real conflict. Section 25 applied in the present situation and provided a full answer to the claim.

La stratégie du gouvernement fédéral relative aux pêches autochtones a, dans une large mesure, consisté à établir trois programmes pilotes de vente. L'un d'entre eux a donné lieu à la délivrance du permis de pêche communautaire en cause dans la présente affaire. Le permis a été délivré conformément au Règlement sur les permis de pêche communautaires des Autochtones (« RPPCA »). Le permis délivré aux membres de trois bandes autochtones leur accordait le droit exclusif

de pêcher le saumon à l'embouchure du fleuve Fraser pendant une période de 24 heures en août 1998. Les pêcheurs avaient le droit d'utiliser le poisson pêché à des fins alimentaires, sociales et rituelles, ainsi qu'à des fins de vente. Les accusés étaient des pêcheurs commerciaux, pour la plupart non autochtones, à qui il était interdit de pêcher pendant ladite période de 24 heures. Les accusés ont participé à une pêche de protestation pendant la période interdite. Ils ont été accusés d'avoir pêché pendant une période interdite. Les accusés ont déposé un avis de question constitutionnelle dans lequel ils demandaient que le permis de pêche communautaire, le RPPCA et les règlements connexes ainsi que la Stratégie relative aux pêches autochtones soient déclarés inconstitutionnels. Le juge de la Cour provinciale a conclu que le permis de pêche communautaire délivré aux trois bandes portait atteinte aux droits à l'égalité garantis aux accusés par l'art. 15(1) de la Charte canadienne des droits et libertés, et que cette atteinte n'était pas justifiée au regard de l'article premier de la Charte. La Cour supérieure a accueilli l'appel de la Couronne contre les déclarations sommaires de culpabilité. Elle a conclu que le programme pilote de vente n'avait pas un objet ou un effet discriminatoire. La Cour d'appel a rejeté l'appel en se fondant sur cinq séries de motifs concordants quant au résultat. Les accusés ont formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

McLachlin, J.C.C., Abella, J. (Binnie, LeBel, Deschamps, Fish, Charron, Rothstein, JJ., souscrivant à leur opinion) : Cette Cour avait précédemment estimé que l'art. 15(2) pouvait faire l'objet de deux interprétations. La Cour pouvait considérer que l'art. 15(2) est un outil d'interprétation de l'art. 15(1) ou qu'il établit une exception ou une exemption relativement à l'application de l'art. 15(1). Il existait cependant une troisième possibilité. Si le gouvernement peut démontrer qu'un programme contesté remplit les conditions de l'art. 15(2), il peut se révéler tout à fait inutile d'effectuer une analyse relative à l'art. 15(1). Les deux articles devraient être interprétés comme ayant pour effet combiné de promouvoir l'égalité réelle. Une fois que l'auteur d'une demande présentée en vertu de l'art. 15 a établi l'existence d'une distinction fondée sur un motif énuméré, le gouvernement peut démontrer que la loi, le programme ou l'activité contesté apporte une amélioration et est donc conforme à la Constitution. Si le gouvernement ne démontre pas que son programme relève de l'art. 15(2), ce programme doit alors faire l'objet d'un examen approfondi au regard de l'art. 15(1) afin de déterminer s'il a un effet discriminatoire. Le critère est formulé de la façon suivante. Un programme ne porte pas atteinte au droit à l'égalité garanti par l'art. 15 si le gouvernement peut démontrer (1) que le programme a un objet améliorateur ou réparateur et (2) que le programme vise un groupe défavorisé caractérisé par un motif énuméré ou analogue.

L'analyse de l'art. 15(2) et de son application est basée sur trois mots clés de la disposition. Elle protège les lois, programmes ou activités « destinés » à « améliorer » la situation d'individus ou de groupes « défavorisés ». Compte tenu du libellé de la disposition et de son objectif de permettre aux gouvernements de combattre de manière proactive la discrimination, l'approche fondée sur l'objet est plus indiquée que celle fondée sur l'effet. Le sens du mot améliorer mérite d'être examiné attentivement lors de l'évaluation de programmes au regard de l'art. 15(2). Les lois destinées à limiter ou à punir un comportement ne doivent pas bénéficier de la protection de l'art. 15(2). L'accent ne doit pas être mis sur l'effet de la loi. Toutefois, le fait qu'une loi n'ait aucun effet améliorateur plausible ou prévisible risque de rendre douteux l'objet améliorateur visé par l'État. Le « désavantage » aux fins d'application de l'art. 15 dénote la vulnérabilité, un préjugé et une image négative dans la société.

En l'espèce, le gouvernement a accordé le permis de pêche communautaire à certaines bandes autochtones. Par conséquent, les accusés ont démontré l'existence d'une distinction fondée sur la race, un motif énuméré à l'art. 15. En introduisant le programme pilote de vente et le permis de pêche communautaire, le gouvernement visait à favoriser l'accession des bandes à l'autosuffisance et espérait remédier au désavantage social et économique dont étaient victimes les bandes visées. Les moyens choisis pour réaliser cet objectif avaient un lien rationnel avec la poursuite de cet objectif. Il s'ensuivait que la Couronne avait prouvé que le programme avait un objet améliorateur crédible. Les objectifs du gouvernement, et les permis de pêche communautaire, étaient en corrélation avec le désavantage économique et social dont étaient réellement victimes les membres des trois bandes autochtones. Le programme gouvernemental était protégé par l'art. 15(2) en tant que programme destiné à améliorer la situation d'individus ou de groupes défavorisés. Il s'ensuivait que le programme ne portait pas atteinte au droit à l'égalité garanti par l'art. 15 de la Charte.

Après avoir conclu que l'existence d'une violation de l'art. 15 n'était pas établie, il n'était pas nécessaire de se demander si l'art. 25 de la Charte faisait obstacle à la demande des accusés. Toutefois, certains aspects du raisonnement du juge Bastarache, qui aurait rejeté l'appel sur le seul fondement de l'art. 25, soulevaient des questions. La première question était

de savoir si le permis de pêche communautaire dont il était question en l'espèce tombait sous le coup de l'art. 25. Le libellé de l'art. 25 et les exemples qu'on y trouve indiquaient que les droits des autochtones ou les programmes destinés à ceux-ci n'étaient pas tous visés par cette disposition. Au contraire, seuls les droits de nature constitutionnelle étaient susceptibles de bénéficier de la protection de l'art. 25. Même dans l'hypothèse où le permis de pêche relèverait de l'art. 25, la deuxième question était de savoir si la demande des accusés fondée sur l'art. 15 était totalement irrecevable, contrairement à ce qui se produirait dans le cas d'une disposition servant à interpréter des droits garantis par la Charte susceptibles d'entrer en conflit. Il serait plus prudent de laisser à la Cour le soin de trancher ces questions au fur et à mesure qu'elles seront soulevées dans des cas particuliers.

Bastarache, J. (souscrivant au résultat des juges majoritaires) : L'article 25 de la Charte répondait parfaitement à la question posée dans ce pourvoi. Il n'était pas nécessaire de se lancer dans une analyse exhaustive de l'application de l'art. 15 de la Charte. Il était suffisant d'établir l'existence d'un conflit potentiel entre le programme pilote de vente et l'art. 15. Il y avait une adhésion totale à la réaffirmation du critère adopté par la Juge en chef McLachlin et la juge Abella, dans leurs motifs, à l'égard de l'application de l'art. 15.

L'article 25 a pour objectif de protéger les droits des peuples autochtones lorsque l'application des protections établies dans la Charte à l'endroit des individus diminuerait l'identité distinctive, collective et culturelle d'un groupe autochtone. Il n'est pas raisonnable d'invoquer l'art. 25 une fois qu'une violation de la Charte est établie. Il en est ainsi notamment parce qu'il n'existerait pas de raison d'invoquer l'art. 25 dans le cas où l'on conclut à une discrimination non susceptible d'être justifiée en vertu de l'article premier, simplement parce que, dans le contexte de l'art. 15, les considérations servant à démontrer qu'un acte n'est pas discriminatoire devraient faire l'objet d'un nouvel examen judiciaire dans le cadre de l'art. 25. Une autre raison tient au fait qu'une véritable disposition interprétative servirait à définir la garantie fondamentale. L'article 25 vise à préserver certaines distinctions incompatibles avec une pondération des droits à l'égalité et des droits des peuples autochtones. Il est contraire à l'économie de la Charte de faire entrer l'art. 25 en ligne de compte dans l'application de l'article premier. L'article premier ne s'applique pas à l'art. 25 en tant que tel parce que l'art. 25 ne crée pas de droits. L'article 25 a une fonction de protection, et cette fonction doit être préservée. L'article 25 n'a pas été conçu pour établir un équilibre entre les droits garantis par la Charte et les droits des peuples autochtones.

La première étape dans l'application de l'art. 25 exige une évaluation de la revendication afin d'établir la nature du droit fondamental garanti par la Charte et de déterminer si le bien-fondé de la revendication a été établi à première vue. La deuxième étape consiste à évaluer le droit autochtone afin de déterminer s'il relève de l'art. 25. La troisième étape consiste à déterminer s'il existe un conflit véritable entre le droit garanti par la Charte et le droit autochtone. En l'espèce, il existait une preuve *prima facie* de discrimination selon l'art. 15(1). Le rapport tout à fait particulier des communautés autochtones de la Colombie-Britannique avec la pêche devrait suffire à établir un lien entre le droit de pêche donné aux Autochtones en vertu du programme pilote de vente et les droits envisagés à l'art. 25. Le droit dont il est question en l'espèce dépendait entièrement de l'exercice des pouvoirs conférés au Parlement par l'art. 91(24) de la Loi constitutionnelle de 1867, qui concerne une catégorie de personnes, soit les Indiens. On ne peut interpréter la Charte comme si elle rendait inconstitutionnel l'exercice de pouvoirs conformes aux objectifs de l'art. 91(24), et il n'était pas logique de croire que tout exercice de la compétence établie à l'art. 91(24) exige une justification en vertu de l'article premier. L'article 25 est un compagnon indissociable de l'art. 35(1); il protège les objectifs de l'art. 35(1) et accroît la portée des mesures nécessaires pour que soit remplie la promesse de réconciliation.

Le droit conféré par le programme pilote de vente était limité aux Autochtones et avait un effet préjudiciable aux pêcheurs commerciaux non autochtones actifs dans la même région que les bénéficiaires du programme. Le désavantage était lié à des différences raciales. L'article 15 de la Charte pouvait à première vue être invoqué. L'application du droit à l'égalité reconnu à tous en vertu de l'art. 15 n'était pas compatible avec les droits des pêcheurs autochtones titulaires de permis dans le cadre du programme pilote de vente. Il existait un conflit véritable. L'article 25 de la Charte s'appliquait en l'espèce et constituait une réponse complète à la revendication.

Annotation

The decision in *Kapp* is now the leading decision on how to address section 15(2). However, its major significance is that the Court has unanimously backed off the 15-part test for section 15 that it announced in *Law v. Canada (Mister of Employment & Immigration)*, [1999] 1 S.C.R. 497 and re-emphasised its approach in *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143. In particular the Court now holds that dignity of the person is no longer a test of

discrimination and that the *Law* factors need not be slavishly followed. The Court achieves this major change in the following short paragraphs in the joint judgment of the Chief Justice and Justice Abella:

[19] A decade later, in *Law*, this Court suggested that discrimination should be defined in terms of the impact of the law or program on the "human dignity" of members of the claimant group, having regard to four contextual factors: (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected (paras. 62-75).

[20] The achievement of *Law* was its success in unifying what had become, since *Andrews*, a division in this Court's approach to s. 15. *Law* accomplished this by reiterating and confirming *Andrews*' interpretation of s. 15 as a guarantee of substantive, and not just formal, equality. Moreover, *Law* made an important contribution to our understanding of the conceptual underpinnings of substantive equality.

[21] At the same time, several difficulties have arisen from the attempt in *Law* to employ human dignity as a legal test. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the Charter has as its lodestar the promotion of human dignity . . .

[22] But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.

[23] The analysis in a particular case, as *Law* itself recognizes, more usefully focuses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

[24] Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews* — combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.

The Court cites but does not analyse numerous scholarly criticisms of the *Law* test, which in general suggest that the approach in *Law* was too complicated, too confusing and making section 15 claims much harder to establish. The exact significance of the Court's retreat remains to be seen in future cases, but its promise of a new and simpler path will likely be widely applauded.

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Law v. Canada (Minister of Employment & Immigration) (1999), 170 D.L.R. (4th) 1, 1999 CarswellNat 359, 1999 CarswellNat 360, (sub nom. *Law v. Canada (Minister of Human Resources Development)*) 60 C.R.R. (2d) 1, 236 N.R. 1, [1999] 1 S.C.R. 497, 43 C.C.E.L. (2d) 49, (sub nom. *Law v. Minister of Human Resources Development*) 1999 C.E.B. & P.G.R. 8350 (headnote only) (S.C.C.) — followed

Miron v. Trudel (1995), 10 M.V.R. (3d) 151, 23 O.R. (3d) 160 (note), [1995] I.L.R. 1-3185, 13 R.F.L. (4th) 1, 1995 C.E.B. & P.G.R. 8217, 181 N.R. 253, 124 D.L.R. (4th) 693, 81 O.A.C. 253, [1995] 2 S.C.R. 418, 29 C.R.R. (2d) 189, 1995 CarswellOnt 93, 1995 CarswellOnt 526 (S.C.C.) — referred to

R. v. M. (1985), 1985 CarswellMan 97, 21 C.C.C. (3d) 116, 36 Man. R. (2d) 252, 19 C.R.R. 174 (Man. Q.B.) — referred to

R. v. Music Explosion Ltd. (1989), 62 Man. R. (2d) 189, 1989 CarswellMan 308 (Man. Q.B.) — considered

R. v. Music Explosion Ltd. (1990), 59 C.C.C. (3d) 571, 68 Man. R. (2d) 203, 1990 CarswellMan 295 (Man. C.A.) — referred to

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — considered

R. v. Sparrow (1990), 1990 CarswellBC 105, 1990 CarswellBC 756, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410 (S.C.C.) — considered

R. v. Vanderpeet (1996), [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, 50 C.R. (4th) 1, (sub nom. *R. v. Van der Peet*) 137 D.L.R. (4th) 289, (sub nom. *R. v. Van der Peet*) 109 C.C.C. (3d) 1, (sub nom. *R. v. Van der Peet*) 200 N.R. 1, (sub nom. *R. v. Van der Peet*) 80 B.C.A.C. 81, (sub nom. *R. v. Van der Peet*) [1996] 2 S.C.R. 507, (sub nom. *R. v. Van der Peet*) [1996] 4 C.N.L.R. 177, (sub nom. *R. v. Van der Peet*) 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) — referred to

Rebic v. Colver (1985), 16 C.R.R. 115, 1985 CarswellBC 679, (sub nom. *Rebic v. R.*) 20 C.C.C. (3d) 196 (B.C. S.C.) — referred to

Rebic v. Colver (1986), 1986 CarswellBC 116, 2 B.C.L.R. (2d) 364, [1986] 4 W.W.R. 401, (sub nom. *Rebic v. R.*) 28 C.C.C. (3d) 154, 22 C.R.R. 66 (B.C. C.A.) — referred to

Cases considered by *Bastarache J.* (concurring in the result):

Adler v. Ontario (1996), 1996 CarswellOnt 3989, 1996 CarswellOnt 3990, 204 N.R. 81, [1996] 3 S.C.R. 609, 95 O.A.C. 1, 140 D.L.R. (4th) 385, 40 C.R.R. (2d) 1, 30 O.R. (3d) 642 (note) (S.C.C.) — referred to

- Campbell v. British Columbia (Attorney General)* (2000), 2000 BCSC 1123, 79 B.C.L.R. (3d) 122, [2000] 8 W.W.R. 600, 189 D.L.R. (4th) 333, [2000] 4 C.N.L.R. 1, 2000 CarswellBC 1545 (B.C. S.C.) — considered
- Canada (Attorney General) v. Lavell* (1973), 1973 CarswellOnt 1361, 1973 CarswellOnt 1362, (sub nom. *Bedard v. Isaac*) 11 R.F.L. 333, (sub nom. *Isaac v. Bedard*) 23 C.R.N.S. 197, 38 D.L.R. (3d) 481, [1974] S.C.R. 1349 (S.C.C.) — considered
- Corbiere v. Canada (Minister of Indian & Northern Affairs)* (1999), 163 F.T.R. 284 (note), 1999 CarswellNat 663, 1999 CarswellNat 664, (sub nom. *Canada (Minister of Indian & Northern Affairs) v. Corbiere*) 61 C.R.R. (2d) 189, (sub nom. *Corbière v. Canada (Minister of Indian & Northern Affairs)*) 173 D.L.R. (4th) 1, 239 N.R. 1, [1999] 3 C.N.L.R. 19, [1999] 2 S.C.R. 203 (S.C.C.) — considered
- Delgamuukw v. British Columbia* (1997), 220 N.R. 161, 153 D.L.R. (4th) 193, [1997] 3 S.C.R. 1010, 99 B.C.A.C. 161, 162 W.A.C. 161, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — considered
- Haida Nation v. British Columbia (Minister of Forests)* (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — considered
- Lalonde v. Ontario (Commission de restructuration des services de santé)* (2002), 2002 CarswellOnt 336, 56 O.R. (3d) 505 (Ont. C.A.) — followed
- Law v. Canada (Minister of Employment & Immigration)* (1999), 170 D.L.R. (4th) 1, 1999 CarswellNat 359, 1999 CarswellNat 360, (sub nom. *Law v. Canada (Minister of Human Resources Development)*) 60 C.R.R. (2d) 1, 236 N.R. 1, [1999] 1 S.C.R. 497, 43 C.C.E.L. (2d) 49, (sub nom. *Law v. Minister of Human Resources Development*) 1999 C.E.B. & P.G.R. 8350 (headnote only) (S.C.C.) — considered
- MacNutt v. Shubenacadie Indian Band* (2000), (sub nom. *Shubenacadie Indian Band v. Canadian Human Rights Commission*) 256 N.R. 109, (sub nom. *Shubenacadie Indian Band v. Canada (Human Rights Commission)*) 187 D.L.R. (4th) 741, (sub nom. *Shubenacadie Indian Band v. Canada (Human Rights Commission)*) [2000] 4 C.N.L.R. 275, (sub nom. *Shubenacadie Band Council v. Canada (Human Rights Commission)*) 37 C.H.R.R. D/466, 2000 CarswellNat 968, (sub nom. *Shubenacadie Indian Band v. Canadian Human Rights Commission*) 184 F.T.R. 10 (note) (Fed. C.A.) — considered
- Mahe v. Alberta* (1990), [1990] 3 W.W.R. 97, 106 A.R. 321, 46 C.R.R. 193, [1990] 1 S.C.R. 342, 68 D.L.R. (4th) 69, 105 N.R. 321, 72 Alta. L.R. (2d) 257, 1990 CarswellAlta 26, 1990 CarswellAlta 649 (S.C.C.) — considered
- Mitchell v. Minister of National Revenue* (2001), 2001 SCC 33, 2001 CarswellNat 873, 2001 CarswellNat 874, (sub nom. *Mitchell v. M.N.R.*) 83 C.R.R. (2d) 1, 269 N.R. 207, (sub nom. *Mitchell v. M.N.R.*) 199 D.L.R. (4th) 385, (sub nom. *Mitchell v. M.N.R.*) [2001] 3 C.N.L.R. 122, 206 F.T.R. 160 (note), (sub nom. *Mitchell v. M.N.R.*) [2001] 1 S.C.R. 911, [2002] 3 C.T.C. 359 (S.C.C.) — considered
- R. c. Bois* (2004), (sub nom. *R. v. Daoust*) 2004 SCC 6, 2004 CarswellQue 138, 2004 CarswellQue 139, (sub nom. *R. v. Daoust*) 316 N.R. 203, 18 C.R. (6th) 57, (sub nom. *R. v. Daoust*) 235 D.L.R. (4th) 216, [2004] 1 S.C.R. 217, (sub nom. *R. v. Daoust*) 180 C.C.C. (3d) 449 (S.C.C.) — referred to
- R. v. Drybones* (1969), [1970] S.C.R. 282, [1970] 3 C.C.C. 355, 1969 CarswellNWT 4, 10 C.R.N.S. 334, 71 W.W.R. 161, 9 D.L.R. (3d) 473 (S.C.C.) — considered
- R. v. Nicholas* (1988), 232 A.P.R. 248, [1989] 2 C.N.L.R. 131, 91 N.B.R. (2d) 248, 1988 CarswellNB 441 (N.B. Q.B.) — considered
- R. v. Oakes* (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — considered
- R. v. Sparrow* (1990), 1990 CarswellBC 105, 1990 CarswellBC 756, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410 (S.C.C.) — referred to
- R. v. Steinhauer* (1985), [1985] 3 C.N.L.R. 187, 15 C.R.R. 175, 63 A.R. 381, 1985 CarswellAlta 443 (Alta. Q.B.) — referred to

R. v. Ulybel Enterprises Ltd. (2001), 2001 SCC 56, 2001 CarswellNfld 239, 2001 CarswellNfld 240, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 45 C.R. (5th) 1, [2001] 2 S.C.R. 867 (S.C.C.) — considered

R. v. Vanderpeet (1996), [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, 50 C.R. (4th) 1, (sub nom. *R. v. Van der Peet*) 137 D.L.R. (4th) 289, (sub nom. *R. v. Van der Peet*) 109 C.C.C. (3d) 1, (sub nom. *R. v. Van der Peet*) 200 N.R. 1, (sub nom. *R. v. Van der Peet*) 80 B.C.A.C. 81, (sub nom. *R. v. Van der Peet*) [1996] 2 S.C.R. 507, (sub nom. *R. v. Van der Peet*) [1996] 4 C.N.L.R. 177, (sub nom. *R. v. Van der Peet*) 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) — followed

Reference re Secession of Quebec (1998), 228 N.R. 203, 1998 CarswellNat 1300, 161 D.L.R. (4th) 385, 1998 CarswellNat 1299, 55 C.R.R. (2d) 1, [1998] 2 S.C.R. 217 (S.C.C.) — considered

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (2004), 19 Admin. L.R. (4th) 165, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 327 N.R. 133, 36 B.C.L.R. (4th) 370, 206 B.C.A.C. 132, 338 W.A.C. 132, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, 2004 CarswellBC 2654, 2004 CarswellBC 2655, 2004 SCC 74, 245 D.L.R. (4th) 193, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) [2004] 3 S.C.R. 550, [2005] 3 W.W.R. 403 (S.C.C.) — considered

Statutes considered by *McLachlin C.J.C., Abella J.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 1 — referred to

s. 15 — considered

s. 15(1) — considered

s. 15(2) — considered

s. 24 — referred to

s. 25 — considered

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

Generally — referred to

Individual's Rights Protection Act, S.A. 1972, c. 2

Generally — referred to

Young Offenders Act, S.C. 1980-81-82-83, c. 110

Generally — referred to

Statutes considered by *Bastarache J.* (concurring in the result):

Canadian Bill of Rights, S.C. 1960, c. 44, Pt. I, reprinted R.S.C. 1985, App. III

Generally — referred to

s. 2 — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 2 — considered

s. 3 — considered

s. 15 — considered

s. 15(1) — considered

s. 15(2) — considered

ss. 16-20 — considered

s. 16(3) — considered

s. 21 — considered

s. 25 — considered

s. 27 — considered

s. 28 — considered

s. 29 — considered

s. 32(a) — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91(24) — considered

s. 93 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — considered

s. 35(1) — referred to

s. 35(3) "treaty rights" [en. SI/84-102] — considered

Constitution Amendment Proclamation, 1983, SI/84-102

Generally — referred to

Fisheries Act, R.S.C. 1985, c. F-14

Generally — referred to

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

s. 81 — referred to

s. 83 — referred to

s. 85.1 [en. R.S.C. 1985, c. 32, (1st Supp.), s. 16] — referred to

s. 88 — referred to

Regulations considered by *McLachlin C.J.C.*, *Abella J.*:

Fisheries Act, R.S.C. 1985, c. F-14

Aboriginal Communal Fishing Licences Regulations, SOR/93-332

Generally — referred to

s. 2 "aboriginal organization" — considered

Regulations considered by *Bastarache J.* (concurring in the result):

Fisheries Act, R.S.C. 1985, c. F-14

Aboriginal Communal Fishing Licences Regulations, SOR/93-332

Generally — referred to

Words and phrases considered:

disadvantage

[Per McLachlin C.J.C. and Abella J. (Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ. concurring):] "Disadvantage" under s. 15 [*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11] connotes vulnerability, prejudice and negative social characterization. Section 15(2)'s purpose is to protect government programs targeting the conditions of a specific and identifiable disadvantaged group, as contrasted with broad societal legislation, such as social assistance programs. Not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination.

construed

[Per Bastarache J. (concurring in the result):] Most authors have considered the use of the word "construed" as significant in s. 25 [*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11]. In my opinion, the word "construe" is very broad. The *Oxford English Dictionary* (2nd ed. 1989) defines the term as meaning "[t]o analyse or trace the grammatical construction of a sentence; to take its words in such an order as to show the meaning of the sentence" (p. 796). The term accordingly permits the understanding that in constructing and interpreting the scope of *Charter* rights, courts must ensure that they do not abrogate or derogate from an aboriginal right or freedom. . . . I view the expression "shall not be construed" as ambiguous in terms of the effect of the provision.

This said, I view the French version of s. 25 as being considerably more certain. The expression "*ne porte pas atteinte aux*" loosely translates to "without prejudice to" (J. Picotte, *Juridictionnaire: Recueil des difficultés et des ressources du français juridique* (1991), vol. LA., at p. 228) or "will not prejudicially affect" (*Ontario English-French Legal Lexicon* (1987), entry 224). It is also important to note that the French version of s. 25 uses the same terms as ss. 21 and 29 of the *Charter* and that those sections have already been interpreted by this Court. In *Reference re Roman Catholic Separate High Schools Funding*, [1987] 1 S.C.R. 1148 (S.C.C.), "*ne porte pas atteinte aux*" in s. 29 was read by this Court, in *obiter dicta*, as constituting a bar to competing rights. The rule of internal consistency would require that the same words used in the same *Charter* (especially in the same section, dealing with general provisions) be interpreted in the same way, militating against finding that the French version does not provide for the most consistent answer to the quest for a common meaning.

other rights or freedoms

[Per Bastarache J. (concurring in the result):] In this case, what is significant about the scope of s. 25 [*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11] protection is the meaning of the words "other rights or freedoms". These words are "all-embrative" . . . ; this indicates that the protection was meant to be very broad. But the rights and freedoms are only those that "*pertain to the aboriginal peoples of Canada*", those that are particular to them. In French, the Act speaks of "*droits ou libertés ancestraux, issus de traités ou autres des peuples autochtones du Canada*".

The *ejusdem generis* rule indicates that, in an enumeration, the general word must be constrained to persons or things of the same class as those specifically mentioned. In s. 25, the general term "other rights or freedoms" follows the enumerated terms "aboriginal" and "treaty" rights. McLachlin C.J. and Abella J. argue that the rule should apply to limit the rights or freedoms protected to those of a constitutional character. I believe that a broader approach is merited, one more consistent with the interpretative principles outlined above.

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"[O]ther rights or freedoms" comprise statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government, as mentioned above, and settlement agreements that are a replacement for treaty and aboriginal rights. But private rights of individual Indians held in a private capacity as ordinary Canadian citizens would not be protected.

Termes et locutions cités:

défavorisés

[McLachlin, J.C.C., Abella, J. (Binnie, LeBel, Deschamps, Fish, Charron, Rothstein, JJ., souscrivant à leur opinion):] Le « désavantage » aux fins d'application de l'art. 15 [*Charte canadienne des droits et libertés*, partie 1 de la Loi Constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11] dénote la vulnérabilité, un préjugé et une image négative dans la société. Le paragraphe 15(2) a pour objet de protéger les programmes gouvernementaux axés sur la situation d'un groupe défavorisé précis et identifiable, par opposition aux mesures législatives sociales générales, tels les programmes d'aide sociale. Il n'est pas nécessaire que les membres du groupe soient tous défavorisés, il suffit que l'ensemble du groupe soit victime de discrimination.

construed

[Bastarache, J. (souscrivant au résultat des juges majoritaires):] La plupart des auteurs jugent importante la présence du mot « construed » dans le texte anglais de l'art. 25 [*Charte canadienne des droits et libertés*, partie 1 de la Loi Constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11]. À mon avis, le mot « construe » a un sens très large. Le dictionnaire *Oxford English Dictionary* (2e éd. 1989) en donne la définition suivante : [traduction] « analyser ou trouver la construction grammaticale d'une phrase; indiquer par l'ordre des mots le sens de la phrase » (p. 796). La présence de ce terme autorise donc à considérer que, lorsqu'ils interprètent la portée de droits garantis par la *Charte*, les tribunaux doivent s'assurer que ces droits ne portent pas atteinte à un droit ou à une liberté des peuples autochtones. [...] J'estime que l'expression « shall not be construed » est ambiguë en ce qui a trait à l'effet de la disposition.

Ceci étant dit, je suis d'avis que le texte français de l'art. 25 est beaucoup plus certain. L'expression « ne porte pas atteinte aux » pourrait être rendue approximativement par « without prejudice to » (J. Picotte, *Juridictionnaire : Recueil des difficultés et des ressources du français juridique* (1991), vol. I.A., p. 228) ou par « will not prejudicially affect » (*Lexique anglais-français du droit en Ontario* (1987), entrée 224). Il importe par ailleurs de souligner qu'on trouve dans le texte français de l'art. 25 les mêmes termes que dans les art. 21 et 29 de la *Charte*, qui ont déjà été interprétés par la Cour. Dans le *Renvoi relatif au projet de loi 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 R.C.S. 1148 (C.S.C.), la Cour a estimé, dans des remarques incidentes, que les mots « ne porte pas atteinte aux » figurant à l'art. 29 faisaient obstacle à des droits inconciliables. La règle de la cohérence interne exigerait que les mêmes mots utilisés dans la même *Charte* (surtout dans la même section, formée de dispositions générales) soient interprétés de la même manière, ce qui s'opposerait à la conclusion suivant laquelle le texte français ne fournit pas la réponse la plus cohérente pour la recherche d'une signification commune.

droits ou libertés [...] autres

[Bastarache, J. (souscrivant au résultat des juges majoritaires):] En l'espèce, ce qui importe au sujet de l'étendue de la protection établie par l'art. 25 [*Charte canadienne des droits et libertés*, partie 1 de la Loi Constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11], c'est la signification des mots « droits ou libertés [...] autres ». Ces mots ont une [traduction] « portée très générale », [...] ce qui indique qu'on voulait donner une étendue très large à la protection. Mais il est uniquement question des « droits ou libertés ancestraux, issus de traités ou autres des peuples autochtones du Canada », de ceux qui leur sont propres. En anglais, le texte parle de « rights or freedom that pertain to the aboriginal peoples of Canada ».

La règle *ejusdem generis* veut que, dans une énumération, la portée du terme général soit limitée aux personnes ou aux choses de la même catégorie que celles qui sont expressément mentionnées. À l'art. 25, le terme général « ou autres » suit l'énumération des droits ou libertés « ancestraux » et « issus de traités ». La Juge en chef McLachlin et la juge Abella soutiennent qu'il faut appliquer la règle de façon à limiter les droits ou libertés protégés à ceux qui sont de nature constitutionnelle. Je crois pour ma part qu'il faut retenir une approche plus large qui s'accorde davantage avec les principes d'interprétation décrits ci-dessus.

.....

Sont compris dans les droits et libertés « autres » les droits d'origine législative qui visent à protéger des intérêts liés à la culture, au territoire et à l'autonomie gouvernementale des Autochtones, comme je l'ai déjà signalé, ainsi que les accords de règlement qui remplacent des droits ancestraux ou issus de traités. Mais les droits privés dont jouissent les Autochtones sur le plan individuel, à titre privé, en tant que citoyens canadiens comme les autres, ne seraient pas protégés.

APPEAL by accused charged with fishing offences from judgment reported at *R. v. Kapp* (2006), 141 C.R.R. (2d) 249, 56 B.C.L.R. (4th) 11, 374 W.A.C. 248, [2006] 10 W.W.R. 577, 227 B.C.A.C. 248, 24 C.E.L.R. (3d) 99, [2006] 3 C.N.L.R. 282, [2006] B.C.J. No. 1273, 2006 BCCA 277, 2006 CarswellBC 1407 (B.C. C.A.), concerning constitutionality of communal fishing licence, regulations and Aboriginal Fisheries Strategy.

POURVOI formé par des accusés inculpés d'infractions relatives à la pêche à l'encontre d'un jugement publié à *R. v. Kapp* (2006), 141 C.R.R. (2d) 249, 56 B.C.L.R. (4th) 11, 374 W.A.C. 248, [2006] 10 W.W.R. 577, 227 B.C.A.C. 248, 24 C.E.L.R. (3d) 99, [2006] 3 C.N.L.R. 282, [2006] B.C.J. No. 1273, 2006 BCCA 277, 2006 CarswellBC 1407 (B.C. C.A.), au sujet de la constitutionnalité du permis de pêche communautaire, des règlements et de la Stratégie relative aux pêches autochtones.

McLachlin C.J.C., Abella J.:

A. Introduction

1 The appellants are commercial fishers, mainly non-aboriginal, who assert that their equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms* were violated by a communal fishing licence granting members of three aboriginal bands the exclusive right to fish for salmon in the mouth of the Fraser River for a period of 24 hours on August 19-20, 1998.

2 The appellants base their claim on s. 15(1). The essence of the claim is that the communal fishing licence discriminated against them on the basis of race. The Crown argues that the general purpose of the program under which the licence was issued was to regulate the fishery, and that it ameliorated the conditions of a disadvantaged group. These contentions, taken together, raise the issue of the interplay between s. 15(1) and s. 15(2) of the *Charter*. Specifically, they require this Court to consider whether s. 15(2) is capable of operating independently of s. 15(1) to protect ameliorative programs from claims of discrimination — a possibility left open in this Court's equality jurisprudence.

3 We have concluded that where a program makes a distinction on one of the grounds enumerated under s. 15 or an analogous ground but has as its object the amelioration of the conditions of a disadvantaged group, s. 15's guarantee of substantive equality is furthered, and the claim of discrimination must fail. As the communal fishing licence challenged in this appeal falls within s. 15(2)'s ambit — one of its objects being to ameliorate the conditions of the participating aboriginal bands — the appellants' claim of a violation of s. 15 cannot succeed. While the operation of s. 15(2) is sufficient to dispose of the appeal, these reasons, in addition to examining the respective roles of s. 15(1) and s. 15(2), will comment briefly on s. 25 of the *Charter*, in view of the reasons of Bastarache J. on this point.

B. Factual and Judicial History

4 Prior to European contact, aboriginal groups living in the region of the mouth of the Fraser River fished the river for food, social and ceremonial purposes. It is no exaggeration to say that their life centered in large part around the river and its abundant fishery. In the last two decades, court decisions have confirmed that pre-contact fishing practices integral to the culture of aboriginal people translate into a modern-day right to fish for food, social and ceremonial purposes: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.). The right is a communal right. It inheres in the community, not the individual, and may be exercised by people who are linked to the ancestral aboriginal community.

5 The aboriginal right has not been recognized by the courts as extending to fishing for the purpose of sale or commercial fishing: *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.). The participation of Aboriginals in the commercial fishery was thus left to individual initiative or to negotiation between aboriginal peoples and the government. The federal government determined that aboriginal people should be given a stake in the commercial fishery. The bands tended to be disadvantaged economically, compared to non-Aboriginals. Catching fish for their own tables and ceremonies left many needs unmet.

6 The government's decision to enhance aboriginal involvement in the commercial fishery followed the recommendations of the 1982 Pearse Final Report, which endorsed the negotiation of aboriginal fishery agreements (*Turning the Tide: A New Policy For Canada's Pacific Fisheries*). The Pearse Report recognized the problematic connection between aboriginal communities' economic disadvantage and the longstanding prohibition against selling fish — a prohibition that disrupted what was once an important economic opportunity for Aboriginals. Policing the prohibition was also problematic; the 1994 Gardner Pinfold Report addressed the serious conservation issue stemming from a fish sales prohibition "honoured more in the breach than the observance" (*An Evaluation of the Pilot Sale Arrangement of Aboriginal Fisheries Strategy (AFS)*, p. 3). The decision to enhance aboriginal participation in the commercial fishery may also be seen as a response to the directive of this Court in *Sparrow*, at p. 1119, that the government consult with aboriginal groups in the implementation of fishery regulation in order to honour its fiduciary duty to aboriginal communities. Subsequent decisions have affirmed the duty to consult and accommodate aboriginal communities with respect to resource development and conservation; it is a constitutional duty, the fulfilment of which is consistent with the honour of the Crown: see e.g. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.).

7 The federal government's policies aimed at giving aboriginal people a share of the commercial fishery took different forms, united under the umbrella of the "Aboriginal Fisheries Strategy". Introduced in 1992, the Aboriginal Fisheries Strategy has three stated objectives: ensuring the rights recognized by the *Sparrow* decision are respected; providing aboriginal communities with a larger role in fisheries management and increased economic benefits; and minimizing the disruption of non-aboriginal fisheries (1994 Gardner Pinfold Report). In response to consultations with stakeholders carried out since its inception, the Aboriginal Fisheries Strategy has been reviewed and adjusted periodically in order to achieve these goals. A significant part of the Aboriginal Fisheries Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of the communal fishing licence at issue in this case. The licence was granted pursuant to the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332 ("ACFLR"). The ACFLR grants communal licences to "aboriginal organization[s]", defined as including "an Indian band, an Indian band council, a tribal council and an organization that represents a territorially based aboriginal community". The communal licence cannot be granted to individuals, but an aboriginal organization can designate its use to individuals.

8 The licence with which we are concerned permitted fishers designated by the bands to fish for sockeye salmon between 7:00 a.m on August 19, 1998 and 7:00 a.m. on August 20, 1998, and to use the fish caught for food, social and ceremonial purposes, and for sale. Some of the fishers designated by the bands to fish under the communal fishing licence were also licensed commercial fishers entitled to fish at other openings for commercial fishers.

9 The appellants are all commercial fishers who were excluded from the fishery during the 24 hours allocated to the aboriginal fishery under the communal fishing licence. Under the auspices of the B.C. Fisheries Survival Coalition, they participated in a protest fishery during the prohibited period, for the purpose of bringing a constitutional challenge to the communal licence. As anticipated, they were charged with fishing at a prohibited time. In defence of the charges,

they filed notice of a constitutional question seeking declarations that the communal fishing licence, the *ACFLR* and related regulations and the Aboriginal Fisheries Strategy were unconstitutional.

10 The Provincial Court of British Columbia (Judge Kitchen) found that the communal fishing licence granted to the three bands was a breach of the equality rights of the appellants under s. 15(1) of the *Charter* that was not justified under s. 1 of the *Charter*. The court stayed proceedings on all the charges under s. 24 of the *Charter*: [2003] 4 C.N.L.R. 238, 2003 BCPC 279 (B.C. Prov. Ct.).

11 The Supreme Court of British Columbia (Brenner C.J.S.C.) allowed a summary convictions appeal by the Crown: (2004), 31 B.C.L.R. (4th) 258, 2004 BCSC 958 (B.C. S.C.). It held that the pilot sales program did not have a discriminatory purpose or effect because it did not perpetuate or promote the view that those who were forbidden to fish on the days when the pilot sales program fishery was open are less capable or worthy of recognition or value as human beings or as members of Canadian society. Brenner C.J.S.C. lifted the stay of proceedings and entered convictions against the appellants.

12 The British Columbia Court of Appeal, in five sets of reasons concurring in the result, dismissed the appeal: (2006), 56 B.C.L.R. (4th) 11, 2006 BCCA 277 (B.C. C.A.). Low J.A. concluded that the pilot sales program did not constitute denial of a benefit under s. 15 when the matter was viewed in a contextual rather than formalistic way. Mackenzie J.A. rejected the claim of discrimination on the basis that a discriminatory purpose or effect had not been established, endorsing the view of Brenner C.J.S.C. on the summary convictions appeal. Kirkpatrick J.A. dismissed the s. 15 claim on the basis that s. 25 of the *Charter*, which protects rights and freedoms pertaining to the aboriginal peoples of Canada, insulated the scheme from the discrimination charge. Finch C.J.B.C. concurred with both Low J.A. and Mackenzie J.A. on the s. 15 issue, and found that s. 25 was not engaged. Finally, Levine J.A. agreed with Finch C.J.B.C. on the s. 15 issue, but declined to express a view on whether s. 25 was engaged.

C. Analysis

13 Section 15 of the *Charter* provides:

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.

1. The Purpose of Section 15

14 Nearly 20 years have passed since the Court handed down its first s. 15 decision in the case of *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.). *Andrews* set the template for this Court's commitment to substantive equality — a template which subsequent decisions have enriched but never abandoned.

15 Substantive equality, as contrasted with formal equality, is grounded in the idea 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": *Andrews*, at p. 171, *per* McIntyre J., for the majority on the s. 15 issue. Pointing out that the concept of equality does not necessarily mean identical treatment and that the formal "like treatment" model of discrimination may in fact produce inequality, McIntyre J. stated (at p. 165):

To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and

merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

While acknowledging that equality is an inherently comparative concept (p. 164), McIntyre J. warned against a sterile similarly situated test focussed on treating "likes" alike. An insistence on substantive equality has remained central to the Court's approach to equality claims.

16 Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. Section 15(1) is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds. This is one way of combatting discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15(1). This is made apparent by the existence of s. 15(2). Thus s. 15(1) and s. 15(2) work together to confirm s. 15's purpose of furthering substantive equality.

17 The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same.

18 In *Andrews*, McIntyre J. viewed discriminatory impact through the lens of two concepts: (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics. *Andrews*, for example, was decided on the second of these concepts; it was held that the prohibition against non-citizens practising law was based on a stereotype that non-citizens could not *properly* discharge the responsibilities of a lawyer in British Columbia — a view that denied non-citizens a privilege, not on the basis of their merits and capabilities, but on the basis of what the Royal Commission Report on *Equality in Employment* (1984), referred to as "attributed rather than actual characteristics" (p. 2). Additionally, McIntyre J. emphasized that a finding of discrimination might be grounded in the fact that the impact of a particular law or program was to perpetuate the disadvantage of a group defined by enumerated or analogous s. 15 grounds. In this context, he said (at p. 174):

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

19 A decade later, in *Law*, this Court suggested that discrimination should be defined in terms of the impact of the law or program on the "human dignity" of members of the claimant group, having regard to four contextual factors: (1) preexisting disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected (paras. 62-75).

20 The achievement of *Law* was its success in unifying what had become, since *Andrews*, a division in this Court's approach to s. 15. *Law* accomplished this by reiterating and confirming *Andrews*' interpretation of s. 15 as a guarantee of substantive, and not just formal, equality. Moreover, *Law* made an important contribution to our understanding of the conceptual underpinnings of substantive equality.

21 At the same time, several difficulties have arisen from the attempt in *Law* to employ human dignity *as a legal test*. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity. As Dickson C.J. said in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.):

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. [p. 136]

22 But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.¹ Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.²

23 The analysis in a particular case, as *Law* itself recognizes, more usefully focuses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

24 Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews*—combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.

25 The central purpose of combatting discrimination, as discussed, underlies both s. 15(1) and s. 15(2). Under s. 15(1), the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on *enabling* governments to pro-actively combat existing discrimination through affirmative measures.

26 Against this background, we turn to a more detailed examination of s. 15(2) and its role in this appeal.

2. Section 15(2)

27 Under *Andrews*, as previously noted, s. 15 does not mean identical treatment. McIntyre J. explained that "every difference in treatment between individuals under the law will not necessarily result in inequality", and that "identical treatment may frequently produce serious inequality" (p. 164). McIntyre J. explicitly rejected identical treatment as a *Charter* objective, based in part on the existence of s. 15(2). At p. 171, he stated that "the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2)".

28 Rather than requiring identical treatment for everyone, in *Andrews*, McIntyre J. distinguished between difference and discrimination and adopted an approach to equality that acknowledged and accommodated differences. McIntyre J. proposed the following model, at p. 182:

[I]n assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

In other words, not every distinction is discriminatory. By their very nature, programs designed to ameliorate the disadvantage of one group will inevitably exclude individuals from other groups. This does not necessarily make them either unconstitutional or "reverse discrimination". *Andrews* requires that discriminatory conduct entail more than *different* treatment. As McIntyre J. declared at p. 167, a law will not "necessarily be bad because it makes distinctions".

29 In our view, the appellants have established that they were treated differently based on an enumerated ground, race. Because the government argues that the program ameliorated the conditions of a disadvantaged group, we must take a more detailed look at s. 15(2).

30 The question that arises is whether the program that targeted the aboriginal bands falls under s. 15(2) in the sense that it is a "law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups". As noted, the communal fishing licence authorizing the three bands to fish for sale on August 19-20 was issued pursuant to an enabling statute and regulations — namely the *ACFLR*. This qualifies as a "law, program or activity" within the meaning of s. 15(2). The more complex issue is whether the program fulfills the remaining criteria of s. 15(2) — that is, whether the program "has as its object the amelioration of conditions of disadvantaged individuals or groups".

31 Even before the enactment of the *Charter*, this Court in *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*, [1981] 1 S.C.R. 699 (S.C.C.), recognized that ameliorative programs targeting a disadvantaged group do not constitute discrimination. The issue in the case was whether the Energy Resources Conservation Board had jurisdiction to require an "affirmative action" program for the hiring of aboriginal people as a condition of its approval of a tar sands plant. The Court unanimously concluded that there was no such jurisdiction, but Ritchie J., writing for four of the judges (Laskin C.J., himself, Dickson J. and McIntyre J.), addressed the affirmative action aspect of the case, concluding that a program designed to benefit the aboriginal community was not discrimination within the meaning of *The Individual's Rights Protection Act* of Alberta, 1972 (Alta.), c. 2:

In the present case what is involved is a proposal designed to improve the lot of the native peoples with a view to enabling them to compete as nearly as possible on equal terms with other members of the community who are seeking employment in the tar sands plant. With all respect, I can see no reason why the measures proposed by the "affirmative action" programs for the betterment of the lot of the native peoples in the area in question should be construed as "discriminating against" other inhabitants. The purpose of the plan as I understand it is not to displace non-Indians from their employment, but rather to advance the lot of the Indians so that they may be in a competitive position to obtain employment without regard to the handicaps which their race has inherited. [p. 711]

32 The Royal Commission Report on *Equality in Employment*, whose mandate was to determine whether there should be affirmative action in Canada and on which McIntyre J. relied to develop his theories of discrimination and equality, set out the principles underlying s. 15(2), at pp. 13-14:

In recognition of the journey many have yet to complete before they achieve equality, and in recognition of how the duration of the journey has been and is being unfairly protracted by arbitrary barriers, section 15(2) permits laws, programs, or activities designed to eliminate these restraints. While section 15(1) guarantees to individuals the right to be treated as equals free from discrimination, section 15(2), though itself creating no enforceable remedy, assures

that it is neither discriminatory nor a violation of the equality guaranteed by section 15(1) to attempt to improve the condition of disadvantaged individuals or groups, even if this means treating them differently.

Section 15(2) covers the canvas with a broad brush, permitting a group remedy for discrimination. The section encourages a comprehensive or systemic rather than a particularized approach to the elimination of discriminatory barriers.

Section 15(2) does not create the statutory obligation to establish laws, programs, or activities to hasten equality, ameliorate disadvantage, or eliminate discrimination. But it sanctions them, acting with statutory acquiescence.

33 In essence, s. 15(2) of the *Charter* seeks to protect efforts by the state to develop and adopt remedial schemes designed to assist disadvantaged groups. This interpretation is confirmed by the language in s. 15(2), "does not preclude".

34 This Court dealt explicitly with the relationship between s. 15(1) and s. 15(2) in *Ardoch Algonquin First Nation & Allies v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37 (S.C.C.). The Court, *per* Iacobucci J., appeared unwilling at that time to give s. 15(2) independent force, but left the door open for that possibility, at para. 108:

[A]t this stage of the jurisprudence, I see s. 15(2) as confirmatory of s. 15(1) and, in that respect, claimants arguing equality claims in the future should first be directed to s. 15(1) since that subsection can embrace ameliorative programs of the kind that are contemplated by s. 15(2). By doing that one can ensure that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review. However ... we may well wish to reconsider this matter at a future time in the context of another case. [Emphasis added.]

35 Iacobucci J. in *Ardoch* perceived two possible approaches to the interpretation of s. 15(2). He believed that the Supreme Court could either read s. 15(2) as an interpretive aid to s. 15(1) (the approach adopted in *Ardoch*) or read it as an exception or exemption from the operation of s. 15(1).

36 He favoured the interpretive aid approach, while acknowledging that the exemption approach had some support. In particular, he cited Mark A. Drumbl and John D. R. Craig for the proposition that s. 15(2) should defend against a s. 15(1) violation because otherwise the provision becomes redundant and does not encourage the government to combat discrimination pro-actively through ameliorative programs ("Affirmative Action in Question: A Coherent Theory for Section 15(2)" (1997), 4 *Rev. Const. Stud.* 80, at para. 102).

37 In our view, there is a third option: if the government can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a s. 15(1) analysis at all. As discussed at the outset of this analysis, s. 15(1) and s. 15(2) should be read as working together to promote substantive equality. The focus of s. 15(1) is on *preventing* governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on *enabling* governments to pro-actively combat discrimination. Read thus, the two sections are confirmatory of each other. Section 15(2) supports a full expression of equality, rather than derogating from it. "Under a substantive definition of equality, different treatment in the service of equity for disadvantaged groups is an expression of equality, not an exception to it": P. W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 2, at p. 55-53.

38 But this confirmatory purpose does not preclude an independent role for s. 15(2). Section 15(2) is more than a hortatory admonition. It tells us, in simple clear language, that s. 15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of s. 15.

39 Here the appellants claim discrimination on the basis of s. 15(1). The source of that discrimination — the very essence of their complaint — is a program that may be ameliorative. This leaves but one conclusion: if the government establishes that the program falls under s. 15(2), the appellants' claim must fail.

40 In other words, once the s. 15 claimant has shown a distinction made on an enumerated or analogous ground, it is open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional. This approach has the advantage of avoiding the symbolic problem of finding a program discriminatory before "saving" it as ameliorative, while also giving independent force to a provision that has been written as distinct and separate from s. 15(1). Should the government fail to demonstrate that its program falls under s. 15(2), the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory.

41 We would therefore formulate the test under s. 15(2) as follows. A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. In proposing this test, we are mindful that future cases may demand some adjustment to the framework in order to meet the litigants' particular circumstances. However, at this early stage in the development of the law surrounding s. 15(2), the test we have described provides a basic starting point — one that is adequate for determining the issues before us on this appeal, but leaves open the possibility for future refinement.

42 We build our analysis of s. 15(2) and its operation around three key phrases in the provision. The subsection protects "any law, program or activity that *has as its object* the *amelioration* of conditions of *disadvantaged* individuals or groups". While there is some overlap in the considerations raised by each of these terms, it may be useful to consider each of them individually.

a) "*Has as its Object*"

43 In interpreting this phrase, two issues arise. The first is whether courts should look to the *purpose* or to the *effect* of legislation. The second is whether, in order to qualify for s. 15(2) protection, a program must have an ameliorative purpose as its sole object, or whether having such a goal as one of several objectives is sufficient.

44 The language of s. 15(2) suggests that legislative goal rather than actual effect is the paramount consideration in determining whether or not a program qualifies for s. 15(2) protection. Michael Peirce defends this view, which he refers to as the "subjective" approach, because it adheres more closely to the language of the provision and avoids potentially inappropriate judicial intervention in government programs ("[A Progressive Interpretation of Subsection 15\(2\) of the Charter](#)" (1993), 57 *Sask. L. Rev.* 263). Scholars have nonetheless disagreed about the appropriate approach, often using the "subjective" (goal-based) and "objective" (effect-based) language.

45 Scholars and judges who have supported judicial examination of the actual *effect* of a program offer one primary argument to defend their view. They express concern that a "subjective" test will permit the government to defeat a discrimination claim by declaring that the impugned law has an ameliorative purpose. Thus, Russell Juriansz states that a "purely subjective test may be too wide" ("Recent Developments in Canadian Law: Anti-Discrimination Law Part I" (1987), 19 *Ottawa L. Rev.* 447, at p. 483). David Lepofsky and Jerome Bickenbach believe that the "better view is that the defendant must establish that the impugned program has some serious likelihood of achieving its ameliorative goal" ("Equality Rights and the Physically Handicapped", in A. F. Bayefsky and M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985), 323, at p. 355). They justify this perspective with the argument that "if ameliorative legislative purpose were the sole test under section 15(2), a legislature could easily circumvent the egalitarian requirements under section 15(1) by including in any potentially discriminatory legislation a clause which provides that 'this Act has as its object the amelioration of the conditions of ... a disadvantaged group'" (p. 355).

46 In our opinion, this concern can be easily addressed. There is nothing to suggest that a test focussed on the goal of legislation must slavishly accept the government's characterization of its purpose. Courts could well examine legislation to ensure that the declared purpose is genuine. Courts confronted with a s. 15(2) claim have done just that. For example, in *Apsit v. Manitoba (Human Rights Commission)* (1987), 50 *Man. R. (2d)* 92 (Man. Q.B.) (rev'd in part (1988), 55 *Man. R. (2d)* 263 (Man. C.A.)), Simonsen J. explained, at para. 51:

A bald declaration by government that it has adopted a program which "has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race ..." does not *ipso facto* meet the requirements to sanctify the program under s. 15(2) of the *Charter*. The government cannot employ such a naked declaration as a shield to protect an activity or program which is unnecessarily discriminatory.

47 In that vein, proponents of the approach that focusses on the ameliorative goal of the program, rather than its effect, argue that doing so will prevent courts from unduly interfering in ameliorative programs created by the legislature. They note that Canadian *Charter* drafters wished to avoid the American experience, whereby judges overturned affirmative action programs under the banner of equality. The purpose-driven approach also reflects the language of the provision itself, which focuses on the "object" of the program, law or activity rather than its impact. Moreover, the effects of a program in its fledgling stages cannot always be easily ascertained. The law or program may be experimental. If the sincere purpose is to promote equality by ameliorating the conditions of a disadvantaged group, the government should be given some leeway to adopt innovative programs, even though some may ultimately prove to be unsuccessful. The government may learn from such failures and revise equality-enhancing programs to make them more effective.

48 Given the language of the provision and its goal of enabling governments to pro-actively combat discrimination, we believe the "purpose"-based approach is more appropriate than the "effect"-based approach: where a law, program or activity creates a distinction based on an enumerated or analogous ground, was the government's goal in creating that distinction to improve the conditions of a group that is disadvantaged? In examining purpose, courts may therefore find it necessary to consider not only statements made by the drafters of the program but also whether the legislature chose means rationally related to that ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the stated goal of combatting disadvantage. The Manitoba Court of Queen's Bench suggested that it favoured an analysis of this kind in *Apsit*, at para. 54:

In order to justify a program under s. 15(2), I believe there must be a real nexus between the object of the program as declared by the government and its form and implementation. It is not sufficient to declare that the object of a program is to help a disadvantaged group if in fact the ameliorative remedy is not directed toward the cause of the disadvantage. There must be a unity or interrelationship amongst the elements in the program which will prompt the court to conclude that the remedy in its form and implementation is rationally related to the cause of the disadvantage.

49 Analysing the means employed by the government can easily turn into assessing the *effect* of the program. As a result, to preserve an intent-based analysis, courts could be encouraged to frame the analysis as follows: Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose? For the distinction to be rational, there must be a correlation between the program and the disadvantage suffered by the target group. Such a standard permits significant deference to the legislature but allows judicial review where a program nominally seeks to serve the disadvantaged but in practice serves other non-remedial objectives.

50 The next issue is whether the program's ameliorative purpose needs to be its exclusive objective. Programs frequently serve more than one purpose or attempt to meet more than one goal. Must the ameliorative object be the sole object, or may it be one of several?

51 We can find little justification for requiring the ameliorative purpose to be the sole object of a program. It seems unlikely that a single purpose will motivate any particular program; any number of goals are likely to be subsumed within a single scheme. To prevent such programs from earning s. 15(2) protection on the grounds that they contain other objectives seems to undermine the goal of s. 15(2).

52 The importance of the ameliorative purpose within the scheme may help determine the *scope* of s. 15(2) protection, however. Consider that an ameliorative program may coexist with or interact with a larger legislative scheme. If only the program has an ameliorative purpose, does s. 15(2) extend to protect the wider legislative scheme? We offer as a tentative

guide that s. 15(2) precludes from s. 15(1) review distinctions made on enumerated or analogous grounds that serve and are necessary to the ameliorative purpose.

b) "*Amelioration*"

53 Section 15(2) protects programs that aim to "ameliorate" the condition of disadvantaged groups identified by the enumerated or analogous grounds. Although the word does not at first seem liable to misunderstanding, courts have previously understood the term (and s. 15(2)) to apply in surprising circumstances. In *R. v. Music Explosion Ltd.* (1989), 62 Man. R. (2d) 189 (Man. Q.B.), the Manitoba Court of Queen's Bench upheld a Winnipeg bylaw that restricted young people under 16 from operating an amusement device without the consent of a guardian or a parent on the grounds that it was protected by s. 15(2). Smith J. declared that the bylaw "is obviously for the benefit of the special needs of young persons" (para. 21). On appeal, the decision was reversed. The Court of Appeal explained: "[T]his legislation does not confer special benefits upon young people, but rather imposes a limitation. Nor is the purpose of the legislation the amelioration of their condition" ((1990), 68 Man. R. (2d) 203 (Man. C.A.), at para. 18). Courts have also used s. 15(2) to uphold provisions of the *Criminal Code* (*Rebic v. Collver* (1985), 20 C.C.C. (3d) 196 (B.C. S.C.), aff'd (1986), 28 C.C.C. (3d) 154 (B.C. C.A.)) and of the *Young Offenders Act* (*R. v. M.* (1985), 21 C.C.C. (3d) 116 (Man. Q.B.)).

54 These precedents suggest that the meaning of "amelioration" deserves careful attention in evaluating programs under s. 15(2). We would suggest that laws designed to restrict or punish behaviour would not qualify for s. 15(2) protection. Nor, as already discussed, should the focus be on the effect of the law. This said, the fact that a law has no plausible or predictable ameliorative effect may render suspect the state's ameliorative purpose. Governments, as discussed above, are not permitted to protect discriminatory programs on colourable pretexts.

c) "*Disadvantaged*"

55 The interpretation of "disadvantaged", explored in *Andrews, Miron v. Trudel*, [1995] 2 S.C.R. 418 (S.C.C.), and *Law*, and other cases in the context of s. 15(1), requires little further elaboration here. "Disadvantage" under s. 15 connotes vulnerability, prejudice and negative social characterization. Section 15(2)'s purpose is to protect government programs targeting the conditions of a specific and identifiable disadvantaged group, as contrasted with broad societal legislation, such as social assistance programs. Not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination.

3. *Application of Section 15(2) to this Case*

56 The appellants have argued they were denied a benefit on the basis of race, a ground enumerated in s. 15 of the *Charter*. As discussed above, once the appellants have demonstrated such a distinction, the government may attempt to show the program is protected under s. 15(2). The government conferred the communal fishing licence valid for August 19-20 to particular aboriginal bands. Therefore, we are satisfied that the appellants have demonstrated a distinction imposed on the basis of race, an enumerated ground under s. 15.

57 We have earlier suggested that a distinction based on the enumerated or analogous grounds in a government program will not constitute discrimination under s. 15 if, under s. 15(2), (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. The question is whether the program at issue on this appeal meets these conditions.

58 The first issue is whether the program that excluded Mr. Kapp and other non-band fishers from the fishery had an ameliorative or remedial purpose. The Crown describes numerous objectives for the impugned pilot sales program. These include negotiating solutions to aboriginal fishing rights claims, providing economic opportunities to native bands and supporting their progress towards self-sufficiency. The impugned fishing licence relates to all of these goals. The pilot sales program was part of an attempt — albeit a small part — to negotiate a solution to aboriginal fishing rights claims. The communal fishing licence provided economic opportunities, through sale or trade, to the bands. Through these endeavours, the government was pursuing the goal of promoting band self-sufficiency. In these ways, the government

was hoping to redress the social and economic disadvantage of the targeted bands. The means chosen to achieve the purpose (special fishing privileges for aboriginal communities, constituting a benefit) are rationally related to serving that purpose. It follows that the Crown has established a credible ameliorative purpose for the program.

59 The government's aims correlate to the actual economic and social disadvantage suffered by members of the three aboriginal bands. The disadvantage of aboriginal people is indisputable. In *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 (S.C.C.), the Court noted "the legacy of stereotyping and prejudice against Aboriginal peoples" (para. 66). The Court has also acknowledged that "Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health and housing" (*Ardoch*, at para. 69). More particularly, the evidence shows in this case that the bands granted the benefit were in fact disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day. The communal fishing licence, by addressing long-term goals of self-sufficiency and, more immediately, by providing additional sources of income and employment, relates to the social and economic disadvantage suffered by the bands. The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage suffered by band members.

60 Mr. Kapp suggests that the focus must be on the particular forms of disadvantage suffered by the bands who received the benefit, and argues that this program did not offer a benefit that effectively tackled the problems faced by these bands. As discussed above, what is required is a correlation between the program and the disadvantage suffered by the target group. If the target group is socially and economically disadvantaged, as is the case here, and the program may rationally address that disadvantage, then the necessary correspondence is established.

61 We conclude that the government program here at issue is protected by s. 15(2) as a program that "has as its object the amelioration of conditions of disadvantaged individuals or groups". It follows that the program does not violate the equality guarantee of s. 15 of the *Charter*.

5. Section 25 of the Charter

62 Having concluded that a breach of s. 15 is not established, it is unnecessary to consider whether s. 25 of the *Charter* would bar the appellants' claim. However, we wish to signal our concerns with aspects of the reasoning of Bastarache J. and of Kirkpatrick J.A., both of whom would have dismissed the appeal solely on the basis of s. 25.

63 An initial concern is whether the communal fishing licence at issue in this case lies within s. 25's compass. In our view, the wording of s. 25 and the examples given therein — aboriginal rights, treaty rights, and "other rights or freedoms", such as rights derived from the *Royal Proclamation* or from land claims agreements — suggest that not every aboriginal interest or program falls within the provision's scope. Rather, only rights of a constitutional character are likely to benefit from s. 25. If so, we would question, without deciding, whether the fishing licence is a s. 25 right or freedom.

64 A second concern is whether, even if the fishing licence does fall under s. 25, the result would constitute an absolute bar to the appellants' s. 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting *Charter* rights.

65 These issues raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians. In our view, prudence suggests that these issues are best left for resolution on a case-by-case basis as they arise before the Court.

D. Conclusion

66 We would dismiss the appeal on the ground that breach of the s. 15 equality guarantee has not been established.

Bastarache J.:

1. Introduction

67 The Minister of Fisheries and Oceans has the task of managing the salmon fishery on the Fraser River. In an effort to enhance the management of this fishery and address a number of issues besetting the fishery, he developed the *Aboriginal Fisheries Strategy*, a component of which in turn is the *Pilot Sales Program*. Under this program, the Minister exercised his discretion under the *Fisheries Act*, R.S.C. 1985, c. F-14, and the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332.

68 On August 19, 1998, the Minister issued a licence to the Musqueam, Burrard and Tsawwassen First Nations, permitting them to fish for a period of 24 hours in exclusivity, and to sell their catch. The appellants, who are all commercial fishers, mounted a "protest fishery" during the aboriginal fishery and were charged for fishing during a time when the fishery was closed to them. At their subsequent trial, the appellants did not challenge the law under which they were charged, but asserted that the trial proceedings should be stayed as their rights to equality under s. 15(1) of the *Canadian Charter of Rights and Freedoms* had been violated. They argue that their right to participate as equals in the public commercial fishery has been breached on the basis of a race-based distinction and that any race-based distinction affects the dignity of the persons subject to discrimination.

69 The respondent Minister argues that the appellants were not denied any benefit of the law, as they were provided opportunities to fish and, indeed, caught significant quantities of salmon. Moreover, providing aboriginal communities, which have historically been disadvantaged, with access to commercial salmon fishing does not demean the dignity of commercial salmon fishers by treating them as less worthy and valued members of Canadian society. The respondent Minister stated that the policy under the *Aboriginal Fisheries Strategy* was to provide opportunities to fish for food, and for social and ceremonial purposes, and in some cases pilot sales, to aboriginal communities having historical use and occupancy of an area. He explained that approximately 70 fisheries agreements were negotiated annually with aboriginal groups throughout the province. Under these agreements, the groups received communal licences authorizing fishing in accordance with the fisheries agreements. The position of the respondent is that the members of the claimant group, which consists of individuals, cannot properly compare themselves to aboriginal communities, the recipients of the benefit in question. The appellants respond that membership in a band does not constitute a valid proxy in any circumstance that is functionally relevant to the regulation of the public fishery. The appellants add that any cultural significance to fishery activity is dealt with by the doctrine of aboriginal rights and the protection of such rights by s. 35 of the *Constitution Act, 1982*.

70 With regard to the communal aspect of the fishery, the trial judge, Kitchen Prov. Ct. J., had this to say: "The Department labels the fishery 'communal', but the individuals designated by the bands to participate are completely on their own and keep all profits for themselves.... [T]he pilot sales fishery provides financial assistance to only the individual members of the bands, not the bands generally ... It is not a communal fishery.... [B]and members who were most successful in the pilot sales fishery were those who were also commercial fishers and operated fully equipped commercial fishing vessels" ([2003] 4 C.N.L.R. 238, 2003 BCPC 279 (B.C. Prov. Ct.), at paras. 200, 211 and 214).

71 The *Pilot Sales Program* was not related to the specific aboriginal right to fish for food found in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.). Rather, according to the respondent, it was designed to reach negotiated solutions to claims for aboriginal commercial fishing rights and to provide economic opportunities to native bands, to support their progress towards self-sufficiency. Minister Crosbie, the Minister of Fisheries and Oceans at the time, explained that unauthorized sale of aboriginal food fish was creating a management problem. He explained that, rather than litigating the issue, the Department sought to reach an agreement with aboriginal groups as to how much fish they could take and sell and to allow the Department to regulate how the fish would be sold. James Matkin, speaking for the Department of Fisheries, explained that the pilot sales are justified as an exercise in policy making of the Minister's authority under the *Fisheries Act* and that they are designated to follow the court's direction to negotiate rather than to litigate.

72 With regard to the rationale for the pilot project, Kitchen Prov. Ct. J. had this to say:

It is difficult to discern the real purpose of the pilot sales fishery.... Fisheries Minister John Crosbie gave control of poaching as the reason for the program....

[H]e also mentioned that the program was to be an experiment. This is a second justification given for the program....

This literature also asserts that the *Sparrow Case* requires that this type of opportunity be afforded to Aboriginals. This is clearly not the situation....

... Department literature also mentions the fiduciary duty society has to the Aboriginal community and how this has prompted the Department to move ahead of caselaw ...

.....

Most significantly, the Department of Fisheries and Oceans have given economic development and an ameliorative purpose as the reason for pilot sales program. But there is a real suspicion that this is an *ex post facto* justification; ...

.....

Even if financial disadvantage were an issue there was no economic study or assessment done prior to or during the pilot sales fishery concerning the economic need of the bands and the financial rewards the fishery would produce....

.....

Several reasons have been proffered at various times. There has been no consistent rationale for the program. [paras. 186-89, 191, 199 and 210]

73 The important point to be made here is that the respondent's position is that the *Aboriginal Fisheries Strategy* and the *Pilot Sales Program* were primarily aimed at management of the fishery and did not have as their primary object the amelioration of conditions of disadvantaged groups or individuals. The respondent therefore does not rely on s. 15(2) of the *Charter*. He states that s.15(2) is an interpretative provision and that given this Court's established lines of authority on the proper approach to analysis of the equality claims under s. 15(1), the ameliorative purpose or effect of a program can readily be taken into account under s. 15(1).

74 Kitchen Prov. Ct. J. held that the *Pilot Sales Program* violated s. 15(1) and was not saved by s. 1 of the *Charter*. The summary conviction appeal judge, Brenner C.J.S.C., allowed the appeal on the basis that the trial judge had identified the claimant and comparator groups too narrowly, that he had failed to properly consider the preexisting disadvantage of the aboriginal communities that comprise the comparator group, and that he did not give sufficient weight to the fact that the *Pilot Sales Program* did not have a significant impact on the claimant group ((2004), 31 B.C.L.R. (4th) 258, 2004 BCSC 958 (B.C. S.C.)). He concluded that the *Pilot Sales Program* corresponds to the needs, capacity and circumstances of the aboriginal communities and that it is also consistent with the needs, capacity and circumstances of the rest of Canadian society. Although the issue was not dealt with substantially at trial, Brenner C.J.S.C. permitted a number of interveners to argue that s. 25 of the *Charter* applied in this case. He eventually concluded that it did not. The application of s. 25 was fully argued by all parties and most interveners in the Court of Appeal and in this Court.

75 The five members of the panel in the Court of Appeal of British Columbia were unanimous in dismissing the appeal, but for different reasons ((2006), 56 B.C.L.R. (4th) 11, 2006 BCCA 277 (B.C. C.A.)). Finch C.J.B.C. and Low and Levine J.J.A. held that the appellants had totally failed to establish that they had been denied a benefit and therefore failed to get past the first stage of the *Law* test (*Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.)). They concluded that the aboriginal communal licence was simply part of a broader regulatory framework which provided for various user groups. The Minister in exercising his discretion did not deny the appellants a real benefit since they were provided other opportunities to fish under commercial licences. MacKenzie J.A. held that, assuming the appellants were successful in getting past the first two stages of the *Law* test, they had failed to establish that the communal licences had a discriminatory purpose or effect. Kirkpatrick J.A. held that the communal fishing licences granted were protected under s. 25 of the *Charter* as "[an]other righ[t] or freedo[m] that pertain[s] to the aboriginal peoples of Canada". She further held that s. 25 was triggered whenever the outcome of a *Charter* challenge might abrogate or

derogate from aboriginal rights or freedoms. Since the appellants were seeking to eliminate the *Pilot Sales Program*, s. 25 operated to bar their constitutional challenge under s. 15.

2. Analysis

76 Like Kirkpatrick J.A., I am of the view that s. 25 of the *Charter* provides a complete answer to the question posed in this appeal. I will initially address the role and effect of s. 25, then outline the scope of the provision. Finally, I will propose an analytical approach to be followed when s. 25 is engaged and apply that approach to the present matter.

77 There is no need for me to engage in a full analysis of the application of s. 15 of the *Charter*. It is sufficient for me to establish the existence of a potential conflict between the *Pilot Sales Program* and s. 15. This said, I want to state clearly that I am in complete agreement with the restatement of the test for the application of s. 15 that is adopted by the Chief Justice and Abella J. in their reasons for judgment.

2.1 Role and Effect of Section 25

78 The enactment of the *Charter* undoubtedly heralded a new era for individual rights in Canada. Nevertheless, the document also expressly recognizes rights more aptly described as collective or group rights. The manner in which collective rights can exist with the liberal paradigm otherwise established by the *Charter* remains a source of ongoing tension within the jurisprudence and the literature. This tension comes to a head in the aboriginal context in s. 25.

79 Most authors believe that s. 25 is an interpretative provision and does not create new rights. B.H. Wildsmith outlines the two modes of interpretation most commonly posited:

Under one mode of interpreting section 25, the section admonishes the decision maker to construe the Charter right or freedom so as to give effect to it, if possible, without an adverse impact on section 25 rights or freedoms. If it is not possible to so construe the Charter right or freedom so as to avoid a negative impact on native rights, then the force of section 25 is spent. Effect is given to the Charter right or freedom despite the [negative] impact on native rights. Under the second mode of interpreting section 25, the conflict between Charter rights and section 25 rights, if irreconcilable, would be resolved by giving effect to the section 25 rights and freedoms. In short, native rights remain inviolable and unaffected by the rights or freedoms guaranteed by the Charter.

(*Aboriginal Peoples & Section 25 of the Canadian Charter of Rights and Freedoms* (1988), at pp. 10-11)

80 The first mode has been described in the literature as an interpretative prism or a mere canon of interpretation. The second method is most commonly referred to as a shield. Wildsmith provides an example (at pp. 11-12) that is highly reminiscent of the present matter to demonstrate that there is a serious difficulty in finding that s. 25 is a mere canon of interpretation. If a provincial Act were to establish that "no Indian shall fish or hunt except for his own personal consumption unless he has first obtained a licence", and that no treaty or aboriginal right to this exemption existed, then a non-Indian hunter or fisherman would say that the statute violated s. 15(1) of the *Charter*. Indians would have a right to hunt or fish for personal consumption denied to others. The statutory right given to the Indians would be an "other right or freedom" under s. 25. The court would then be forced to choose between vindicating the equality right or the right protected by s. 25. If the real effect of s. 25 is to protect native rights and freedoms from erosion based on the *Charter*, the conflict should be resolved by refusing to apply s. 15 in these circumstances.

81 I agree that giving primacy to s. 25 is what was clearly intended. As will be seen, this is consistent with the wording and history of the provision. It is also consistent with the declarations of the then Deputy Minister of Justice, Roger Tassé, and with those of the Minister of Justice at the time of the 1983 amendment, Justice Minister Mark MacGuigan.

2.1.1 Interpretative Approach

82 Our Court has given great importance to the need for purposeful interpretations. In *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56 (S.C.C.), Iacobucci J. gives a detailed explanation of the rules of statutory

interpretation, showing that one must first consider the wording of the Act, then the legislative history, the scheme of the Act, and the legislative context. Consequently, I will examine the manner in which s. 25 addresses the tension between individual and group rights with reference to all of the above.

83 In *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), at para. 82, this Court stated: "Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples." Clearly, this Court has held that a generous interpretation is mandated.

2.1.2 Textual and Structural Analysis

84 First, let us consider the terms of s. 25:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

25. Le fait que la présente Charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment :

a) aux droits ou libertés reconnus par la Proclamation royale du 7 octobre 1763;

b) aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

85 Here we have an Act that is clear in its French version and ambiguous in its English version. Other provisions of the *Charter* provide the statutory context for the interpretation of s. 25. Section 21 provides that nothing in ss. 16 to 20 "abrogates or derogates from any right, privilege or obligation with respect to the English and French languages". Section 29 provides that nothing in the *Charter* "abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools".

86 Most authors have considered the use of the word "construed" as significant in s. 25. In my opinion, the word "construe" is very broad. The *Oxford English Dictionary* (2nd ed. 1989) defines the term as meaning "[t]o analyse or trace the grammatical construction of a sentence; to take its words in such an order as to show the meaning of the sentence" (p. 796). The term accordingly permits the understanding that in constructing and interpreting the scope of *Charter* rights, courts must ensure that they do not abrogate or derogate from an aboriginal right or freedom. As noted above, Wildsmith described the two competing approaches to s. 25 as differing modes of interpretation. I view the expression "shall not be construed" as ambiguous in terms of the effect of the provision.

87 This said, I view the French version of s. 25 as being considerably more certain. The expression "*ne porte pas atteinte aux*" loosely translates to "without prejudice to" (J. Picotte, *Juridictionnaire: Recueil des difficultés et des ressources du français juridique* (1991), vol. LA., at p. 228) or "will not prejudicially affect" (*Ontario English-French Legal Lexicon* (1987), entry 224). It is also important to note that the French version of s. 25 uses the same terms as ss. 21 and 29 of the *Charter* and that those sections have already been interpreted by this Court. In *Reference re Roman Catholic Separate High Schools Funding*, [1987] 1 S.C.R. 1148 (S.C.C.), "*ne porte pas atteinte aux*" in s. 29 was read by this Court, in *obiter dicta*, as constituting a bar to competing rights. The rule of internal consistency would require that the same words used in the same *Charter* (especially in the same section, dealing with general provisions) be interpreted in the same way, militating against finding that the French version does not provide for the most consistent answer to the quest for a common meaning. See *R. c. Bois*, [2004] 1 S.C.R. 217, 2004 SCC 6 (S.C.C.); see also *Reference re Roman Catholic Separate High Schools Funding* and *Adler v. Ontario*, [1996] 3 S.C.R. 609 (S.C.C.).

88 In any case, like Wildsmith, I do not believe that the difference in wording is decisive. First, s. 25 is very different from s. 27, which is the only general provision in the *Charter* that has been clearly identified as a simple interpretative clause. Second, it creates a priority, which is inconsistent with the idea of weighing one right against another. This Court has considered a similar provision in the *Canadian Bill of Rights*, R.S.C. 1985, App. III, s. 2, which reads: "Every law of Canada shall, ... be so construed and applied as not to abrogate, abridge or infringe ... any of the rights or freedoms herein recognized...". In *R. v. Drybones* (1969), [1970] S.C.R. 282 (S.C.C.), Ritchie J. said that a more realistic meaning had to be given to the operative words, meaning that if a law cannot be "sensibly construed and applied" (p. 294) without infringing the right, it must be declared inoperative. This was affirmed in *Canada (Attorney General) v. Lavell* (1973), [1974] S.C.R. 1349 (S.C.C.). There is no substantial difference in the present case.

89 It could be argued that to interpret s. 25 as a shield would not be in keeping with the flexible, non-hierarchical approach to *Charter* rights that this Court has espoused. It is certainly true that this Court has in the past acknowledged the difficulty in reconciling rights that often seem to be operating in opposition to each other, particularly in the context of equality claims. Nevertheless, where collective rights are clearly prioritized in terms of protection (as I believe is the case here), individual equality rights have typically given way. In *Reference re Roman Catholic Separate High Schools Funding*, Wilson J. stated at p. 1197, that although the special minority religion education rights conferred by s. 93 of the *Constitution Act, 1867* "si[t] uncomfortably with the concept of equality embodied in the *Charter*", s. 15 can be used neither to nullify the specific rights of the protected group nor to extend those rights to other religious groups. It is also instructive to read the reasons of former Chief Justice Dickson in *Mahe v. Alberta*, [1990] 1 S.C.R. 342 (S.C.C.), at p. 369, where, speaking of the application of s. 15 in the context of minority language rights in education, he said: "[I]t would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to 'every individual'". In my opinion, and as argued by J. M. Arbour, s. 25 serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group ("The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms" (2003), 21 *S.C.L.R.* (2d) 3, p. 60).

2.1.3 Legislative History

90 The legislative history of s. 25 was set out by Wildsmith, at pp. 5-8. He noted that s. 25 of the *Charter* can be traced back to s. 26 of Bill C-60, presented to Parliament on June 20, 1978. The white paper accompanying the Bill stated that "[t]he renewal of the Federation must fully respect the legitimate rights of the native peoples" (*A Time for Action — Toward the Renewal of the Canadian Federation* (1978)). Section 26 was incorporated as s. 24 in the October 1980 Resolution which followed the First Ministers' meeting of September 1980. Sanders described this section as being designed to protect aboriginal rights from the egalitarian provisions of the *Charter* (see D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada", in S. M. Beck and I. Bernier, eds., *Canada and the New Constitution: The Unfinished Agenda* (1983), vol. 1, 225, at p. 231).

91 On January 30, 1981, an agreement was reached between representatives of aboriginal organizations and the three national political parties on new provisions concerning native peoples. These provisions were introduced that day to the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. A new s. 34 provided that "[t]he aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Section 24 was also altered by divorcing the native rights issue from the general saving provision created by a new s. 25.

92 These changes were then incorporated into the Consolidated Resolution of April 24, 1981. Support for the resolution weakened and there were new negotiations between aboriginal representatives and government officials which led to the introduction of a modified s. 25 on November 18, 1981. This section makes no reference to treaty rights or "other rights or freedoms". Negotiations with the premiers resulted in an amendment reflected in the final resolution of December 8, 1981. The text of that resolution was amended again by the adoption of the *Constitution Amendment Proclamation*,

1983, R.S.C. 1983, App. II, No. 46. This modification added s. 35(3) which states: "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."

93 The Minister of Justice of the time, the Honourable Jean Chrétien, declared before the Special Joint Committee: "We say that there is nothing in this Charter that will infringe upon the rights of the Natives.... [T]he rights of all the native Canadians, either flowing from treaties or the Royal Proclamation, are assured to remain as they are, and not being changed by the adoption of this Charter of Rights, its clause 24" (*Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 3, November 12, 1980, at pp. 68 and 84). It was made abundantly clear that s. 25 creates no new rights. It was meant as a shield against the intrusion of the *Charter* upon native rights or freedoms. A more comprehensive account of the historical foundation of s. 25 is found in *Arbour*, at pp. 30-37).

2.1.4 Academic and Judicial Commentary

94 Practically all authors agree with the fact that s. 25 operates as a shield: see Wildsmith, at p. 23; B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-1983), 8 *Queen's L.J.* 232, at p. 239; N. K. Zlotkin, *Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference* (1983), at p. 46; K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *S.C.L.R.* 255, at p. 262; P. W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 1, at pp. 810-11; D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 *Can. Bar Rev.* 314, at p. 321; P. Cumming, "Canada's North and Native Rights", in B.W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (1985) 695, at p. 732; N. Lyon, "Constitutional Issues in Native Law", in Morse, 408, at p. 423; K. M. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada", in W. S. Tarnopolsky and G.-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (1982), 467, at pp. 471-72; and *contra*: R. H. Bartlett, "Survey of Canadian Law: Indian and Native Law" (1983), 15 *Ottawa L. Rev.* 431; B. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982-1984* (1985).

95 Also agreeing are K. Wilkins, "...But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (1999), 49 *U.T.L.J.* 53; T. Isaac, "*Canadian Charter of Rights and Freedoms*. The Challenge of the Individual and Collective Rights of Aboriginal People" (2002), 21 *Windsor Y.B. Access Just.* 431; A. Goldenberg, "Salmon for Peanut Butter: Equality, Reconciliation and the Rejection of Commercial Aboriginal Rights" (2004), 3 *Indigenous L.J.* 61, at p. 90; C. Hutchinson, "*Case Comment on R. v. Kapp: An Analytical Framework for Section 25 of the Charter*" (2007), 52 *McGill L.J.* 173, at p. 189. P. Macklem, *Indigenous Difference and the Constitution of Canada* (2001), and T. Dickson, "*Section 25 and Intercultural Judgment*" (2003), 61 *U.T. Fac. L. Rev.* 141, develop a unique approach based on the distinction between individual and collective rights. It might be noted that none of these authors have applied the rule of interpretation applicable to bilingual legislation.

96 There is little case law on the issue, but the recent trend has been to see the protective feature in s. 25 as a "shield", as opposed to an "interpretative prism"; *R. v. Steinhauer*, [1985] 3 *C.N.L.R.* 187 (Alta. Q.B.), *Campbell v. British Columbia (Attorney General)*, [2000] 4 *C.N.L.R.* 1 (B.C. S.C.), and *MacNutt v. Shubenacadie Indian Band* (2000), 187 *D.L.R.* (4th) 741 (Fed. C.A.) held that s. 25 provides a shield. *R. v. Nicholas* (1988), [1989] 2 *C.N.L.R.* 131 (N.B. Q.B.), is to the same effect but restricts the application of s. 25 to s. 15 rights. In *Campbell*, Williamson J. summarized the case law at that point as showing that "the section is meant to be a 'shield' which protects Aboriginal, treaty and other rights from being adversely affected by provisions of the *Charter*": para. 156. He further suggested that a purposive approach to s. 25 should be taken and that "the purpose of this section is to shield the distinctive position of Aboriginal peoples in Canada from being eroded or undermined by provisions of the *Charter*" (para. 158).

2.1.5 Limitations on the Shield

97 Is this shield absolute? Obviously not. First, it is restricted by s. 28 of the *Charter* which provides for gender equality "[n]otwithstanding anything in this Charter". Second, it is restricted to its object, placing *Charter* rights and freedoms in juxtaposition to aboriginal rights and freedoms. *R. v. Vanderpeet*, [1996] 2 *S.C.R.* 507 (S.C.C.), at para. 46, provides

guidance in that respect. This means in essence that only laws that actually impair native rights will be considered, not those that simply have incidental effects on natives.

98 There is some uncertainty concerning what rights and freedoms are contemplated in s. 25. Most concerns have been with self-government issues. Are all of the laws adopted by bands under the authority of the *Indian Act*, R.S.C. 1985, c. I-5, protected? Wildsmith suggests that this is possibly the case because their source is in s. 91(24) of the *Constitution Act, 1867*, which is clearly associated with the concept of Indianness (p. 33). He nevertheless says that the power in question would not be unrestrained because the courts would read in the need for "reasonableness" as they did for the exercise of municipal powers, and because the *Canadian Bill of Rights* would continue to apply. (The courts would of course have to deal with the *Lavell* precedent to make this avenue useful.) Wildsmith, at pp. 25-26 suggests that the court may want to apply a proportionality test similar to that in *Oakes* in order to determine whether an Act would truly abrogate an aboriginal right or freedom (*R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.)). He argues at p. 37 that *Charter* rights would still be available to Indians who would want to attack federal legislation giving preferential treatment to other Indians.

99 There is no reason to believe that s. 25 has taken Aboriginals out of the *Charter* protection scheme. One aboriginal group can ask to be given the same benefit as another aboriginal group under s. 15(1). Sections 2 and 3 of the *Charter* apply to Aboriginals. Macklem, at pp. 225-27, suggests that the courts should distinguish between external and internal restrictions on aboriginal laws that clash with the *Charter* and that in the case of internal restrictions, aboriginal communities should be required to satisfy the *Oakes* test to resist a challenge. It could also be argued that it would be contrary to the purpose of s. 25 to prevent an Aboriginal from invoking those sections to attack an Act passed by a band council. It is not at all obvious in my view that it is necessary to constrain the individual rights of Aboriginals in order to recognize collective rights under s. 25; as Ayelet Shachar notes, individuals can have multiple identities ("The Paradox of Multicultural Vulnerability: Individual Rights, Identity Groups, and the State", in C. Joppke and S. Lukes, eds., *Multicultural Questions* (1999), 87; see also W. Kymlicka, *Multicultural Citizenship: A Liberal-Theory of Minority Rights* (1995), at p. 35). Aboriginals are Canadian. The framework of reconciliation is consistent with the need for flexibility in the application of s. 25. This is in line with the approach taken by Binnie J. in *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911, 2001 SCC 33 (S.C.C.), at para. 164.

100 Some would like the Court to ignore s. 25 because of the uncertainty in its application, particularly with regard to legislative powers contemplated by the *Indian Act*. I think it is unreasonable to suggest that a law should not be applied by this Court because it is too difficult. After all, s. 25 is the only provision in the *Charter* which makes express reference to aboriginal people, and the *Charter* is now 25 years old. I also think the concerns are overstated. Even under the present justification in a s. 1 analysis, there is much room for government to establish that *Charter* values should not be overstated when dealing with the requirements of substantive equality of native peoples. Legislative powers of bands under s. 81 of the *Indian Act* are subject to disallowance; those that fall under ss. 83 and 85.1 can be addressed by amendments to the *Indian Act* if a serious problem of consistency with *Charter* values occurs. Section 25 rights are not constitutionalized and can be taken away. Parliament can also make a right subject to the same protections as those afforded in the *Charter* by its particular terms. Wildsmith mentions that s. 25 may not even apply to band councils because they may not fall under the definition of s. 32(a) of the *Charter* (p. 39), an argument that might find support in the fact that the *Charlottetown Accord* contained a provision that would have provided for the application of s. 25 to aboriginal governments. All this to say we need not resolve every imaginable case in this single decision.

2.2 Scope of Section 25 Protection

101 In this case, what is significant about the scope of s. 25 protection is the meaning of the words "other rights or freedoms". These words are "all-embracing", as mentioned by Lysyk, at p. 472; this indicates that the protection was meant to be very broad. But the rights and freedoms are only those that "*pertain to the aboriginal peoples of Canada*", those that are particular to them. In French, the Act speaks of "*droits ou libertés ancestraux, issus de traités ou autres des peuples autochtones du Canada*".

102 The *ejusdem generis* rule indicates that, in an enumeration, the general word must be constrained to persons or things of the same class as those specifically mentioned. In s. 25, the general term "other rights or freedoms" follows the enumerated terms "aboriginal" and "treaty" rights. McLachlin C.J. and Abella J. argue that the rule should apply to limit the rights or freedoms protected to those of a constitutional character. I believe that a broader approach is merited, one more consistent with the interpretative principles outlined above.

103 I believe that the reference to "aboriginal and treaty rights" suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status. As argued by Macklem, s. 25 "protects federal, provincial and aboriginal initiatives that seek to further interests associated with indigenous difference from *Charter* scrutiny": seep. 225. Accordingly, legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from *Charter* scrutiny.

104 In *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 (S.C.C.), at para. 52, L'Heureux-Dubé J. suggested in *obiter* that the scope of s. 25 was likely greater than that of s. 35 of the *Constitution Act, 1982* and may include statutory provisions. She did qualify this statement by noting that the fact that a statute relates to aboriginal people would not, without more, suffice to bring it within the scope of s. 25. In my opinion, the limitations proposed above are consistent with this statement.

105 Laws adopted under the s. 91(24) power would normally fall into this category, the power being in relation to the aboriginal peoples as such, but not laws that fall under s. 88 of the *Indian Act*, because they are by definition laws of general application. "[O]ther rights or freedoms" comprise statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government, as mentioned above, and settlement agreements that are a replacement for treaty and aboriginal rights. But private rights of individual Indians held in a private capacity as ordinary Canadian citizens would not be protected.

106 The inclusion of statutory rights and settlement agreements pertaining to the treaty process and pertaining to indigenous difference is consistent with the jurisprudence of this Court. As observed by Kirkpatrick J.A., this Court's decisions in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 (S.C.C.), and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74 (S.C.C.), make it clear that the Crown's duty to consult with and accommodate aboriginal peoples arises prior to the establishment of an aboriginal or treaty right. These were, of course, the two enumerated terms discussed above in the context of the *ejusdem generis* rule. Moreover, this Court in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at para. 186, held that in order to preserve the honour of the Crown, the Crown must be allowed to negotiate in good faith with aboriginal peoples. Finally, in *Sparrow*, this Court urged the Crown to negotiate first prior to litigation. Section 25 reflects this imperative need to accommodate, recognize and reconcile aboriginal interests.

107 William Pentney raises the concern that if the phrase "other rights or freedoms" is construed broadly to include legislated or common law rights, this will result in the "undesirable and anomalous result" that the scope of a *Charter*-protected provision can be modified by ordinary legislation: "The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982*" (1988), 22 *U.B.C.L. Rev.* 21, at p. 57. Another concern often raised is that allowing statutory rights to be protected by s. 25 would elevate them to constitutional rights: see e.g., Hutchinson, at p. 186. Similar concerns have been raised with respect to s. 16(3) of the *Charter*, the principle of advancement for language rights. In *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2002), 56 O.R. (3d) 505 (Ont. C.A.), at para. 92, the Ontario Court of Appeal addressed these concerns as follows:

We are not persuaded that s. 16(3) includes a "ratchet" principle that clothes measures taken to advance linguistic equality with constitutional protection. Section 16(3) builds on the principle established in *Jones v. New Brunswick (Attorney General)* (1974), [1975] 2 S.C.R. 182, 45 D.L.R. (3d) 583 that the Constitution's language guarantees are a "floor" and not a "ceiling" and reflects an aspirational element of advancement toward substantive equality.

The aspirational element of s. 16(3) is not without significance when it comes to interpreting legislation. However, it seems to us undeniable that the effect of this provision is to *protect*, not *constitutionalize*, measures to advance linguistic equality. The operative legal effect of s. 16(3) is determined and limited by its opening words: "Nothing in this *Charter* limits the authority of Parliament or a legislature." Section 16(3) is not a rights-conferring provision. It is, rather, a provision designed to shield from attack government action that would otherwise contravene s. 15 or exceed legislative authority.

In my view, the same principles apply to legislative measures protected by s. 25.

2.3 Approach to Section 25

108 One important issue is to determine when s. 25 is triggered. Kirkpatrick J.A. held that it was before any consideration of the *Charter* right; Brenner C.J.S.C, the conviction appeals judge in this case, agreed by adopting the approach taken in the *Campbell* case. This seems to correspond to what was said by L'Heureux-Dubé J. in *Corbiere*, at para. 52. In *Campbell*, it was also held that s. 25 is a threshold issue. I agree. This does not mean that there is no need to properly define the *Charter* claim; it simply means that there is no need to go through a full s. 15 analysis, for instance in this case, before considering whether s. 25 applies. What has to be determined is whether there is a real conflict.

109 I do not think it is reasonable to invoke s. 25 once a *Charter* violation is established. One reason for this position is that there would be no rationale for invoking s. 25 in the case of a finding of discrimination that could not be justified under s. 1, simply because, in the context of s. 15, as in this case for instance, considerations that serve to justify that an Act is not discriminatory would have to be relitigated under the terms of s. 25. Another reason is that a true interpretative section would serve to define the substantive guarantee. Section 25 is meant to preserve some distinctions, which are inconsistent with weighing equality rights and native rights. What is called for, in essence, is a contextualized interpretation that takes into account the cultural needs and aspirations of natives. Dan Russell (*A People's Dream: Aboriginal Self-Government in Canada* (2000), at p. 100) gives an example of this based on s. 3 of the *Charter*: he says that the right to vote should be reinterpreted in the context of band elections to reflect the particularities of the clan system. This, I believe, is tantamount to saying natives do not have the same rights as other Canadians, rather than saying they are protected like all other Canadians from interference with their individual rights as guaranteed by the *Charter*. W. Pentney (*The Aboriginal Rights Provisions in the Constitution Act, 1982* (1987), takes the same approach by suggesting that the *Charter* be interpreted through a native prism. I do not believe there are distinct *Charter* rights for aboriginal individuals and non-aboriginal individuals, or that it is feasible to take into account the specific cultural experience of Aboriginals in defining rights guaranteed by the *Charter*. The rights are the same for everyone; their application is a matter of justification according to context.

110 I also think it is contrary to the scheme of the *Charter* to invoke s. 25 as a factor in applying s. 1. Section 1 does not apply to s. 25 as such because s. 25 does not create rights; to incorporate s. 25 is inconceivable in that context. Section 1 already takes into account the aboriginal perspective in the right case. Section 25 is protective and its function must be preserved. Section 25 was not meant to provide for balancing *Charter* rights against aboriginal rights. There should be no reading down of s. 25 while our jurisprudence establishes that aboriginal rights must be given a broad and generous application, and that where there is uncertainty, every effort should be made to give priority to the aboriginal perspective. It seems to me that the only reason for wanting to consider s. 25 within the framework of s. 15(1) is the fear mentioned earlier that individual rights will possibly be compromised. Another fear that is revealed by some pleadings in this case is that rights falling under s. 25 will be constitutionalized; this fear is totally unfounded. Section 25 does not create or constitutionalize rights.

2.4 Application in this Case

111 There are three steps in the application of s. 25. The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step

requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right.

2.4.1 *The Nature of the Claim*

112 The appellants claim that aboriginal fishers have been given the right to fish in exclusivity, for one day, prior to the opening of the general commercial fishery in which they participate, and that this right gives rise to a benefit that is denied to non-Aboriginals on the basis of race. They argue that the fact that communal licences are given to a number of bands which then authorize specific fishers to fish is irrelevant, membership in bands not being a valid proxy that is functionally relevant to the regulation of the public fishery.

113 The respondent has presented a number of arguments opposing the claim. He says in particular that s. 15(1) is not breached because the claimants are individual licence holders while the aboriginal licences are communal; there is no valid comparator. He says that there is no denial of benefit because the program allows for sufficient catches under different categories of beneficiaries, some communal, some individual.

114 It is a finding of fact that the fishery is not communal (findings of Kitchen Prov. Ct. J. are summarized in the factum of the appellants, at para. 22); it is also a finding of fact that many Aboriginals who fish under the communal licences also participate in the general commercial fishery. More importantly, it is admitted that aboriginal fishers are being given a licence to fish that is not available to non-Aboriginals. The fact that the authorization to fish is given by way of band licences is immaterial; government cannot do indirectly what it cannot do directly. As mentioned in *Vanderpeet*, at para. 19, these rights "arise from the fact that aboriginal people are aboriginal" (emphasis deleted). It is also some indication of the true nature of the licence that practically all parties and interveners in this case speak of the "right to fish" afforded by the *Pilot Sales Program*. Even if communal licences were significant, their nature says nothing about the fact that limiting them to natives as a user group may be discriminatory. The fact that the program is race-based is established beyond doubt.

115 The declarations of Minister Crosbie and government officials explaining the rationale for the program clearly relate to agreements with bands on the regulation and management of the fishery. The very title of the regulations is instructive: *Aboriginal Communal Fishing Licences Regulations*. With regard to the existence of a benefit, here again there is a finding of fact of Kitchen Prov. Ct. J. (a summary is found in the appellants' factum, at para. 25). In any case, it is hard to understand how the respondent can argue that there was considerable benefit to Aboriginals, particularly the Tsawwassen Band which went from 15 to 35 boats (respondent's factum, at para. 43), and increased revenues and employment for Aboriginals (para. 44), with no impact on non-aboriginal fishers, while the catch is limited by allocations adjusted from year to year. What is allocated to bands in exclusivity cannot be allocated to the general fishery.

116 There is in my view a *prima facie* case of discrimination pursuant to s. 15(1). There is no need to proceed further in the analysis or to invoke s. 1. The potential for conflict is established.

2.4.2 *The Native Right*

117 The Minister issued licences to Aboriginals in application of a discretion given by the *Fisheries Act* and the *Aboriginal Communal Fishing Licences Regulations*. The respondent argues that these licences do not constitute a right or freedom as prescribed by s. 25 of the *Charter*. He says that only those rights and freedoms that "are vital to maintaining the distinctiveness of aboriginal cultures within the larger Canadian polity ... have the potential to fall within s. 25" (factum, at para. 131), and adds that "[i]t follows that to be afforded protection under s. 25, an 'other right or freedom' must: (1) be of sufficient magnitude to warrant overriding a *Charter* right or freedom; (2) manifest a strong degree of permanence; and, (3) be intimately related to the protection and affirmation of aboriginal distinctiveness. The licence in question does not satisfy these criteria. The licence permitting sale was simply an exercise of administrative discretion, subject to numerous conditions and of brief duration. It was only effective for twenty-four hours. The agreement entered into

with the Musqueam, Burrard and Tsawwassen bands expressly stated that it did not create any aboriginal rights. The conclusion of Brenner C.J.S.C. that the licence did not create a right under s. 25 was correct" (paras. 137-38).

118 The first comment that I would make is that the criterion of magnitude is simply inconsistent with the actual terms of s. 25. That section simply speaks of rights that pertain to the aboriginal peoples of Canada, i.e., any rights that advance the distinctive position of aboriginal peoples. The same is true with regard to the criterion of permanence; as mentioned earlier in these reasons, "other rights or freedoms" necessarily refers to statutory rights, which can be abolished at any time. The fact that the agreements with the named bands stated that they did not create any aboriginal rights is of no moment. Section 25 does not create any rights.

119 The respondent agrees that the intended scope of "other rights or freedoms" in s. 25 is achieved by applying the *ejusdem generis* rule. At para. 101 of his factum, the respondent speaks of the unique relationship between British Columbia aboriginal communities and the fishery. This should be enough to draw a link between the right to fish given to Aboriginals pursuant to the *Pilot Sales Program* and the rights contemplated by s. 25. The right to fish has consistently been the object of claims based on aboriginal rights and treaty rights, the enumerated terms in the provisions.

120 Furthermore, the respondent himself argues that these rights were a first step in establishing a treaty right. As noted earlier in these reasons, s. 25 reflects the notions of reconciliation and negotiation present in the treaty process and recognized by the previous jurisprudence of this Court: *Haida Nation, Taku River*. Brenner C.J.S.C. discussed the rights and freedoms provided to the aboriginal peoples participating in the *Pilot Sales Program* as well as the significance of the program to the aboriginal peoples of British Columbia (at para. 93):

The A.F.S. represented an attempt to reconcile this unique relationship with the need for regulation of the fishery by providing for a separately regulated fishery respectful of and sensitive to traditional aboriginal values. This was achieved through the negotiation of such matters as co-management of the fishery, allocation of fish and other matters of importance to aboriginal groups. It also provided an opportunity for communal licencing, which is of particular and unique importance to aboriginal communities.

121 Finally, in my opinion, the right in this case is totally dependent on the exercise of powers given to Parliament under s. 91(24) of the *Constitution Act, 1867* which deals with a class of persons, Indians. Here again it is interesting to note the parallel made between s. 93 and s. 91(24) of the *Constitution Act, 1867* by Estey J. in *Reference re Roman Catholic Separate High Schools Funding*, at p. 1206, where he says: "In this sense, s. 93 is a provincial counterpart of s. 91(24) (Indians, and lands reserved for Indians) which authorizes the Parliament of Canada to legislate for the benefit of the Indian population in a preferential, discriminatory, or distinctive fashion *vis-à-vis* others." To argue that according these licences is not a right but an exercise of ministerial discretion is to privilege form over substance. The *Charter* cannot be interpreted as rendering unconstitutional the exercise of powers consistent with the purposes of s. 91(24), nor is it rational to believe that every exercise of the s. 91(24) jurisdiction requires a justification under s. 1. Section 25 is a necessary partner to s. 35(1); it protects s. 35(1) purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation.

2.4.3 Potential Conflict

122 I think it is established, in this case, that the right given by the *Pilot Sales Program* is limited to Aboriginals and has a detrimental effect on non-aboriginal commercial fishers who operate in the same region as the beneficiaries of the program. It is also clear that the disadvantage is related to racial differences. Section 15 of the *Charter* is *prima facie* engaged. The right to equality afforded to every individual under s. 15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the *Pilot Sales Program*. There is a real conflict.

3. Conclusion

123 Section 25 of the *Charter* applies in the present situation and provides a full answer to the claim. For this reason, I would dismiss the appeal.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

- 1 Donna Greschner, "Does *Law Advance the Cause of Equality?*" (2001), 27 *Queen's L.J.* 299; Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001), 80 *Can. Bar Rev.* 299; Donna Greschner, "The Purpose of Canadian Equality Rights" (2002), 6 *Rev. Const. Stud.* 291; Debra M. McAllister, "Section 15 — The Unpredictability of the *Law Test*" (2003-2004), 15 *N.J.C.L.* 3; Christopher D. Bredt and Adam M. Dodek, "Breaking the *Low's* Grip on Equality: A New Paradigm for Section 15" (2003), 20 *S.C.L.R.* (2d) 33; Daphne Gilbert, "*Time to Regroup: Rethinking Section 15 of the Charter*" (2003), 48 *McGill L.J.* 627; Daniel Proulx, "*Le concept de dignité et son usage en contexte de discrimination: deux Chartes, deux modèles*", [2003] *R. du B.* (numéro spécial) 485; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dumps Section 15" (2006), 24 *Windsor Y.B. Access Just.* 111; Christian Brunelle, « La dignité dans la *Charte des droits et libertés de la personne*: de l'ubiquité à l'ambiguïté d'une notion fondamentale », in *La Charte québécoise: origines, enjeux et perspectives* (2006), numéro thématique de la Revue du Barreau en marge du trentième anniversaire de l'entrée en vigueur de la Charte des droits et libertés de la personne, sous la direction de M^e Alain-Robert Nadeau, 143; R. James Fyfe, "*Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada*" (2007), 70 *Sask. L. Rev.* 1; Peter W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol 2, pp. 55-28 and 55-29; Alexandre Morin, *Le droit à l'égalité au Canada* (2008), p. 80-82.
- 2 Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006), 5 *J.L. & Equality* 81; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dumps Section 15" (2006), 24 *Windsor Y.B. Access Just.* 111; Beverley Baines, "Equality, Comparison, Discrimination, Status", in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006), 73; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 135. See also Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001), 13 *C.J.W.L.* 37; Bruce Ryder, Cidalia C. Faria and Emily Lawrence, "What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004), 24 *S.C.L.R.* (2d) 103; Mayo Moran, "Protesting Too Much: Rational Basis Review Under Canada's Equality Guarantee", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 71; Sheila McIntyre, "Deference and Dominance: Equality Without Substance", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 95.

TAB 12

Local Planning Appeal Tribunal Act, 2017, S.O. 2017, c. 23, Sched. 1

Part IV

GENERAL MUNICIPAL JURISDICTION

General municipal jurisdiction of the Tribunal

15 (1) The Tribunal has jurisdiction and power in relation to municipal affairs,

(a) to approve the exercise in whole or in part of any of the powers by a municipality under any general or special Act that may or will involve or require the borrowing of money by the issue of debentures, or the incurring of any debt or the issuing of any debentures, which approval the municipality voluntarily applies for or is required by law to obtain;

(b) to approve any by-law or proposed by-law of a municipality, which approval the municipality voluntarily applies for or is required by law to obtain;

(c) to authorize the issue by a municipality, without the assent of the electors, of debentures to pay any floating indebtedness that it may have incurred, upon such terms, in such manner and at such times as the Tribunal may approve, or to direct that the floating indebtedness be paid in such other manner and within such time as the Tribunal may require;

(d) to authorize the issue by a municipality, without the assent of the electors, of debentures to retire debentures that are redeemable before maturity, and the raising of the sum required for payment of the new debentures in the same manner as the sum required for payment of the retired debentures;

(e) to certify to the validity of debentures issued under the authority of any by-law of a municipality that the Tribunal has approved;

(f) to direct that before any approval is given by the Tribunal to the exercise of any powers by a municipality or to any by-law passed by it, or before any authorization is given by the Tribunal to the issue by a municipality of debentures to pay any floating indebtedness, the assent of the electors of the municipality or those who are qualified to vote on money by-laws first be obtained, even though the assent is not otherwise required;

(g) to supervise, where considered necessary, the expenditure of any money borrowed by a municipality with the approval of the Tribunal;

(h) to require and obtain from any municipality, at any time and for any definite period, statements in detail of any of its affairs, financial and otherwise;

(i) to inquire at any time into any or all of the affairs, financial and otherwise, of a municipality and hold hearings and make investigations respecting those affairs as may appear necessary to be made in the interest of the municipality, its ratepayers,

inhabitants and creditors and particularly to make and hold inquiries, hearings and investigations for the purpose of avoiding any default or recurrence of a default by any municipality in meeting its obligations;

(j) when authorized by an agreement entered into by two or more municipalities in which the municipalities agree to be bound by the decision of the Tribunal, to hear and determine disputes in relation to the agreement; and

(k) where water or sewage service is supplied or to be supplied by one municipality to another municipality, to hear and determine the application of either municipality to confirm, vary or fix rates charged or to be charged in connection with the water or sewage service.

Same

(2) Clauses (1) (c) and (d) have effect despite any general or special Act.

TAB 13

2014 ONCJ 370

Ontario Court of Justice

R. v. **1676929 Ontario** Inc.

2014 CarswellOnt 11139, 2014 ONCJ 370, [2014] O.J. No. 3785,
116 W.C.B. (2d) 122, 28 M.P.L.R. (5th) 124, 318 C.R.R. (2d) 93

**Her Majesty the Queen (Town of Oakville),
Appellant and **1676929 Ontario** Inc., Respondent**

Roselyn Zisman J.

Heard: May 8, 2014

Judgment: August 12, 2014

Docket: 1211 999 00

Counsel: Nadia Chandra, for Appellant
Steven J. Gearing, for Respondent

Subject: Constitutional; Criminal; Property; Public; Human Rights; Municipal

Related Abridgment Classifications

Criminal law

IV Charter of Rights and Freedoms

IV.30 Charter remedies [s. 24]

IV.30.i Miscellaneous

Criminal law

XXXIII Appeals

XXXIII.3 Appeals of provincial offences

Municipal law

V Municipal council

V.7 Judicial review

V.7.c Miscellaneous

Headnote

Municipal law --- Municipal council — Judicial review — Miscellaneous

Sign by-law was enacted by appellant municipality of O — Challenge to previous versions of sign by-law had gone to Court of Appeal and Supreme Court of Canada — Following public consultation process, new version was passed by O's council — In February 2012, corporate respondent 167 Inc. was charged with three counts of contravening s. 7(3) of latest sign by-law for displaying mobile third-party signs, now referred to as advertising signs — At trial, 167 Inc. admitted elements of offence but submitted that sign by-law violated right to freedom of expression under s. 2(b) of Canadian Charter of Rights and Freedoms — O conceded that sign by-law limited freedom of expression rights, but asserted it was reasonable limit under s. 1 of Charter — At trial, justice of peace ruled that s. 39(3) of sign by-law breached 167 Inc.'s right to freedom of expression and was not saved by s. 1 of Charter — Justice of peace held that O had not met second part of Oakes test with respect to proportionality under s. 1 of Charter — Justice of peace dismissed all charges laid against 167 Inc. — O appealed — Appeal allowed — Justice of peace did not explain why judicial deference was not owed to town council's sign by-law regime — Instead, she suggested alternative regulatory scheme that was not contemplated by public consulting process or by Court of Appeal in its consideration of O's previous sign by-law — In cases considering municipality's ability to regulate third-party sign and billboard advertising, courts have held that deference is owed to decisions of municipal councils as democratically representative of their constituents, absent clear demonstration that municipality exceeds its powers and as long as law meets Oakes test — Objectives of O's sign by-law, as amended,

to prevent aesthetic blight, protect O's unique character and protect traffic safety by reducing visual distractions were rationally connected to amended sign by-law and struck appropriate balance between protecting these objectives and interests of commercial advertisers — Measures adopted by O were within measures that it could rationally adopt and should have been accorded large degree of deference — Benefits of sign by-law outweighed its detrimental effects — As 167 Inc. admitted all of essential elements of offence, conviction was entered on three charges under sign by-law — Total fine payable for each offence was set at \$260, therefore 167 Inc. was fined total of \$780 payable within 60 days.

Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — General principles

Sign by-law was enacted by appellant municipality of O — Challenge to previous versions of sign by-law had gone to Court of Appeal and Supreme Court of Canada — Following public consultation process, new version was passed by O's council — In February 2012, corporate respondent 167 Inc. was charged with three counts of contravening s. 7(3) of latest sign by-law for displaying mobile third-party signs, now referred to as advertising signs — At trial, 167 Inc. admitted elements of offence but submitted that sign by-law violated right to freedom of expression under s. 2(b) of Canadian Charter of Rights and Freedoms — O conceded that sign by-law limited freedom of expression rights, but asserted it was reasonable limit under s. 1 of Charter — At trial, justice of peace ruled that s. 39(3) of sign by-law breached 167 Inc.'s right to freedom of expression and was not saved by s. 1 of Charter — Justice of peace held that O had not met second part of Oakes test with respect to proportionality under s. 1 of Charter — Justice of peace dismissed all charges laid against 167 Inc. — O appealed — Appeal allowed — Justice of peace proceeded in her analysis to assume that commercial expression in form of third-party advertising was entitled to same degree of protection as other forms of expression that lie at core of values of s. 2(b) Charter values — Justice of peace erred in application of second branch of Oakes test with respect to her finding that there was no rational connection of limit of third-party signs to pressing and substantial objectives of O's sign by-law — All leading cases regarding third-party signs have found that restrictions, even in some cases total prohibition, were rationally connected to valid municipal objectives to regulating signs — By focusing and criticising sign by-law's policy decision to give greater priority to first-party signs, justice of peace asked wrong questions and did not properly apply minimal impairment test in Oakes — Review of evidence in this case showed that objectives of O's by-law, as amended, were rationally connected to amended sign by-law and struck appropriate balance between protecting these objectives and interests of commercial advertisers — Measures adopted by O were within measures that it could rationally adopt and should have been accorded large degree of deference — Benefits of sign by-law outweighed its detrimental effects — As 167 Inc. admitted all of essential elements of offence, conviction was entered on three charges under sign by-law — Total fine payable for each offence was set at \$260, therefore 167 Inc. was fined total of \$780 payable within 60 days.

Criminal law --- Provincial offences — Conduct of appeal

Sign by-law was enacted by appellant municipality of O — Challenge to previous versions of sign by-law had gone to Court of Appeal and Supreme Court of Canada — Following public consultation process, new version was passed by O's council — In February 2012, corporate respondent 167 Inc. was charged with three counts of contravening s. 7(3) of latest sign by-law for displaying mobile third-party signs, now referred to as advertising signs — At trial, 167 Inc. admitted elements of offence but submitted that sign by-law violated right to freedom of expression under s. 2(b) of Canadian Charter of Rights and Freedoms — O conceded that sign by-law limited freedom of expression rights, but asserted it was reasonable limit under s. 1 of Charter — At trial, justice of peace ruled that s. 39(3) of sign by-law breached 167 Inc.'s right to freedom of expression and was not saved by s. 1 of Charter — Justice of peace dismissed all charges laid against 167 Inc. — O appealed — O argued that justice of peace did not have jurisdiction to exercise declaratory power — This ground of appeal was dismissed — Appeal allowed on other grounds — Justice of peace sitting in **Ontario** Court of Justice presiding with respect to proceedings brought under Provincial Offences Act is "court of competent jurisdiction" and therefore has jurisdiction to grant remedial relief pursuant to s. 24(1) of Charter but does not have declaratory power to hold law constitutionally invalid and of no force and effect — If justice of peace had been purporting to exercise declaratory power, she did not have that jurisdiction — However, justice of peace did have power to grant remedial relief pursuant to s. 24(1) of Charter, and by dismissing charges against respondent, she was only exercising that power — Submissions by appellant counsel misapprehend distinction between ruling and declaration — Ruling simply determines accused's position in relation to charge before court — Ruling does not make declaration of constitutional invalidity pursuant to s. 52(1) of Constitution Act, 1982 — Justice of peace acted within her statutory powers.

Table of Authorities**Cases considered by Roselyn Zisman J.:**

Cuddy Chicks Ltd. v. Ontario (*Labour Relations Board*) (1991), 91 C.L.L.C. 14,024, 3 O.R. (3d) 128 (note), 50 Admin. L.R. 44, 122 N.R. 361, 81 D.L.R. (4th) 121, [1991] O.L.R.B. Rep. 790, 47 O.A.C. 271, 4 C.R.R. (2d) 1, [1991] 2 S.C.R. 5, 1991 CarswellOnt 976, 1991 CarswellOnt 3004 (S.C.C.) — considered

Nichol (Township) v. McCarthy Signs Co. (1997), 43 C.R.R. (2d) 309, 1997 CarswellOnt 1810, 100 O.A.C. 143, 33 O.R. (3d) 771, 39 M.P.L.R. (2d) 96 (Ont. C.A.) — referred to

Ontario (*Minister of Transportation*) v. *Miracle* (2005), 2005 CarswellOnt 319, 194 O.A.C. 133, 127 C.R.R. (2d) 127, 249 D.L.R. (4th) 680, 10 M.V.R. (5th) 39, 74 O.R. (3d) 161 (Ont. C.A.) — referred to

R. v. Big M Drug Mart Ltd. (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 1985 CarswellAlta 316, 1985 CarswellAlta 609 (S.C.C.) — referred to

R. v. Gill (2003), 2003 CarswellOnt 4911, 46 M.V.R. (4th) 230 (Ont. C.J.) — followed

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 1986 CarswellOnt 95, 1986 CarswellOnt 1001, 53 O.R. (2d) 719 (note) (S.C.C.) — followed

RJR-Macdonald Inc. c. Canada (*Procureur général*) (1995), (sub nom. *RJR-MacDonald Inc. v. Canada* (*Attorney General*)) 127 D.L.R. (4th) 1, (sub nom. *RJR-MacDonald Inc. v. Canada* (*Attorney General*)) [1995] 3 S.C.R. 199, 1995 CarswellQue 119, (sub nom. *RJR-MacDonald Inc. v. Canada* (*Attorney General*)) 100 C.C.C. (3d) 449, (sub nom. *RJR-MacDonald Inc. v. Canada* (*Attorney General*)) 62 C.P.R. (3d) 417, (sub nom. *RJR-MacDonald Inc. v. Canada* (*Attorney General*)) 31 C.R.R. (2d) 189, (sub nom. *RJR-MacDonald Inc. c. Canada* (*Procureur général*)) 187 N.R. 1, 1995 CarswellQue 119F (S.C.C.) — referred to

Shell Canada Products Ltd. v. Vancouver (City) (1994), 1994 CarswellBC 115, 1994 CarswellBC 1234, [1994] 3 W.W.R. 609, 20 M.P.L.R. (2d) 1, 20 Admin. L.R. (2d) 202, 110 D.L.R. (4th) 1, 88 B.C.L.R. (2d) 145, [1994] 1 S.C.R. 231, 163 N.R. 81, 41 B.C.A.C. 81, 66 W.A.C. 81 (S.C.C.) — referred to

Toronto Livery Assn. v. Toronto (City) (2009), 2009 CarswellOnt 3714, 2009 ONCA 535, 58 M.P.L.R. (4th) 11, 253 O.A.C. 56, 83 M.V.R. (5th) 1 (Ont. C.A.) — referred to

Vann Media Inc. v. Oakville (Town) (2008), 89 O.R. (3d) 385, 2008 CarswellOnt 588, 43 M.P.L.R. (4th) 163, 168 C.R.R. (2d) 226 (Ont. S.C.J.) — referred to

Vann Media Inc. v. Oakville (Town) (2008), 2008 CarswellOnt 8659, (sub nom. *Vann Media Group Inc. v. Oakville (Town)*) 95 O.R. (3d) 252, 54 M.P.L.R. (4th) 1, (sub nom. *Vann Media Group Inc. v. Oakville (Town)*) 271 O.A.C. 370, 311 D.L.R. (4th) 556, 2008 ONCA 752 (Ont. C.A.) — followed

Vann Niagara Ltd. v. Oakville (Town) (2002), 2002 CarswellOnt 1915, 43 M.P.L.R. (3d) 9, 214 D.L.R. (4th) 307, 94 C.R.R. (2d) 255, 60 O.R. (3d) 1, 161 O.A.C. 183 (Ont. C.A.) — followed

Vann Niagara Ltd. v. Oakville (Town) (2003), 101 C.R.R. (2d) 373 (note), 2003 CarswellOnt 235, 2003 CarswellOnt 236, 308 N.R. 198 (note), 186 O.A.C. 399 (note) (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — considered

s. 2(b) — considered

s. 24 — considered

s. 24(1) — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 52 — considered

s. 52(1) — considered

Provincial Offences Act, R.S.O. 1990, c. P.33

Generally — referred to

Pt. 1 — referred to

s. 136(2) — referred to

s. 138(1) — referred to

Words and phrases considered:

third party sign

. . . "third party signs" . . . were defined as signs that direct attention to products, goods or services not located on the same premises as the signs.

In the current version of By-law No. 2006-005, as amended, "third party signs" are referred to as "advertising signs".

APPEAL from dismissal of charges against corporate respondent for displaying mobile third-party signs.

Roselyn Zisman J.:

Introduction

1 This is an appeal by the appellant, the Town of Oakville ("Oakville") from the decision of Justice of the Peace Farnand dated November 26, 2012. The Justice of the Peace dismissed all charges laid against the respondent, **1676929 Ontario** Inc. carrying on business as "Advantage Signs", for displaying mobile, "third party signs" contrary to Oakville's By-Law No. 2006-005, as a result of finding that section 39 (3) of the Sign By-Law constitutionally invalid as contrary to section 2(b) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), in a manner that was not saved under section 1 of the *Charter*.

Legislative History

2 Oakville's sign by-law regulation has been the subject of significant judicial determination at various court levels, including twice at the **Ontario** Court of Appeal as well as the Supreme Court of Canada. In order to appreciate the context of this appeal it is necessary to outline the history of the judicial challenges and court rulings.

3 In 1994, Oakville enacted a sign by-law that prohibited billboard signs larger than 7.5 metres (80 square feet) and also prohibited all "third party signs" which were defined as signs that direct attention to products, goods or services not located on the same premises as the signs.¹

4 In 2002, the **Ontario** Court of Appeal in *Vann Niagara Ltd. v. Oakville (Town)*² ("*Vann No. I*"), quashed both of the prohibitions contained in the 1994 by-law, on the basis that the provisions contravened section 2(b) of the *Charter* and could not be saved under section 1. However, the court recognized that Oakville had legitimate objectives for enacting the by-law namely, "to protect the public from unsafe signs, to reduce distractions that may be an impediment to road safety, to prevent the blight of unsightly signs, and to preserve the unique character of Oakville."³ Oakville appealed to the Supreme Court of Canada only with respect to the prohibition on the size restriction contained in the by-law. The Supreme Court of Canada allowed the appeal and held, in accordance with the dissenting opinion in the **Ontario** Court of Appeal, that Oakville's restriction of the size of the signs was constitutional.

5 Oakville undertook a process of public consultation to remove the total prohibition of third party signs in the 1994 by-law and to find appropriate locations for third party signs. Oakville adopted By-law No. 2006-005 ("2006 by-law") which permitted third party signs but restricted the locations for such signs.

6 Section 39 of the 2006 by-law regulating the permissible location of third party signs provided as follows:

39. No person shall erect, locate or display an advertising sign:

(1) if any other sign is also erected, located, or displayed on the property other than a temporary real estate sign with a sign area of no greater than 4.65 m²(50 sq. ft.) and a maximum height of 3.6 metres(1.8 ft.) or an election sign;

(2) on any property North of Dundas Street;

(3) on property other than property within an E2 zone under the Zoning By-law;

(4) if there is any building on the property, or a building permit has been issued for a building on the property;

(5) within 200 metres of any of the following:

(a) any property within a residential zone or legally used for a residential purposes;

(b) the road allowance of any of the following streets: Burloak Drive, Bronte Road (Regional Road 25), Third Line, Fourth Line, Notting hill Gate, Dorval Drive, Kerr Street, Trafalgar Road, Ford Drive, and Winston Churchill Boulevard; or

(c) the QEW and Highway 403 Corridors; and

(6) any closer to the edge of the road allowance than the set back required for buildings and structures other than signs on the property under the provisions of the Zoning By-law;

7 In 2008, *Vann Media Inc.* challenged Oakville's new sign by-law. Specifically it challenged subsections 39 (1), (3), (4), (5) (a) and (b) and (6) of the 2006 by way of an application to the Superior Court of Justice⁴ for a declaration quashing the by-law as unconstitutional. The application judge quashed the entire by-law and found that Oakville had failed to show that the prohibition of billboard signs to E2 industrial zones, as opposed to other "unremarkable" areas in Oakville, was rationally connected to the valid objectives of the sign by-law or that they minimally impaired the right to freedom of expression.

8 Oakville appealed to the **Ontario** Court of Appeal, in *Vann Media Inc. v. Oakville (Town)*⁵ ("*Vann No. 2*"). The court held that the objectives of the 2006 By-law namely, preservation of Oakville's distinct visual and aesthetic character, the preservation of clutter in the landscape and driver safety were pressing and substantial and rationally connected to the by-law. However, in its section 1 *Charter* analysis, the court held that the cumulative effect of the four impugned by-law provisions namely, sections 39 (1), (3), (4) and 5(b) were unduly restrictive and did not minimally impair the section 2(b) *Charter* right of freedom of expression. The court upheld the other two impugned sections namely, sections 39 (5) (a) and 39 (6) as they struck an appropriate balance between intrusion on the *Charter* right and Oakville's objectives.

9 In the decision, Justice Rouleau made observations to offer "some limited guidance"⁶ to the municipality in re-drafting the by-law so as to minimally impair the section 2(b) *Charter* right as follows:

Section 39(1) could be adjusted to allow for more than one sign per property where the property has a very large frontage.

Section 39(3) could be adjusted to allow third party signs in "non-prestige" industrial zones located outside of the E2 zones.

Section 39(4) could be adjusted to allow third party signs on very large properties where there is a large portion consisting of open space.

Section 39(5) (b) could be adjusted to allow for signs near some of the listed northsouth roads or portion of the listed roads.

10 As a result of the *Vann No. 2* decision, Oakville convened a sign by-law working group which included staff representatives from a range of departments and external consultants and initiated public consultation to develop new criteria to replace the four provisions in section 39 of the 2006 by-law which the Court of Appeal found invalid.

11 At the public meetings, representatives of the sign industry, members of the business community and local residents attended and written submissions were also received. Oakville acknowledged that the manner in which the public meetings were advertised suggested to some that the sign by-law under consideration was strictly related to billboards and therefore there was little response from the mobile sign industry of which the respondent is a member. However, the respondent did receive notice of the meetings.

12 The revised criteria proposed by the working group were accepted by the Oakville town counsel through the enactment of By-law No, 2009-059 that amended section 39 of the Sign By-law which provides as follows:

13 39. No person shall erect, locate or display as advertising sign:

(1)(a) in the case of a ground advertising sign, on the same property as a mobile advertising sign, and in the case of a mobile advertising sign, and in the case a mobile advertising sign, on the same property as a ground advertising sign; and

(b) in the case of a ground advertising sign, within a radius of 300 metres of any other ground advertising sign, and in the case of a mobile advertising sign, within a radius of 300 metres of other mobile advertising sign; (2009-059)

(2) on any property North of Dundas Street;

(3) on property other than property within an E1 Zone or E2 Zone under the Zoning By-Law; (2009-059);

(4) on any property on which another advertising sign has been erected or for which an advertising sign permit has been issued under this By-law, except where the property has a frontage greater than 300 metres; (2009-059)

(5) within 200 metres of any of the following:

(a) any property within a residential zone or legally used for residential purposes;

(b) any property which is used for a school or park, or any property which is designated under Part IV or Part V of the **Ontario** Heritage Act; or (2009-059)

(c) the QEW and Highway 403 corridors;

(6)(a) any closer to the edge of any road allowance than the following: (2009-059)

(i) in the case of a ground advertising sign, the midpoint between the edge of the road allowance and the set back required for buildings and structures (other than signs on the property) under the provisions of

the zoning By-law, provided that in no event shall any portion of a ground advertising sign be erected less than 4.5 metres from the edge of any road allowance;

(ii) in the case of a mobile advertising sign, in no event shall any portion of a mobile advertising sign be erected less than 1.5 metres from the edge of any road allowance;

(b) any closer to any property line, other than a road allowance, than a minimum 1.5 metres;

(c) for greater clarity, the setbacks set out in (6) shall apply to ground advertising signs and mobile signs rather than those set out in Schedule C.

Charges against the Respondent

14 On February 27, 2012, the respondent was charged with three counts of contravening section 7 (3) of the Sign By-law which provides as follows:

7. No person shall:

(3) erect, locate or display a sign for which a permit has been obtained except in accordance with the approved plans and drawings submitted as part of the permit application;

15 The respondent had erected signs at locations outside of the E1 and E2 Zones, in contravention of section 39(3) of the Sign By-law.

16 At the trial, the respondent admitted the elements of the offence but submitted that the Sign by-law violated his right to freedom of expression under section 2(b) of the *Charter*. Oakville conceded that the Sign By-law limited the freedom of expression rights, but asserted it was a reasonable limit under section 1 of the *Charter*.

Decision under appeal

17 The trial took place before the Justice of the Peace Farnand on October 1, 2012. The parties filed an Agreed Statement of Fact and an exhibit brief. Donald Macphail the president of 1676629 **Ontario** Ltd. ("Advantage Signs") testified and Phillip Bouillon, the manager of by-law endorsement and licensing testified on behalf of Oakville.

18 On November 26, 2012 Justice of the Peace Farnand ruled that section 39 (3) of the Sign By-law breached the respondent's right to freedom of expression and was not saved by section 1 of the *Charter*. When it was pointed out that the respondent had not been arraigned, after a short discussion about the proper process, the respondent was arraigned on all three charges and he pleaded not guilty. The Justice of the Peace stated that, "Having made the finding on the motion that the Town of Oakville's by-law [section 39(3)] is unconstitutional this Court is dismissing all charges."⁷

19 In the oral reasons of the Justice of the Peace she acknowledged that Oakville's objectives in the 2008 by-law namely, to limits the signage that would interfere with the preservation of Oakville's distinct character, aesthetic nature, avoiding visual clutter and ensuring safety of the public by distractions and preventing blight, were the same objectives upheld by the Court of Appeal in *Vann No. 2*. Therefore, she held that, as in *Vann No. 2*, the objectives were "pressing and substantial" and warranted overriding the *Charter* protected right of freedom of expression, being the first branch of the *Oakes*⁸ test.

20 However, she held that Oakville had not met the second part of the *Oakes* test with respect to proportionality under section 1 of the *Charter* and stated as follows⁹:

The Town must also meet the second part of the test and successfully establish that the by-law is fair and designed to meet the objective and be rationally connected to the objective....

In assessing the second part of the *Oakes* test the Court has difficulty in digesting the Town's explanation as to how its measures are fair and not arbitrary and carefully designed to achieve its objectives and that the measures implemented through the Town of Oakville's by-law does not minimally impair the applicant's constitutional right to freedom of expression.

Standard of Review on Appeal

21 Neither counsel addressed the applicable standard of review or the statutory provisions for this appeal. As Certificates of Offence were issued to the respondent, these are Part 1 offences and therefore this appeal is governed by section 136 (2) of the **Ontario** *Provincial Offences Act*. Pursuant to that section the appeal is conducted by means of a review.

22 The appeal court "may affirm, reverse or vary the decision appealed from or where, in the opinion of the court, it is necessary to do so to satisfy the ends of justice, direct a new trial".¹⁰

23 I adopt the approach outlined by Justice Duncan in the case of *R. v. Gill*¹¹ where he stated at paragraphs 7 and 11:

The appeal created by these words could hardly be more generous. Unlike appeals from proceedings under POA Part III, or those governed by the Criminal Code, for example, the court is not limited as to when it may intervene - in particular it is not required to find that the trial judgment was unreasonable, unsupportable or erroneous in law...or that the sentence imposed at trial was unfit, unreasonable, or erroneous in principle... Even the requirement in section 138 above that it "is necessary to satisfy the ends of justice" apparently applies only to the order for a new trial, rather than the allowance of the appeal itself..

Further, I am of the view that I must review the record before me and reach my own conclusion on the issue. It is not a matter of deferring to the trial justice's conclusion and intervening only if I conclude that her decision was unreasonable. To approach it in that way would be to effectively transpose the Part III provisions to Part I and II appeals when the legislature took pains to distinguish between the two. However, where findings of credibility are in issue, I should accept the trial justice's findings unless they are unreasonable.

Grounds of Appeal

24 The appellant, Town of Oakville submits that Justice of the Peace made the following errors of law:

1. The Justice of the Peace acted outside of her limited statutory jurisdiction in that a Justice of the Peace sitting in the **Ontario** Court of Justice cannot grant declaratory relief and declare a law constitutionally invalid.
2. The Justice of the Peace erred in her section 1 Charter analysis by:
 - (i) Failing to have due regard for the empirical evidence with respect to Oakville's extensive public consultation process and balancing exercise and for the substantial deference which should be accorded to a municipal policy decision;
 - (ii) Made a finding on the "rational connection" branch of the *Oakes* test which cannot be reconciled with the Court of Appeal decision in *Vann No. 2* with respect to an earlier version of the sign by-law;
 - (iii) Imported a commercial "fairness" consideration into the section 1 Charter analysis specifically commercial fairness as between third party sign advertisers and first party sign users in a manner that fundamentally misapprehended the distinction between first party and third party signage;
 - (iii) Conducted an erroneous assessment of section 39(3) of the Sign By-law by comparing it to the previous version of section 39(3) of the Sign By-law, without considering the impacts that were of concern to the

Court of Appeal in *Vann No. 2* decision and the cumulative impacts of the amendments to section 39 in light of the Court of Appeal decision.

Analysis

Did the Justice of the Peace act outside of her statutory powers?

25 Section 52 of the *Constitution Act, 1982*, provides that the Constitution is the supreme law of Canada and that any law that is inconsistent with the Constitution is of no force or effect. It follows that no individual or corporation can be convicted of an offence under an unconstitutional law. Section 24 of the *Charter* empowers courts of competent jurisdiction to grant remedies for breaches of the *Charter*.¹²

26 The Supreme Court of Canada in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*¹³ confirmed that only a Superior Court has the prerogative jurisdiction to formally declare legislation constitutionally invalid and that a statutory court may only treat the legislation invalid for the purpose of the matter before it.

27 A Justice of the Peace sitting in the **Ontario** Court of Justice presiding with respect to proceedings brought under the **Ontario** *Provincial Offences Act* is a "court of competent jurisdiction" and therefore has the jurisdiction to grant remedial relief pursuant to section 24(1) of the *Charter* but does not have the declaratory power to hold a law constitutionally invalid and of no force and effect.

28 I therefore agree with the submission of counsel for Oakville that if the Justice of the Peace was purporting to exercise a declaratory power she did not have that jurisdiction. However, the Justice of the Peace did have the power to grant remedial relief pursuant to section 24 (1) of the *Charter* and I find that by dismissing the charges against the respondent she was only exercising that power.

29 The submissions by counsel for Oakville misapprehend the distinction between a ruling and a declaration. In this case, the respondent proceeded to trial in the **Ontario** Court of Justice and raised a defence that his right to freedom of expression had been violated. The Justice of the Peace had the power to declare the legislation "invalid" as against the respondent as no one can be convicted under an invalid law. After finding the legislation invalid, the Justice of the Peace had the jurisdiction to dismiss the charges against the respondent. The ruling simply determines the accused's position in relation to the charge before the court. The ruling does not make a declaration of constitutional invalidity pursuant to section 52(1) of the *Constitution Act*.

30 I therefore find the Justice of the Peace acted within her statutory powers and dismiss this ground of appeal.

Did the Justice of the Peace err in finding that the Sign By-law did not satisfy the tests under section 1 of the Charter?

31 Oakville acknowledges that the Sign By-law infringes the respondent's right to freedom of expression under section 2(b) of the *Charter*. The onus therefore falls on the municipality to satisfy the Court that this infringement is reasonable and demonstrably justifiable and therefore saved under section 1 of the *Charter*.

32 In *R. v. Oakes*¹⁴, the Supreme Court of Canada held that in order to establish that a limit is reasonable and demonstrably justified, two central criteria must be satisfied. First, the objective which the impugned legislation is designed to serve must be of pressing and substantial importance, sufficient to override a constitutionally protected right or freedom. Secondly, the means chosen to achieve the objectives must satisfy a three pronged proportionality test, as follows:

- (a) the measures adopted must be rationally connected to the objectives;
- (b) the measures chosen must constitute a minimal impairment on the right; and

(c) there must be a proportionality between the effects of the measure chosen and the objectives.

33 The Supreme Court of Canada has affirmed that the test in *Oakes* must be applied with flexibility, having regard to the specific factual and legal context of each case in order to strike the appropriate balance between individual rights and community needs.¹⁵

34 In such a contextual analysis, the cases have recognized that in a section 1 *Charter* analysis the nature of the expression at issue is relevant. Fundamental or "core" values including the search for political, artistic and scientific truth will warrant a higher degree of protection than for example, commercial expression that falls outside of the core of protected expression under section 2(b) of the *Charter*.¹⁶

35 In cases considering a municipality's ability to regulate third party sign and billboard advertising, the courts have held that deference is owed to the decisions of municipal councils as the democratically representatives of their constituents absent a clear demonstration that the municipality exceeds its powers and as long as the law meets the *Oakes* test.¹⁷

36 I agree with the submissions of counsel for Oakville that the Justice of the Peace erred in law in failing to give any recognition to either of these crucial contextual considerations. The Justice of the Peace proceeded in her analysis to assume that the commercial expression in the form of third-party advertising was entitled to the same degree of protection as other forms of expression that lie at the core of the section 2 (b) *Charter* values. The Justice of the Peace did not explain why judicial deference was not owed to the municipal town council's sign by-law regime instead she suggested an alternative regulatory scheme that was not contemplated by the public consulting process or by the Court of Appeal in its consideration of Oakville's previous by-law.¹⁸

37 The Justice of the Peace accepted that the objectives of the sign by-law of Oakville namely, to limit signage that would interfere with the preservation of Oakville's distinct character, aesthetic nature, avoiding visual clutter and ensuring safety of the public by reducing distractions and preventing blight, were pressing and substantial and met the first part of the *Oakes* test and therefore warranted overriding the constitutionally protected right to freedom of expression related to third party advertising signs. The Justice of the Peace also agreed that these objectives were the same objectives that had been enunciated and upheld by the Court of Appeal in *Vann No.1* and *Vann No. 2*.

38 I find that the Justice of the Peace erred in the application of the second branch of the *Oakes* test with respect to her finding that there was no rational connection of the limit of third party signs to the pressing and substantial objectives of Oakville's sign by-law. This issue was already determined by the Court of Appeal in *Vann No. 2*.¹⁹ Further, all of the leading cases regarding third party signs have found that restrictions-even in some cases a total prohibition- are rationally connected to valid municipal objectives to regulating signs.

39 With respect to the minimal impairment provision, the onus is on Oakville to demonstrate on a balance of probabilities that the means chosen impaired the freedom of expression as little as possible. The Justice of the Peace failed to acknowledge that in *Vann No. 2* the Court of Appeal held that some of the impugned provisions of the former section 39 by-law achieved the appropriate balance between Oakville's objectives but it was the cumulative effect of the by-law and the extent of the restrictions on "unremarkable industrial zones" or "non prestige industrial zones" that caused the court to hold that deference should not be accorded to the municipality.

40 The Justice of the Peace failed to consider the changes made to the by-law as a result of the court's decision in *Vann No. 2* The Justice of the Peace quotes Mr. Bouillon, the city's manager of by-law enforcement, as testifying that Oakville considers all mobile signs to be a "blight" but fails to note that he further explained that council accepts that they must exist but with certain regulations and that in response to the court decision the city struck a working committee

to determine how to amend the by-law to meet the directions of the court decision to where the sign should be located to minimally impair the impact of the signs.

41 The Justice of the Peace erred in suggesting that "a sign is a sign" and finding that the by-law, restricting third party signs, is not fair and is arbitrary thereby failing to distinguish the legitimate right of municipality to restrict third party signs. Although the Justice of the Peace states that she accepts "to some extent" the town's submission that some advantage should be given to first party signs she then finds that there is no good reason to find that the absolute advantage given to first party signs.

42 I agree with the submissions of counsel for Oakville that the Justice of the Peace by focusing and criticising the sign by-law's policy decision to give greater priority to first party signs caused her to ask the wrong questions and not properly apply the minimal impairment test in *Oakes*. The **Ontario** Court of Appeal in *Vann No. 2* accepted that restrictions on third party signs had a rational connection to the objectives of the Oakville sign by-law in particular with respect to the objectives of aesthetic and avoidance of visual clutter. These objectives can be practically achieved by establishing set-back requirements, vacant lot requirements and restrictions to particular zones.

43 The Justice of the Peace erred in fact in holding that the only change made by Oakville was adding that the third party signs could be located in E1 zones in addition to E2 zones. She failed to acknowledge that the other restrictions formerly to the erection in third party signs in E2 zones had also been removed in accordance with the suggestions made by the court in *Vann No. 2*. The Justice of the Peace therefore erred in failing to consider the cumulative effect of the changes made by Oakville as a result of the *Vann No. 2* decision.

44 With respect to the proportionality between effect and objectives, I find that the Justice of the Peace erred in not considering that the objectives of Oakville sign by-law outweighed the partial prohibition against third party signs. The by-law balanced the right of Oakville to protect its character and still provided locations for third party signs in the town and provided other types of media advertising such as on buses and bus shelters.

45 In my review of the evidence in this case, I find that the objectives of Oakville's by-law, an amended, to prevent aesthetic blight, protect its unique character and protecting traffic safety by reducing visual distractions are rationally connected to the amended by-law and strike the appropriate balance between protecting these objectives and the interests of commercial advertisers. The measures adopted by Oakville are within the measures that it could rationally adopt and should be accorded a large degree of deference. The benefits of the by-law outweigh its detrimental effects.

46 In the result, I would allow the appeal and set aside the finding that the by-law is invalid.

47 As the respondent admitted all of the essential elements of the offence I enter a conviction on the three charges under By-law 39. The total fine payable for each offence is set at \$260.00. I therefore fine the respondent a total of \$780.00 payable within 60 days.

Appeal allowed.

Footnotes

1 In the current version of By-law No. 2006-005, as amended, "third party signs" are referred to as "advertising signs"

2 [2002] O.J. No. 2323 (**Ont.** C.A.) rev'd in part (S.C.C.)

3 *Supra*, at paras. 24 and 50.

4 *Vann Media Inc. v. Oakville (Town)*, [2008] O.J. No. 457 (**Ont.** S.C.J.);

5 [2008] O.J. No. 4567 (**Ont.** C.A.); the court granted the appeal in part by striking portions of the judgement that quashed the entire by-law and that ordered Oakville to grant permits to Vann Media Inc.

- 6 *Supra*, para. 53
- 7 Transcript of Reasons for Ruling, p.16 lines 16-20
- 8 *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.)
- 9 Transcript of Reasons for Ruling, p. 4 lines 26-29 and p. 8 lines 21-29
- 10 Section 138 (1) **Ontario** *Provincial Offences Act*
- 11 [2003] O.J. No. 4761 (**Ont.** C.J.) at paras. 7 and 11
- 12 *Constitution Act, 1982*, Schedule B to the Canada Act, (UK) 1982, c.11; *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17 (S.C.C.) at paras. 45-47
- 13 [1991] 2 S.C.R. 5 (S.C.C.) at para.17
- 14 [1986] 1 S.C.R. 103 (S.C.C.) at paras. 69-70
- 15 *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.) at para.63
- 16 *Supra*, paras. 71-74
- 17 *Supra*, at paras. 71-73; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 (S.C.C.) at paras. 19, 24-25 (in dissent); *Toronto Livery Assn. v. Toronto (City)*, [2009] O.J. No. 2725 (**Ont.** C.A.) at para. 44; *Vann No. 2*, *ibid*, at paras.32-38
- 18 Transcript of Reasons for Ruling at pages 9-11
- 19 *Ibid*, at paras. 40-41. See also *Nichol (Township) v. McCarthy Signs Co.*, [1997] O.J. No. 2053 (**Ont.** C.A.); **Ontario** (*Minister of Transportation*) *v. Miracle*, [2005] O.J. No. 299 (**Ont.** C.A.)

TAB 14

1991 CarswellSask 166
Saskatchewan Court of Appeal

R. v. Pinehouse Plaza Pharmacy Ltd.

1991 CarswellSask 166, [1991] 2 W.W.R. 544, 12 W.C.B. (2d) 197, 25
A.C.W.S. (3d) 256, 4 M.P.L.R. (2d) 1, 62 C.C.C. (3d) 321, 89 Sask. R. 47

R. v. PINEHOUSE PLAZA PHARMACY LTD.

Bayda C.J.S., Vancise and Gerwing JJ.A.

Heard: December 9, 1988

Judgment: January 25, 1991

Docket: No. 4171

Counsel: *W.J. Davern*, for city of Saskatoon.

R.G. Richards, for Attorney General of Saskatchewan

B.A. Beresh, for appellant.

Subject: Public; Criminal; Constitutional; Municipal

Related Abridgment Classifications

Constitutional law

[XI Charter of Rights and Freedoms](#)

[XI.3 Nature of rights and freedoms](#)

[XI.3.b Freedom of expression](#)

[XI.3.b.v Advertising](#)

Constitutional law

[XI Charter of Rights and Freedoms](#)

[XI.3 Nature of rights and freedoms](#)

[XI.3.f Life, liberty and security](#)

[XI.3.f.ii Economic, commercial and proprietary rights](#)

Municipal law

[XVI Zoning](#)

[XVI.6 Attacking validity of zoning by-laws](#)

[XVI.6.a Grounds](#)

[XVI.6.a.xiv Charter of Rights and Freedoms](#)

Municipal law

[XVI Zoning](#)

[XVI.7 Enforcement of zoning by-laws](#)

[XVI.7.a Effect of Charter of Rights and Freedoms](#)

Headnote

Constitutional Law --- Charter of Rights and Freedoms — Nature of rights and freedom — Freedom of expression — Advertising

Municipal Law --- Zoning — Attacking validity of zoning by-laws — Grounds — Charter of Rights and Freedoms

Municipal Law --- Zoning — Enforcement of zoning by-laws and statutes — Effect of Charter of Rights and Freedoms

Planning and zoning — Zoning — Zoning by-laws — Validity — Ancillary tenant convicted of erecting external commercial sign in contravention of municipal zoning by-law enacted under Saskatchewan Planning and Development Act — By-law offending Charter guarantee of freedom of expression but being justifiable limitation within s. 1 of

Charter — Court enunciating test to determine if impugned governmental activity protected by guarantee of freedom of expression — Appeal from conviction dismissed.

Civil liberties and human rights — Legal rights — Life, liberty and security — Corporate accused convicted of erecting external commercial sign in contravention of municipal zoning by-law enacted under Saskatchewan Planning and Development Act — Accused not being entitled to protection of s. 7 of Charter — Appeal from conviction dismissed.

Civil liberties and human rights — Equality rights — Equality before the law — Pharmacy being ancillary tenant in building — Pharmacy charged with erecting external commercial sign in contravention of municipal zoning by-law prior to s. 15(1) of Charter coming into force — Section 15 not operating retrospectively — Distinction between pharmacies and other businesses not constituting inequality under Charter — Appeal from conviction dismissed.

Civil liberties and human rights — Freedom of expression/opinion — Ancillary tenant convicted of erecting external commercial sign in contravention of municipal zoning by-law enacted under Saskatchewan Planning and Development Act — By-law offending Charter guarantee of freedom of expression but being justifiable limitation within s. 1 of Charter — Court enunciating test to determine if impugned governmental activity protected by guarantee of freedom of expression — Appeal from conviction dismissed.

Municipal corporations — By-laws — Validity — Ultra vires — Ancillary tenant convicted of erecting external commercial sign in contravention of municipal zoning by-law enacted under Saskatchewan Planning and Development Act — By-law offending Charter guarantee of freedom of expression but being justifiable limitation within s. 1 of Charter — Court enunciating test to determine if impugned governmental activity protected by guarantee of freedom of expression — Appeal from conviction dismissed. .

A municipal zoning by-law enacted under the Saskatchewan Planning and Development Act restricted the use of exterior signage erected by ancillary tenants on buildings. In full knowledge of the by-law the accused signed a lease to operate a pharmacy inside a medical clinic as an ancillary tenant, and erected a large exterior sign advertising its existence as a pharmacy. The accused was convicted of contravening the by-law and the Act. The accused unsuccessfully appealed on the grounds that the by-law violated ss. 2(b), 7 and 15 of the Charter. The accused appealed further.

Held:

Appeal dismissed.

Per Vancise J.A. (Bayda C.J.S. concurring)

It is a two-step inquiry to determine whether the governmental activity sought to be justified is protected by the guarantee of freedom of expression under the Charter. The first step is to determine whether the action or conduct which the claimant wishes to pursue may be categorized as falling within "freedom of expression." If the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee. Commercial expression falls within the scope of freedom of expression. The word "pharmacy" conveys a meaning which requires no further elaboration. It indicates the type of service provided and gives the consumer a reasonable idea of the range of products available. Thus, the accused's sign was an attempt to convey meaning to potential customers and was therefore commercial expression and subject to protection by the Charter.

The second step of the inquiry is to determine whether the purpose or effect of the impugned governmental action is to restrict freedom of expression. If the government's purpose is to restrict attempts to convey meaning, there is a limitation by law of the s. 2(b) right and an analysis under s. 1 of the Charter must take place. If the purpose is not to restrict attempts to convey meaning, then the court must determine whether the effect of the action is a limitation on the s. 2(b) right. Where the government's purpose is to control attempts to convey meaning by directly restricting the content or the form of expression as tied to content, then the s. 2(b) right has been infringed. The right will not be infringed if the purpose relates merely to the physical consequences of the activity. The impugned provisions of the by-law prevented the accused from conveying the location of its business and the nature of the products and services offered for sale. It was a means to control access by the general public to meaning and a restriction on the right of the accused to convey a meaning. It was not an attempt to control physical consequences and therefore constituted a limitation on the right to freedom of expression. However, the by-law was an acceptable limitation on the freedom by virtue of s. 1 of the Charter. The pressing and substantial objective of the by-law was the preservation of principal/ancillary land use designation in order to carry out the municipality's planning objectives or orderly urban development. The restrictions were not unfair and were rational and the level of impairment was minimal. The harmful effects of the by-law did not outweigh the

municipality's purpose, and no more harm was done to the accused than to anyone else who has to comply with zoning requirements including signage restrictions.

The accused could not avail itself of the protection of s. 7 of the Charter as it was a corporation. Also, the distinction between pharmacies and other businesses does not constitute an inequality under s. 15 of the Charter.

Per Gerwing J.A.

Whether or not the purpose of the impugned municipal governmental action was legitimate, the effect was unquestionably of restricting the accused's free expression. However, the restriction was demonstrably justified within s. 1 of the Charter. The regulation of appropriate environments in different portions of urban communities is a pressing and substantive objective. The limitation on signage was rationally connected to the objective of controlling the use of land in providing for the orderly urban development of the municipality. The by-law attempted to ensure compatibility of various land uses and signage practices throughout the municipality which was necessary to keep the various gradations between residential and commercial districts from overlapping. Further, it was consistent with the ancillary nature of the permitted use. Finally, there was minimum impairment as the limitation was compatible with the other characteristics' ancillary use.

The accused, being a corporation, was incapable of raising s. 7 of the Charter because of its potential effect on other persons who were not parties. Section 15 came into force after the accused committed the offence and does not operate retrospectively.

Table of Authorities

Cases considered:

- Andrews v. Law Soc. of B.C.*, [1989] 1 S.C.R. 143, [1989] 2 W.W.R. 289, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, 56 D.L.R. (4th) 1, 36 C.R.R. 193, 10 C.H.R.R. D/5719, 91 N.R. 255 — referred to
- Ford v. Que. (A.G.)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, 36 C.R.R. 1, 10 C.H.R.R. D/5559, (sub nom. *Chaussure Brown's Inc. v. Qué. (P.G.)*) 19 Q.A.C. 69, 90 N.R. 84 — considered
- Halifax v. Wonnacott*, [1951] 2 D.L.R. 488 (N.S.S.C.) — considered
- Irwin Toy. Ltd. v. Que. (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 24 Q.A.C. 2, 94 N.R. 167 — applied
- R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 85 C.L.L.C. 14,023, 60 A.R. 161, 58 N.R. 81 — considered
- R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713, (sub nom. *R. v. Videoflicks Ltd.*) 55 C.R. (3d) 193, (sub nom. *Edwards Books & Art Ltd. v. R.*; *R. v. Nortown Foods Ltd.*) 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1, 28 C.R.R. 1, 87 C.L.L.C. 14,001, 19 O.A.C. 239, 71 N.R. 161 — considered
- R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87 — applied
- R. v. Stevens*, [1988] 1 S.C.R. 1153, 64 C.R. (3d) 297, 41 C.C.C. (3d) 193, 51 D.L.R. (4th) 394, 35 C.R.R. 107, 28 O.A.C. 243 — applied
- R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 33 D.L.R. (4th) 174, 25 C.R.R. 321, 87 C.L.L.C. 14,002, 71 N.R. 83 — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms

s. 1

s. 2(b)

s. 7

s. 15

Planning and Development Act, S.S. 1983-84, c. P-13.1

s. 63

s. 66

s. 73(k)

s. 221

Words and phrases considered:

COMMERCIAL EXPRESSION

In this case, information regarding the location of the pharmacy and by implication the type of goods sold is relevant and important information for a consumer to have when making an economic choice about where to purchase merchandise. The word "pharmacy" indicates the type of service provided and gives the consumer a reasonable idea of the range of products available. The general public has a perception of the type of goods sold and services offered in a pharmacy, which would include consumer products, confections, non-prescription drugs, and a pharmaceutical dispensary. In my opinion, the word, "pharmacy" conveys a meaning which requires no further elaboration. The sign stating "Pinehouse Plaza Pharmacy" conveys a commercial meaning. It is an attempt to convey meaning to potential customers and is thus commercial expression and subject to protection by the [*Canadian Charter of Rights and Freedoms*].

EXPRESSION

The first question . . . is does the by-law breach the appellant's right of expression? The respondent's first contention was, that if commercial expression were protected, the sign did not constitute "expression" [within the meaning of the *Charter*, s. 2(b)]. The respondent says that the sign merely indicates the presence of a pharmacy and conveys no other information. In [*Ford v. Quebec (Attorney General)* (1988), 54 D.L.R. (4th) 577 (S.C.C.)], the signs as well were merely descriptive with words such as "flowers" or "wool" and the Supreme Court noted that the public signs and posters in that case were indeed forms of expression which could conveniently be characterized as commercial expression. I see no distinction on this point between this sign and those referred to in *Ford*.

PHARMACY

. . . the word "pharmacy" indicates the type of service provided and gives the consumer a reasonable idea of the range of products available. The general public has a perception of the type of goods sold and services offered in a pharmacy, which would include consumer products, confections, non-prescription drugs, and a pharmaceutical dispensary . . . the word "pharmacy" conveys a meaning which requires no further elaboration.

Appeal from decision of Sirois J., [1988] 3 W.W.R. 705, 38 M.P.L.R. 103, 67 Sask. R. 201, upholding accused's conviction of contravening municipal by-law restricting signage.

Vancise J.A. (Bayda C.J.S. concurring):

Introduction

1 Pinehouse Plaza Pharmacy erected a large illuminated sign to advertise its business, in violation of a by-law of the city of Saskatoon which prohibits advertising by the use of exterior signage. It was charged and convicted of contravening the by-law and the Planning and Development Act, S.S. 1983-84, c. P-13.1. It appealed unsuccessfully to the Court of Queen's Bench [reported at [1988] 3 W.W.R. 705, 38 M.P.L.R. 103, 67 Sask. R. 201] and now appeals to this court.

2 The issues are whether a municipal by-law which prohibits advertising by the use of exterior signage limits freedom of expression guaranteed by s. 2(b) of the Charter and violates rights guaranteed by ss. 7 and 15 of the Charter.

I

3

Facts

4 Pinehouse Plaza is a full-service pharmacy located in a professional or institutional plaza in Saskatoon in a M.3.A. zoning district. Under the Saskatoon Zoning By-law 4637, the pharmacy is a permitted "ancillary" use to an office building used for medical purposes in a M.3.A. zoning district, provided that there is no outside entrance to the ancillary use. The by-law restricts the type and size of sign which may be used to advertise the ancillary use. It provides that ancillary users cannot erect signs which are visible from outside the building except for those containing painted lettering on windows or doors.

5 The authority to regulate use of property within urban boundaries is granted by the Planning and Development Act. The zoning by-law in question, s. 40.A(1), sets out the permitted land uses in a M.3.A. zoning district. The by-law creates principal uses of lands and buildings, which include medical clinics. It also permits ancillary use, which, under certain conditions, includes a drug store or a pharmacy. In addition to controlling the actual use of land, the by-law controls the manner of use by placing restrictions on such matters as frontage, area of building to lot size, height, floor space, parking and signage.

6 The signage regulations for primary and ancillary use differ. The by-law permits primary users to erect signs on the exterior of the building, but restricts the size to a percentage of the area of the front of the building. Ancillary users, on the other hand, are not permitted to erect signs which are visible from the exterior of the building except those containing lettering no larger than 16 cm painted on a door or window.

7 The by-laws controlling the use of the land and establishing the signage restrictions were in existence and known to the principals of Pinehouse Pharmacy prior to leasing the property and establishing the business in the office building. Pinehouse Pharmacy attempted to obtain permission from Saskatoon City Council to erect an exterior sign, but was unsuccessful. It subsequently caused the 2 feet x 14 feet sign to be erected on the exterior of the building in contravention of the by-law.

8 Pinehouse Pharmacy claims that the exterior sign is necessary for its survival; that the exterior sign is necessary to advertise its existence in the community and the products it offers for sale; and that the restrictive window signage does not permit it to inform the general public of the nature or location of its business or to attract customers. Even though access to the pharmacy is gained from the interior of the building, the majority of its business is derived from the general public and not from referrals from the medical clinic or traffic generated by other businesses in the plaza. It relies on the walk-in traffic which is aware of the pharmacy's existence because of the 2 feet x 14 feet sign located on the exterior of the building. Approximately 50 per cent of the prescriptions filled by the pharmacy are issued by the medical clinic. The rest come from the persons who live in the surrounding area. Non-prescription drugs constitute 40 per cent of the pharmacy's drug-related sales.

9 The parties agree that the large sign is not offensive, that it contains only the name of the pharmacy and two pharmaceutical symbols, is illuminated at night and is not an eyesore and is not a distraction to motorists.

II

10

Issue

11 Pinehouse Pharmacy contends that the by-law contravenes ss. 2(b), 7 and 15 of the Charter.

12 The principal issue is whether a municipal by-law which restricts or prohibits a business from advertising the type and location of its business by the use of an external sign carrying a commercial message is a limitation on the freedom of expression guaranteed by s. 2(b) of the Charter.

13 The second issue is whether the by-law violates s. 7 of the Charter in that it denies Pinehouse Pharmacy the right to pursue the occupation of its choice and to communicate effectively to its customers.

14 The third issue is whether the by-law offends equality rights guaranteed by the Charter.

III

15

The Relevant Legislative and Constitutional Provisions

16 The relevant constitutional provisions are ss. 1, 2(b), 7 and 15 of the Charter of Rights and Freedoms:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

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

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.

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

2. Chacun a les libertés fondamentales suivantes:

(b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication.

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

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.

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

17 The relevant provisions of the Planning and Development Act are ss. 63 and 73(k), which provide:

63. For the purpose of carrying out a development plan or ensuring that any proposal contained in a plan will be carried out according to the plan, the council may purchase or otherwise acquire land inside or outside the municipality.

73. Without limiting the generality of section 66, a zoning bylaw may, with respect to any district established under clause 72(1)(a), unless the district is designated as a direct control district pursuant to section 77, contain provisions:

(k) regulating or prohibiting the public display of signs and advertisements and regulating the nature, kind, size, location, colour and inscription of any sign or advertisement displayed.

18 The relevant provisions of the Saskatoon zoning by-law are s. 40.A(1)(g) and (i), creating primary and ancillary uses:

40.A(1) In a M.3.A. district, only the following buildings and uses of buildings and land are permitted:

(g) offices and office buildings in which no goods or commodities of business or trade other than for medical, dental, or optical laboratories are stored, transhipped, or processed in the same office or building as part of the operation of any such office.

(i) the following shall be permitted as ancillary uses to any of the above permitted uses when located in the same building; provided there is no separate outside entrances to such ancillary uses, and, provided further, that no signs advertising such uses shall be visible from outside the building other than painted window or door lettering:

(iii) drug store or pharmacy.

19 The relevant provisions of the Saskatoon zoning by-law restricting the right to signage are s. 12(a)(i), (ii) and (iii) and (f)(iii), which provide:

(12)(a) Fascia signs and roof signs and marquee signs shall be permitted on the front of any building. Such signs may only advertise or display the principal use of the premises on which they are located and shall not:

(i) have intermediate supports greater than five-tenths (0.5) of a meter, nor

(ii) shall the sum of the face areas of the signs so permitted be greater than ten (10) percent of the area of the front elevation of the building; provided however, that the sum of the face areas of the signs so permitted shall not be greater than fourteen square metres (14m²), and provided further, that the sum of the face areas of the signs so permitted shall not be required to be lesser than five and five-tenths square metres (5.5 m²), nor

(iii) shall signs advertising uses within the principal building extend above the first floor.

(12) (f) Painted window and door lettering shall be permitted on any window or door; provided however:

(ii) such lettering shall not have letters exceeding sixteen one-hundredths of a square [sic] metre (0.16m²) in height.

IV

20

Disposition in the Provincial Court and Court of Queen's Bench

(a) Provincial Court

21 Her Honour, P.M.B. Linn, in a judgment delivered prior to *Ford v. Que. (A.G.)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, 36 C.R.R. 1, 10 C.H.R.R. D/5559, (sub nom. *Chaussure Brown's Inc. v. Qué. (P.G.)*) 19 Q.A.C. 69, 90 N.R. 84, and *Irwin Toy Ltd. v. Que. (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 24

Q.A.C. 2, 94 N.R. 167, found that there was no "element of expression" as the term was used by the Supreme Court of Canada in *R. W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 33 D.L.R. (4th) 174, 25 C.R.R. 321, 87 C.L.L.C. 14,002, 71 N.R. 83, and, as a result, s. 2(b) did not afford Pinehouse Pharmacy any protection against the contravention of s. 221 of the Planning and Development Act and s. 6(5) and s. 40.A(1)(i)(ii)(c) of Zoning By-law 4637 as amended by the city of Saskatoon. She held that ss. 7 and 15 of the Charter did not apply, found Pinehouse Pharmacy guilty of contravening the by-law and imposed a fine of \$750.

(b) Court of Queen's Bench

22 Pinehouse Pharmacy appealed the conviction and sentence to the Court of Queen's Bench contending, among other things, that the Provincial Judge erred in failing to find that commercial expression was protected by s. 2(b) of the Charter and in failing to grant protection pursuant to ss. 7 and 15 of the Charter. Sirois J., again in a judgment delivered before *Chaussure Brown* and *Irwin Toy*, found that the trial judge was correct in finding that there was no "element of expression" in the signage and that s. 2(b) afforded no protection to Pinehouse Pharmacy. He agreed with the trial judge that ss. 7 and 15 had no application and accordingly dismissed the conviction appeal. He refused to vary the sentence, ordered the fine paid forthwith and the sign taken down 30 days from the date of judgment.

23 It is from this judgment that Pinehouse Pharmacy appeals to the court.

V

24

Whether the Municipal By-law Limits the Freedom of Expression Guaranteed by the Charter

25 The Supreme Court of Canada considered this question in *Irwin Toy Ltd. v. Que. (A.G.)*. The majority outlined a two-step inquiry to determine whether the governmental activity sought to be justified is protected by the guarantee of freedom of expression under the Charter. They expressly and pointedly noted that not all activity is protected by the guarantee of freedom of expression and that if the activity in question is not within the protected sphere, governmental action restricting it does not infringe the Charter.

(a) Step One

26 The first step is to determine whether the action or conduct which the claimant wishes to pursue may be categorized as falling within "freedom of expression". One must identify those things that an individual is free to do when the principle of freedom of expression is accepted.

27 In deciding what activities justify an appeal to the concept of freedom of expression and whether commercial expression was within the protected sphere, the majority stated at p. 968:

"Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.

28 They continued at p. 969:

We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee.

29 The majority concluded that advertising is a form of expression which falls within the scope of freedom of expression. Indeed, it found no sound basis on which commercial expression could be excluded. In this case, information regarding the location of the pharmacy and by implication the type of goods sold is relevant and important information for a consumer to have when making an economic choice about where to purchase merchandise. The word "pharmacy" indicates the type of service provided and gives the consumer a reasonable idea of the range of products available. The general public has a perception of the type of goods sold and services offered in a pharmacy, which would include consumer products, confections, non-prescription drugs and a pharmaceutical dispensary. In my opinion, the word "pharmacy" conveys a meaning which requires no further elaboration. The sign stating "Pinehouse Plaza Pharmacy" conveys a commercial meaning. It is an attempt to convey meaning to potential customers and is thus commercial expression and subject to protection by the Charter.

(b) Step Two

30 The second step is to determine whether the *purpose* or *effect* of the municipal governmental action was to restrict freedom of expression. The court must determine whether the purpose or effect of the impugned governmental action was to control attempts to convey meaning. This step requires a further two-stage inquiry. First, if the purpose is to restrict attempts to convey meaning, there is a limitation by law of the s. 2(b) right, and a s. 1 analysis is required to determine whether the law is justified within the provisions of the Constitution.

31 Secondly, if it was not the government's purpose to restrict attempts to convey meaning, the court must determine whether the *effect* of the action is a limitation on the s. 2(b) right.

(i) Purpose

32 In cases involving the rights and freedoms guaranteed by the Charter, the purpose of governmental action must not be measured in the abstract, but must be measured against the ambit of the relevant guarantee. The majority, at p. 973, described the purpose test in the following terms:

When applying the purpose test to the guarantee of free expression, one must beware of drifting to either of two extremes. On the one hand, the greatest part of human activity has an expressive element and so one might find, on an objective test, that an aspect of the government's purpose is virtually always to restrict expression. On the other hand, the government can almost always claim that its subjective purpose was to address some real or purported social need, not to restrict expression. To avoid both extremes, the government's purpose must be assessed from the standpoint of the guarantee in question. Just as the division of powers jurisprudence of this Court measures the purpose of government action against the ambit of the heads of power established under the *Constitution Act, 1867*, so too, in cases involving the rights and freedoms guaranteed by the Canadian *Charter*, the purpose of government action must be measured against the ambit of the relevant guarantee.

They then went on to show how the purpose of the government is to be tested in light of the guarantee. One must determine whether the purpose relates to content, to form that is tied to content, or merely to the physical consequences of the activity. The first two purposes infringe the s. 2(b) right. The latter does not [p. 974]:

If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression.

33 The purpose must be considered with reference to the by-law as a whole. The purpose of the planning by-law is set out in s. 66 of the Act. That purpose is to control the use of land within the territorial limits of the city to ensure orderly

development having regard to the health, safety, and general welfare of the inhabitants. The purpose of the impugned provision in the by-law is much more specific. Thus the court must have regard to the general and specific purpose against the ambit of the Charter guarantee of freedom of expression.

34 If the government's purpose is to restrict the physical aspects of the conduct, it must show that the harm sought to be regulated is not achieved by preventing the conveyance of meaning, but is achieved by preventing a physical result of the erection of the sign. It must show that its purpose was to control a harmful consequence of the conduct in erecting the sign, in this case the amount of signage, and not the control of thought, opinion or belief.

35 In other words, the harm sought to be regulated must be direct and have no connection to the intervening element of thought or opinion. The regulation must be aimed at physical consequence only and not the content or form tied to content.

36 To assess whether the s. 2(b) right has been infringed, one must determine whether the government has tried to control attempts to convey meaning by directly restricting the content or by restricting the form of expression as tied to content. If it does either, its purpose infringes the guarantee. The specific purpose of the impugned by-law is important in the evaluation of the general purpose of the zoning by-law.

37 The city advanced three purposes to justify its action, which it contends was to control the harmful consequence of signs and not content or meaning. These purposes are (1) aesthetic protection, (2) consistency of land use, and (3) the preservation of the distinction between primary and ancillary use.

(1) Aesthetic protection

38 The sign regulation's purpose is said to be to minimize the intrusion or effect a sign may have on adjacent land use or zoning. The city contends that without regulation there would be a proliferation of commercial signs which would have a deleterious effect on adjacent residential or non-commercial areas.

39 If the prevention of the proliferation of signs were the purpose, without regard to content or meaning, the restriction would be aimed at physical consequences and would not be conduct subject to the protection of the Charter. However, here the signage by-law does not aim at controlling all exterior signs — just those of ancillary users. If the sign in question was erected by the principal user of the land, i.e., the medical clinic, it would be in conformity with the overall sign by-law relating to primary use. Thus the content, the message that there is a particular type of business offering goods and services, is the target of the governmental action. It is a restriction on the attempt to convey information that the pharmacy is located on the premises. The by-law provisions dealing with ancillary use are more restrictive than the by-law provisions dealing with principal use. They determine not only the type of sign but restrict the content, the message of the sign, to the principal use of the ancillary premises. The sign by-law of the principal use restricts the face area of all the signs on the building to 10 per cent of the area of the building. Thus the ancillary sign by-law adds nothing to the control of the overall level of advertising. The total amount of signage is governed or regulated by the by-law provisions dealing with the principal use.

(2) Consistency of land use in various zones

40 The ancillary use sign by-law adds nothing to the purpose of determining what level of signage will be permitted in each zone. The signage by-law applicable to principal users determines the total level and quantity of signage. The purpose of the ancillary use by-law is aimed at content and meaning and not the physical consequence of signage by ancillary users.

(3) Preserving the distinction between primary and ancillary use

41 The city contends that the land use plan envisages suburban centres with a commercial and an institutional component. The zoning by-law, by establishing land use, is the instrument of implementation. The purpose of the

development and land use plan is to provide the framework around which all planning and development action stems. The purpose is to assist in the physical, social and rational economic development of the city. The method of implementing this plan is by the use of zoning by-laws which provide for prohibited uses and creates the standards under which permitted uses are able to establish. The by-law establishes a series of districts for either residential, commercial, industrial or institutional use. Within each zone, certain regulations exist controlling the use of each class of development.

42 In the case at hand, the land is zoned M.3.A., which permits a commercial or institutional component. The by-law establishes the uses and types of buildings that are permitted and the relationship between principal and ancillary or subordinate use. The ancillary use provides a service to the principal use and is subordinate to the principal use. Access by the public to the ancillary use is gained from the interior of the building. The principal use serves the public at large.

43 To ensure the ancillary use remains subordinate, the by-law restricts the content and size of signs. The content of the sign is limited to designating only the "main" ancillary use, such as "pharmacy" or "beauty parlour." The content is limited to identification. The signage by-law permits ancillary users to advertise their existence to persons who use the services of the principal use and to passersby but not to the general public. Only the principal user can advertise or attempt to communicate to the general public. The ancillary user is restricted to advertising or attempting to communicate to the general public by the use of signs inside the office building.

44 One must ask whether those purposes are a restriction on the content or form of the expression tied to content or a restriction on a direct physical consequence of signage. Is it a restriction that aims to control access by others to a meaning being conveyed and a control on the ability of the owner to convey a meaning?

45 An examination of the impugned provisions of the by-law reveals that it is a means to control access by the general public to meaning, and a restriction on the right of the ancillary user to convey a meaning. The ancillary user is prevented from conveying the location of his business and his products and services offered for sale. The impugned provisions of the by-law are a restriction on content or the form of expression tied to content. It is not an attempt to control physical consequences regardless of content for the reasons stated above.

Conclusion

46 The activity of the ancillary user is commercial expression, an activity which falls within the protected sphere of conduct. It is activity which has content and conveys a meaning and thus satisfies the first step of the analysis.

47 When one examines the municipal governmental action, it is apparent that the municipality has aimed to control attempts to convey meaning by restricting the content of expression or form of expression tied to content by restricting the description of usage which constitutes a limitation on the s. 2(b) rights guaranteed by the Charter.

48 As the purpose of the impugned provision is to trench upon the guarantee, it is not necessary to examine the effect of the legislation in this case.

(ii) Is the limit on freedom of expression justified under s. 1 of the Charter?

49 It is well settled that the onus of justifying the limitation of a right or freedom rests with the person or party seeking to uphold the limitation. The analysis to be conducted is set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87, which can be summarized as follows:

50 Two central criteria must be established to show that the limit is reasonable and demonstrably justified:

51 (a) The objective which the limitation seeks to advance is of "sufficient importance to warrant overriding a constitutionally protected right or freedom" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 352, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 85 C.L.L.C. 14,023, 60 A.R. 161, 58 N.R. 81).

52 (b) If a significant objective is recognized, the party seeking to uphold the limitation must demonstrate that the means chosen to limit the right are reasonable and justified. It is necessary to establish the following:

53 (i) That the measures designed to achieve the object in question are rationally connected to the objective.

54 (ii) If the measures are rationally connected to the objective, they must only impair the right or freedom to the smallest degree possible.

55 (iii) There must be a proportionality between the effect and the objective.

(a) Pressing and substantial objective

56 The objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The underlying objective of the impugned legislation is community planning and regulation of the human environment so that urban development occurs in an orderly fashion. The city seeks to justify as pressing and substantial the need for civic and community planning in general and cites s. 66 of the Planning and Development Act as the basis for the governmental objective. As noted above, zoning controls are the means to achieve the objectives set out in the Planning and Development Act. There can be no doubt of the need for such a policy in an urban industrial society. Regulation of land use to ensure the health, welfare and general well-being of the inhabitants is of primary importance.

57 The primary/ancillary designation of land use within a zone is an integral part of the overall development scheme. One cannot examine that element of this scheme in isolation from the land use and development scheme as a whole. The designation of land use and the restriction on the form and content of signage within the various zones is designed to ensure the orderly development of commercial, residential, institutional and related use. Lack of such distinction could result in unregulated growth. Zones designated and set aside for residential or institutional use could effectively be transformed into commercial use. As stated in *Halifax v. Wonnacott*, [1951] 2 D.L.R. 488 at 505 (N.S.S.C.):

It is proper that progress should be encouraged, for the lifeblood of a country is in its trade. But the modern world has too often seen the great hand of industry reach out to absorb school grounds, church properties, recreation centers, and all the rest, without their [sic] being any proper provision for replacement. The absence of long-range town and city planning is evident in every new and growing country and is leaving a trail of difficulties and miseries in its wake.

58 The primary/ancillary use distinction guards against such a result. It ensures that commercial services can be available on an ancillary basis in an area without commercial services or commercialization becoming a prominent feature of that area. Sign restrictions facilitate the preservation of primary/ancillary use distinctions. They are an important means of carrying out city planning objectives and preserving zone use. In my opinion, sign restrictions for ancillary uses can be regarded as an integral part of the pressing and substantial objective of orderly city development through urban planning. The first objective is therefore satisfied.

(b) Rational connection

59 There is little doubt that a form of restriction on the size of signs for ancillary use is rationally connected to the objective of city planning. Such restrictions preserve zone use and control commercial activity. The restrictions on the size of signs for ancillary use are not arbitrary. There is an overall development plan in place which organizes the city into different types of zones with varying restrictions on use depending on the zone. The appellant's pharmacy is located in a M.3.A. zone which specifies specific principal and ancillary uses.

60 The restrictions are not unfair. The city has not totally banned exterior signs. It has simply limited, rather than prevented, advertising in M.3. zones.

61 The measures are rational. They are based on preserving and facilitating the planning goals of the city.

(c) Minimal impairment

62 The next question is whether the means used by the city minimally impair the guarantee in question. If some less restrictive means could have been used to achieve the governmental purpose, then it ought to have been adopted in preference to the means sought to be justified.

63 The city has adopted ancillary/primary use distinctions as a means of obtaining its civic planning goals and there is no evidence to suggest that a less restrictive method of controlling land use could effectively achieve the same result. Restrictions on external signage are the means of ensuring the orderly development and use of land. It is contended that the size restriction is unreasonable and as a result the restrictions are not a minimal impairment. The city contends that the specific dimension for the sign was considered a reasonable size which would permit persons passing directly in front of the premises to see and understand the message. The city's choice of the permitted size is reasonable having regard to the stated purpose. As the Supreme Court of Canada stated in *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 at 781-82, 55 C.R. (3d) 193 (sub nom. *R. v. Videoflicks Ltd.*), 30 C.C.C. (3d) 385 (sub nom. *Edwards Books & Art Ltd. v. R.*; *R. v. Nortown Foods Ltd.*), 35 D.L.R. (4th) 1, 28 C.R.R. 1, 87 C.L.L.C. 14,001, 19 O.A.C. 239, 71 N.R. 161:

A "reasonable limit" is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

The decision of the city is reasonable and justifiable under the minimal impairment standards.

(d) Proportionality

64 Finally, one must consider whether the harmful effects of the by-law outweigh the purpose the city wishes to achieve. The owner of the pharmacy contends that if he complied with the by-law, its effect on his business would be devastating. The window of the pharmacy on which letters 16 cm high are permitted is 200 to 300 feet from the street. He contends it is clearly impossible for passersby to see the letters from that distance and that without a larger sign the pharmacy will encounter economic difficulty.

65 One must consider the harmful effects on the pharmacy from the point of view of informed choice. When the owner of Pinehouse Pharmacy was planning to establish his business, he knew of the restrictions imposed by the by-law and that the location would be subject to external signage regulation. Realistically, the effect of the by-law may be that persons seeking to operate pharmacies may be forced to locate in a different zone within the city. The harmful effects that the owner of Pinehouse Pharmacy contends will befall the business if it is refused the right to continue to display the sign on the exterior of the building are self-inflicted. There is no more harm done to the pharmacy as a result of the effect of this by-law than there is to anyone else who chooses to locate a business in any other zone and does not comply with the zoning requirements, which would include the signage permitted within that zone. There is no more harm done by this by-law than there is by any other zoning by-law.

66 The by-law in question offends freedom of expression guaranteed by s. 2 of the Charter, but is an acceptable limit on this freedom by virtue of s. 1 of the Charter.

67 The appellant also contends that the by-law violates ss. 7 and 15 of the Charter. The appellant, a corporation, is not entitled to avail itself of the protection of s. 7: see *Irwin Toy* at p. 1004.

68 The s. 15 argument is equally untenable. The distinction between pharmacies and other businesses cannot constitute inequality under s. 15 as the grounds for the distinction are in no way analogous to the enumerated grounds in s. 15: see *Andrews v. Law Soc. of B.C.*, [1989] 1 S.C.R. 143, [1989] 2 W.W.R. 289, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, 56 D.L.R. (4th) 1, 36 C.R.R. 193, 10 C.H.R.R. D/5719, 91 N.R. 255.

69 The appeal is dismissed with costs on double col. V.

Gerwing J.A.:

70 The city of Saskatoon by by-law restricted, inter alia, the type and size of signs which might be used in various categories of neighbourhoods. The appellant operated a pharmacy in an office building in an area zoned M.3.A.

71 Under the by-law in such an area the businesses permitted as ancillary to office buildings (which included a pharmacy) were not to be visible from outside the building "other than by a painted window or door lettering in accordance with s. 12(f)." The latter subsection required that the letters on the sign not exceed 16 cm in height. The accused, in contravention of this by-law, erected a sign 2 feet by 14 feet.

72 The accused was convicted by the Provincial Judge and had his appeal dismissed by a judge of the Court of Queen's Bench [reported at [1988] 3 W.W.R. 705, 38 M.P.L.R. 103, 67 Sask. R. 201]. It now appeals to this court alleging violations of ss. 2(b), 7 and 15 of the Charter. The appellant's arguments with respect to s. 7 were perfunctory and with respect to s. 15 there is a virtual concession that the section could not succeed. For reasons which will be set out briefly below, I am of the view that these sections do not avail the appellant. The main focus of the appellant's submission related to s. 2(b) of the Charter.

73 It is now clear that commercial expression is protected by the Charter. The Supreme Court of Canada held in *Ford v. Que. (A.G.)*, [1988] 2 S.C.R. 712 at 766-67, 54 D.L.R. (4th) 577, 36 C.R.R. 1, 10 C.H.R.R. D/5559, (sub nom. *Chaussure Brown's Inc. v. Qué. (P.G.)*) 19 Q.A.C. 69, 90 N.R. 84:

In our view, the commercial element does not have this effect. Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian *Charter* should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the *Charter*. It is worth noting that the courts below applied a similar generous and broad interpretation to include commercial expression within the protection of freedom of expression contained in s. 3 of the Quebec *Charter*. Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy. The Court accordingly rejects the view that commercial expression serves no individual or societal value in a free and democratic society and for this reason is undeserving of any constitutional protection.

74 This decision was rendered after the trial on the Queen's Bench appeal in this matter and overruled the basis for these decisions, which were largely based on the view that commercial expression was not afforded protection by the Charter.

75 The extent of the protection afforded was not fully dealt with in *Chaussure Brown*, where the court noted at p. 767:

Although the expression in this case has a commercial element, it should be noted that the focus here is on choice of language and on a law which prohibits the use of a language. We are not asked in this case to deal with the distinct issue of the permissible scope of regulation of advertising (for example to protect consumers) where different governmental interests come into play, particularly when assessing the reasonableness of limits on such commercial expression pursuant to s. 1 of the Canadian *Charter* or to s. 9.1 of the Quebec *Charter*. It remains to be considered whether the limit imposed on freedom of expression by ss. 58 and 69 is justified under the either s. 1 of the Canadian *Charter* or s. 9.1 of the Quebec *Charter*, as the case may be.

76 Further discussion of the extent of the right and the manner of applying s. 1 if the right were held to be breached is found in *Irwin Toy Ltd. v. Que. (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 24 Q.A.C. 2, 94 N.R. 167.

77 The first question to be answered is, does the by-law breach the appellant's right of expression? The respondent's first contention was that if commercial expression were protected, the sign did not constitute "expression." The respondent

says that the sign merely indicates the presence of a pharmacy and conveys no other information. In *Chaussure Brown*, the signs as well were merely descriptive with words such as "flowers" or "wool" and the Supreme Court noted that the public signs and posters in that case were indeed forms of expression which could be conveniently characterized as commercial expression. I see no distinction on this point between this sign and those referred to in *Chaussure Brown*.

78 The next determination, as was made clear by the Supreme Court in *Irwin Toy*, is to determine "whether the purpose or effect of the impugned governmental action was to control attempts to convey meaning through that activity" (p. 972). As noted, if the government's purpose is to restrict freedom of expression, that is an end to the matter. If it is not found to be the government's purpose, one must then consider if it is the effect. As was noted at pp. 975-76 of the majority judgment:

In sum, the characterization of government purpose must proceed from the standpoint of the guarantee in issue. With regard to freedom of expression, if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity.

79 In this instance, the latter question may well be answered that the purpose here is restricted only to the direct physical result of the activity. However, even if this were the case, it would not end the examination, because if the effect is to restrict the plaintiff's free expression, a breach of s. 2(b) has occurred in any event. Whether or not the purpose is legitimate, the effect here is unquestionably of restricting the plaintiff's free expression.

80 Accordingly I am of the view that there was a breach of the s. 2(b) right of the appellant. However, the next consideration is whether the by-law is such that can be characterized as a restriction which is "demonstrably justified in a free and democratic society" within s. 1 of the Charter.

81 In the *Irwin Toy* case, the Supreme Court of Canada articulated the standard of review to be used under s. 1 in breaches of this type. The *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87) was applied [p. 986]:

It is now well established that the onus of justifying the limitation of a right or freedom rests with the party seeking to uphold the limitation, in this case the Attorney General of Quebec, and that the analysis to be conducted is that set forth by Dickson C.J. in *R. v. Oakes*, *supra*.

82 The *Oakes* test, as the court noted, is a three-stage test. The first stage is set out:

Dickson C.J. explained this requirement in *Oakes* at pp. 138-39:

First, the objective which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom': *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

83 The first part of the test, that is, whether there is a pressing and substantial objective, has in my view been met by the government here. The governmental objective in zoning by-laws is set out in s. 66 of the Planning and Development Act, 1983:

66. The purposes of a zoning bylaw are to control the use of land for providing for the amenity of the area within the council's jurisdiction and for the health, safety and general welfare of the inhabitants of the municipality.

84 The evidence of the city focused on the two basic aspects of community planning, that is, the physical surroundings of the community and, secondly, the social and economic relationships and characteristics of the community. In a society with large percentages of people living in urban settings, and with their daily life and welfare, both physical and mental, being to such a large extent dependent upon appropriate settings, it is, in my view, a pressing and substantial objective. As noted in the decision in *Irwin Toy*, a high standard of justification is required but regulation of appropriate environments in different portions of urban communities, is, in my view, on this level.

85 The second part of the *Oakes* test is whether the means are proportional with the end. The evidence indicated that policy decisions with respect to city planning are governed initially by an overall development plan so that zoning is not done in a haphazard way. This plan is intended to guide development until the city reaches a population of 250,000 persons, that is, to a time substantially distant in the future. The plan permits commercial development in one of several types of areas: neighbourhood commercial areas, district commercial areas, suburban centre commercial, and secondary commercial areas.

86 Each of these has been zoned differently for long-term city planning objectives. The appellant pharmacy is located in a suburban centre commercial area. Under s. 44.A(1) of the by-law, in a M.3.A. district only the following buildings and uses of buildings are permitted:

- (a) churches, church halls and public halls;
- (b) schools, hospitals, and special care homes;
- (c) libraries, reading rooms, art galleries, and museums;
- (d) parks, cemeteries, play grounds, sports fields, and arenas;
- (e) private clubs, lodges and fraternities;
- (f) banks, trust companies, and medical clinics;
- (g) offices and office buildings, in which no goods or commodities of business or trade other than for medical, dental or optical laboratories are stored, transhipped, or processed in the same office or building as part of the operation of any such office.

87 According to the evidence of the city, these were the principal uses of the area. However, the city also permitted ancillary uses which according to the evidence of the city planner were intended to be wholly subordinate. These subordinate facilities were to have access only through the interior of the principal use, were restricted in size and had a restricted signage permitted.

88 The principal use of Pinehouse Plaza was an office building and the pharmacy was from the moment the appellant corporation purchased it an ancillary operation. The limitation on signage here, while it may preclude persons unfamiliar with the neighbourhood from finding the pharmacy at night as suggested by the appellant, does not affect the ancillary purpose. An ancillary use in these contexts is not the attraction of the general public. It exists because the principal use exists.

89 In the context of ancillary use of this nature, I am of the view that the limitation on signage is indeed rationally connected to the objective of controlling the use of the land in providing for the orderly urban development of the city. The by-law attempts *inter alia* to ensure compatibility of various land uses and signage practices throughout a city,

which is clearly necessary to keep the various gradations between residential and commercial districts from overlapping. Further, it is consistent with the ancillary nature of the permitted use.

90 Finally with respect to the *Oakes* test, there has been minimum impairment. The intensity of advertising varies depending upon the degree of commercial activity permitted in the area. For a facility which is inherently ancillary to have the limitation of 16 cm letters on its signs is consistent with the other characteristics, for example, no outside entrance and restricted size. In this context the limitation to purposes suited to ancillary, but incompatible with principal, usage or more highly commercialized areas of the city is the minimum that can be used and still achieve the valid and desirable purpose of regulated urban planning.

91 Accordingly, in my opinion, the test of s. 1 has been met and, although there is a violation of the s. 2(b) right of the appellant, such right is justified under s. 1 of the Charter.

92 As noted above, the s. 7 argument was an ancillary ground of appeal, the appellant having relied principally upon s. 2(b). However, we note the comments of the Supreme Court of Canada on the capacity of a corporation to raise s. 7 of the Charter [*Irwin Toy Ltd. v. Que. (A.G.)*, at pp. 1002-1003]:

In order to put forward a s. 7 argument in a case of this kind where the officers of the corporation are not named as parties to the proceedings, the corporation would have to urge that its own life, liberty or security of the person was being deprived in a manner not in accordance with the principles of fundamental justice. In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the *Charter*.

93 Further, we are of the view that in this case as in *Irwin Toy*, the exception in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 85 C.L.L.C. 14,023, 60 A.R. 161, 58 N.R. 81, is not applicable. Dickson C.J.C. said at p. 315:

... if the legislation under review had a secular purpose and the accused was claiming that it interfered with his religious freedom, the status of the accused and the nature of his belief might be relevant: it is one thing to claim that the legislation is itself unconstitutional, it is quite another to claim a "constitutional exemption" from otherwise valid legislation, which offends one's religious tenets.

94 This is not a case where the purpose is inherently flawed. There is a zoning by-law and the effect on a corporation is not such as to attract the protection of s. 7. The corporation is incapable of raising s. 7 because of its potential effect on other persons who are not parties. Accordingly the ground of appeal based on s. 7 fails as well.

95 Finally, as noted above, the appellant virtually conceded that the s. 15 argument was bound to fail. The appellant was charged with having committed an offence "on or about the 26th day of November 1984". Section 15 came into force on 17th April 1985. Section 15 does not operate retrospectively and hence is not applicable: *R. v. Stevens*, [1988] 1 S.C.R. 1153, 64 C.R. (3d) 297, 41 C.C.C. (3d) 193, 51 D.L.R. (4th) 394, 35 C.R.R. 107, 28 O.A.C. 243, 86 N.R. 85.

96 For these reasons, I am of the view that all of the grounds of appeal fail and the appeal must be dismissed.

Appeal dismissed.

TAB 15

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Fiorino v. Toronto \(City\) Committee of Adjustment](#) | 2007 CarswellOnt 5347, 37 M.P.L.R. (4th) 311, 57 O.M.B.R. 55 | (O.M.B., Aug 16, 2007)

2005 CarswellOnt 2913
Ontario Superior Court of Justice (Divisional Court)

DeGasperis v. Toronto (City) Committee of Adjustment

2005 CarswellOnt 2913, [2005] O.J. No. 2890, 12 M.P.L.R. (4th) 1, 140
A.C.W.S. (3d) 752, 200 O.A.C. 392, 256 D.L.R. (4th) 566, 51 O.M.B.R. 1

**KITSON VINCENT (Appellant) and FREDDY
and WENDY DEGASPERIS (Respondents)**

THE ROSEDALE GOLF ASSOCIATION LIMITED (Appellant) and FREDDY
DEGASPERIS JR. and WENDY **DEGASPERIS** (Respondents) and ONTARIO
MUNICIPAL BOARD (Intervenor) and CITY OF TORONTO (Intervenor)

Matlow, Jarvis, Molloy JJ.

Heard: February 21, 2005

Judgment: July 8, 2005

Docket: Toronto 775/03, 777/03

Proceedings: reversing [DeGasperis v. Toronto \(City\) Committee of Adjustment \(2003\)](#), 2 M.P.L.R. (4th) 124, (sub nom. [Degasperis v. Toronto \(City\)](#)) 46 O.M.B.R. 407, 2003 CarswellOnt 5960 (O.M.B.); additional reasons at [DeGasperis v. Toronto \(City\) Committee of Adjustment \(2005\)](#), 2005 CarswellOnt 7202 (Ont. Div. Ct.)

Counsel: N. Jane Pepino for Appellant, Kitson **Vincent**
A. Brown, L. Richetti for Respondents
Chris Paliare for Appellant, Rosedale Golf Association Limited
M. Michaels for Intervenor, Ontario Municipal Board
Andrew Weretelnik for Intervenor, City of Toronto

Subject: Public; Civil Practice and Procedure; Municipal

Related Abridgment Classifications

Municipal law

XVI Zoning

XVI.8 Zoning variances

XVI.8.a General principles

Municipal law

XVI Zoning

XVI.8 Zoning variances

XVI.8.b Types of variances

XVI.8.b.ii Frontage and set back

XVI.8.b.ii.B Side yard set back

Headnote

Municipal law --- Zoning — Zoning variances — Types of variances — Frontage and set back

Homeowners applied to committee of adjustment for four minor variances — Minor variances sought included setback, height of dwelling, and area of dwelling and balconies — Committee of adjustment dismissed application for all variances — Homeowners appealed to Ontario Municipal Board — Board upheld decision regarding setback, but allowed appeal related to height and area of dwelling and balconies, and granted those variances — Homeowners appealed — Appeal allowed — Four part test mandated by Planning Act requires that variance be minor, desirable for use of land, maintain intent and purpose of zoning by-law, and maintain intent and purpose of official plan — Board required to examine each variance sought and determine whether variances, alone or together, met requirements of test — Board's reasons focused on likely impact of variances sought with little or no regard for anything else — Board failed to consider general intent and purpose of by-law and official plan — Board committed numerous errors in its interpretation and application of four-part test — Standard of review to be applied to decision in which Board interprets its own statute was reasonableness — Board's errors failed to meet standard of reasonableness — Matter remitted to Board to be heard by different panel. Municipal law --- Zoning — Zoning variances — Jurisdiction and powers — Decision maker of first instance

Homeowners applied to committee of adjustment for four minor variances — Minor variances sought included setback, height of dwelling, and area of dwelling and balconies — Committee of adjustment dismissed application for all variances — Homeowners appealed to Ontario Municipal Board — Board upheld decision regarding setback, but allowed appeal related to height and area of dwelling and balconies, and granted those variances — Homeowners appealed — Appeal allowed — Four part test mandated by Planning Act requires that variance be minor, desirable for use of land, maintain intent and purpose of zoning by-law, and maintain intent and purpose of official plan — Board required to examine each variance sought and determine whether variances, alone or together, met requirements of test — Impact of variances sought was not only factor to be considered by Board — Board failed to consider general intent and purpose of by-law and official plan — No separate tests for hardship or need existed — Grant of minor variance application did not constitute special privilege — Committees of adjustment and Ontario Municipal Board entitled to consider issue of need and hardship even if four tests under s. 45(1) of Act satisfied.

Municipal law --- Zoning — Zoning variances — General principles

Homeowners applied to committee of adjustment for four minor variances — Minor variances sought included setback, height of dwelling, and area of dwelling and balconies — Committee of adjustment dismissed application for all variances — Homeowners appealed to Ontario Municipal Board — Board upheld decision regarding setback, but allowed appeal related to height and area of dwelling and balconies, and granted those variances — Homeowners appealed — Appeal allowed — Four part test mandated by Planning Act requires that variance be minor, desirable for use of land, maintain intent and purpose of zoning by-law, and maintain intent and purpose of official plan — Board required to examine each variance sought and determine whether variances, alone or together, met requirements of test — Impact of variances sought was not only factor to be considered by Board — Board failed to consider general intent and purpose of by-law and official plan — No separate tests for hardship or need existed — Grant of minor variance application did not constitute special privilege — Committees of adjustment and Ontario Municipal Board entitled to consider issue of need and hardship even if four tests under s. 45(1) of Act satisfied — Committees of adjustment required to provide careful and detailed analysis of decisions and not able to rely on "template catchword" checklist as reasons for decisions.

Annotation

The Ontario Divisional Court's judgment in *Vincent v. DeGasperis* makes a noteworthy number of important statements regarding the law concerning minor variances under subsection 45(1) of the *Planning Act*, R.S.O. 1990, c. P.13. The decision provides important guidance as to how subsection 45(1) is to be interpreted. The judgment also provides clarification on a number of issues regarding the authority to provide minor relief from zoning requirements and it creates some new law.

Relying principally upon the Ontario Court of Appeal's detailed comments in *Mississauga (City) v. Erin Mills Corp.* (2004), 50 M.P.L.R. (3d) 1, 2004 CarswellOnt 2617 (Ont. C.A.), that, in that case, the Ontario Municipal Board was not interpreting its "home statute" and did not have any unique experience or expertise in interpreting the term "conflict" under O. Reg. 82/98 of the *Development Charges Act, 1997*, the Divisional Court held that the situation at hand in *Vincent v. DeGasperis* was quite different. The Court noted that the *Planning Act* "is the Board's home statute and there is good reason to presume that the Board does have 'unique experience in interpreting it' in relation to the provision dealing with

minor variances." It also relied on two other appellate decisions in finding that the appropriate standard of review of the Ontario Municipal Board's decision on an appeal from a committee of adjustment decision is reasonableness.

The Divisional Court re-states that the test under subsection 45(1) is four-fold: an applicant seeking a minor variance must satisfy a committee of adjustment or the Ontario Municipal Board on appeal that a variance from the zoning by-law: (i) is minor in nature, (ii) is objectively appropriate for the use and development of the land, building or structure, (iii) maintains the general intent of the official plan; and (iv) maintains the general intent of the zoning by-law. As noted by Ken Hare in his article "Rearticulating the Four Tests in *Vincent v. DeGasperis*" in 2 D.M.P.L. (2d) (October 2005), the Court engages in a bit of disentanglement of the four minor variance tests which had over the years merged with one another.

Justice Matlow (writing for the unanimous Ontario Divisional Court) re-iterates the historic interpretation of the minor variance test that goes back to the Divisional Court's seminal decision in *251555 Projects Ltd. v. Morrison* (1974), 5 O.R. (2d) 763, 1974 CarswellOnt 549 (Ont. Div. Ct.). Matlow J.'s restatement is significant because the Ontario Municipal Board in a large number of decisions had appeared to articulate a different approach to the consideration of minor variance applications. More recently and increasingly more reliantly, the Ontario Municipal Board had appeared to make its determinations on whether a variance was minor based on the adverse impact approach. (There are numerous examples and an assortment of slightly varying enunciations of the same approach — see, for example, *Goodwood Club v. Uxbridge (Twp.)* (1990), 24 O.M.B.R. 199 (O.M.B.); *Darling v. Brockville (City) Committee of Adjustment* (1994), 31 O.M.B.R. 285 (O.M.B.); *Quesnelle v. Brookfield Homes (Ontario) Ltd.* (2003), 46 O.M.B.R. 417, 2003 CarswellOnt 6136 (O.M.B.)).

The Court held that the Ontario Municipal Board had erred in this case by essentially subsuming three of the four statutory tests under subsection 45(1) to the single test of "impact". Mr. Justice Matlow determined that the Ontario Municipal Board's decision had not sufficiently analyzed the second, third and fourth tests under subsection 45(1) of the *Planning Act* and that it focused on the likely impact of the variances sought with little or no regard for anything else.

The Court noted that while impact may be an important factor, it is not the *only* factor. Moreover, "impact" cannot be the only consideration in determining whether a variance is "minor" — the size of the variance must also be considered. With respect to the second test of desirability, the Court stated that the test requires variances to be desirable, and not simply compatible, with appropriate development. Whether a variance is desirable is an objective test to be considered from a planning and public interest point of view.

The Ontario Divisional Court also confirmed that subsection 45(1) does not include a fifth test of "need" or a sixth test of "hardship." While this may have been plainly evident from a reading of the language in subsection 45(1), both of these factors had been raised and considered by the Ontario Municipal Board in numerous decisions, including most prevalently in the oft-cited case of *Assaraf v. Toronto (City) Committee of Adjustment* (1994), 31 O.M.B.R. 257, 1994 CarswellOnt 5429 (O.M.B.). Opponents to minor variance applications often attempted to elevate the status of these factors to additional and separate tests for the granting of minor variance relief. The Divisional Court specifically addresses *Assaraf* in noting that the granting of a minor variance is not a "special privilege" that can only be granted or conferred in cases that demonstrate either need or hardship.

Remarkably, however, the Court also found that the inclusion of the word "may" in subsection 45(1) conferred on a committee of adjustment (and on the Ontario Municipal Board on appeal) a "residual discretion" as to whether or not to grant a variance approval, even if the four tests were satisfied. This is a revolutionary finding by the Court and appears to run counter to its own re-articulation of the four tests in subsection 45(1). Based on the Divisional Court's ruling, a committee of adjustment and the Ontario Municipal Board are entitled to take into account additional factors beyond the four tests in considering a minor variance application. The Court notes that in exercising its residual discretion, a decision-maker may "take into account anything that reasonably bears on whether or not an application [for a minor variance] should be granted." It is within this residual discretion that the factors of need and hardship may, in some

instances, properly be taken into account. The residual discretion is a significant variation from the existing jurisprudence and will create a substantial degree of uncertainty in the short term.

Finally, the Divisional Court also noted that committees of adjustment must provide reasons for their decisions so that they can be understood and challenged, if necessary. The Court noted that, "it is not sufficient for the Board to use template catchwords that refer to the four tests in order to show that it properly considered and applied those tests." The Court wrote that "the proper performance of this prescribed four-step exercise will rarely be simple. It requires, without exception, a careful and detailed analysis of each application to the extent necessary to determine if each variance sought satisfies the requirements of each of the four tests."

While the Ontario Municipal Board has always provided reasons for its decisions, committees of adjustment have historically not done so, preferring instead to issue decisions indicating approval or non-approval based on the "template catchword" checklist. Based on the Ontario Divisional Court's ruling, it appears that committees of adjustment will have to completely overhaul their method of decision-writing. This will not be easy or administratively uncomplicated — as stated in the judgment itself, "the proper performance of this prescribed four-step exercise will rarely be simple."

The Ontario Association of Committees of Adjustment and Consent Authorities (OACA) is presently considering the judgment and attempting to determine how its members should endeavour to comply with the requirement for complete comprehensive reasons that demonstrate the interpretation and application of the four tests under subsection 45(1) of the *Planning Act*. If it was not already sufficiently complicated, the attainment of minor variance approval at the committee of adjustment level will most certainly become more complex, time-consuming and expensive.

The decision has not been appealed.

John Mascarin

Table of Authorities

Cases considered by *Matlow J.*:

Assaraf v. Toronto (City) Committee of Adjustment (1994), 1994 CarswellOnt 5429, 31 O.M.B.R. 257 (O.M.B.) — not followed

Eastpine Kennedy-Steeles Ltd. v. Markham (Town) (2004), 45 M.P.L.R. (3d) 14, 237 D.L.R. (4th) 177, 46 O.M.B.R. 353, 2004 CarswellOnt 679, 184 O.A.C. 65 (Ont. Div. Ct.) — followed

London (City) v. Ayerswood Development Corp. (2002), 34 M.P.L.R. (3d) 1, 2002 CarswellOnt 4301, 167 O.A.C. 120 (Ont. C.A.) — followed

Mississauga (City) v. Erin Mills Corp. (2004), 50 M.P.L.R. (3d) 1, 188 O.A.C. 133, 71 O.R. (3d) 397, 2004 CarswellOnt 2617 (Ont. C.A.) — considered

Statutes considered:

Ontario Municipal Board Act, R.S.O. 1990, c. O.28

s. 96(1) — pursuant to

Planning Act, R.S.O. 1990, c. P.13

Generally — referred to

s. 45(1) — considered

s. 45(9) — considered

APPEAL from decision of Ontario Municipal Board reported at *DeGasperis v. Toronto (City) Committee of Adjustment* ((2003)), 2003 CarswellOnt 5960, (sub nom. *Degasperis v. Toronto (City)*) 2 M.P.L.R. (4th) 124, 46 O.M.B.R. 407 ((O.M.B.)), granting three of four requested minor variances upon leave to appeal.

Matlow J.:

1 Both of these appeals are allowed. The order of the Ontario Municipal Board is set aside and the appeal by the **DeGasperis** before the Board is remitted to the Board to be heard by a different panel in accordance with these reasons. If the parties cannot agree on the disposition of costs, written submissions regarding costs may be exchanged and submitted by counsel in triplicate. The submissions by parties claiming costs are to be submitted within one month and all submissions in response are to be delivered within two weeks thereafter.

2 The appeals are brought pursuant to section 96 (1) of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28 ("the OMB Act") which provides for an appeal from an order of the Board to this Court, with leave, on a question of law. Leave was granted by Cunningham, A.C.J.S.C. whose reasons are reported at [2004] O.J. No. 1153 (Ont. Div. Ct.). Both appeals were heard together on the consent of all of the parties and the intervenors.

3 The order in appeal was an order made by the Board allowing, in part, an appeal by the "**DeGasperis**", from a decision of the Committee of Adjustment of the City of Toronto which had dismissed their application for certain minor variances from the zoning by-law applicable to their property at 35 Green Valley Road.

4 The **DeGasperis** initial application is described at the outset of the Board's reasons as follows;

Green Valley Road is located in the City of Toronto (formerly the City of North York) along which are large lots with substantial homes. The property at No. 35 is one such lot and dwelling. The area is a mature enclave of prestige structures. The applicants, (Mr. F. and Mrs. W. **DeGasperis**, Jr.) propose to demolish the existing structure and to replace it with a larger, modern, home. Minor variances to the Zoning By-law provisions were sought from the Committee of Adjustment as follows:

1. north side yard setback of 1.22 metres to the proposed dwelling whereas 1.8 metres is required;
2. length of dwelling to the rear (living space portion) of 21.3 metres, and length of dwelling to the rear of the proposed covered patio and open terrace above of 26.9 metres whereas 16.8 metres is permitted;
3. dwelling height of 10.63 metres whereas 8.0 metres for a flat roof is permitted; and
4. front balcony area of 23.5 square metres and rear balcony area of 81.47 square metres (revised from 110.6 on appeal — the Board accepts the amendment to the application is minor and no further notice is required, invoking Section 45 (18.1) and 45 (18.1.1) of the Planning Act) whereas 3.8 square metres is permitted for each balcony.

5 By its order, the Board upheld the Committee of Adjustment's decision with respect to the first of these variances sought. However, with respect to the remaining three, the appeal was allowed and the variances sought were granted.

6 Various issues arise in this appeal regarding the interpretation and application of section 45 (1) of the *Planning Act*, R.S.O. 1990, c. P.13 ("the Act") which confers jurisdiction on committees of adjustment to grant minor variances. It reads as follows:

45(1) The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.

7 The issues raised by the appellants on which leave to appeal was granted are set out in the reasons of the Associate Chief Justice as follows:

The moving parties raise four issues which they say demonstrate how the OMB erred in law. These issues are as follows:

1. That the OMB erred in law by subsuming three of the four tests under ss. 45(1) of the Planning Act to the sole question of impact, thereby failing to properly address three of the four tests under that section.
2. That the Board erred in law in rejecting previous decisions of the OMB that a minor variance is a "special privilege" and that applicants must be able to demonstrate why they could not adhere to the by-law. By taking the position it did, the moving parties say the OMB erred in law by holding that the respondents herein were not required to demonstrate any need for the minor variance in order to satisfy one or more of the prescribed tests.
3. That the Board manifestly misapprehended the evidence and thereby erred in law by holding that the length of the "habitable" portion of the proposed new dwelling was within the requirements of the by-law. Further, that the OMB erred in law by holding that the height limit set out in the by-law was merely a "technical" requirement such that a variance ought to be granted.
4. That the OMB erred in law by taking into account and relying upon an irrelevant consideration when it concluded that no impact would result from an illegal and unenforceable condition as related to the rear balcony.

8 To the extent that I am persuaded that these issues raise questions of law, I will now address them in roughly the same order, commencing with my analysis of the four tests established by section 45 (1) of the *Act*. I will first deal with the applicable law and then review the proceeding before the Board.

9 An application for a minor variance must meet what is often referred to as the four part test mandated by the *Act*. To satisfy the requirements of the test a variance must:

1. be a minor variance;
2. be desirable, in the opinion of the committee, for the appropriate development or use of the land, building or structure;
3. maintain, in the opinion of the committee, the general intent and purpose of the zoning by-law; and
4. maintain, in the opinion of the committee, the general intent and purpose of the official plan.

10 These tests can, and therefore must, be interpreted in accordance with the adequately clear and ambiguous language used in section 45 (1) of the *Act*.

11 It is incumbent on a committee of adjustment, or the Board in the event of an appeal, to consider each of these requirements and, in its reasons, set out whatever may be reasonably necessary to demonstrate that it did so and that, before any application for a variance is granted, it satisfied all of the requirements.

12 A minor variance is, according to the definition of "minor" given in the Concise Oxford Dictionary, one that is "lesser or comparatively small in size or importance". This definition is similar to what is given in many other authoritative dictionaries and is also how the word, in my experience, is used in common parlance. It follows that a variance can be more than a minor variance for two reasons, namely, that it is too large to be considered minor or that it is too important to be considered minor. The likely impact of a variance is often considered to be the only factor which determines whether or not it qualifies as minor but, in my view, such an approach incorrectly overlooks the first factor, size. Impact is an important factor but it is not the only factor. A variance can, in certain circumstances, be patently too large to qualify as minor even if it likely will have no impact whatsoever on anyone or anything. This can occur, for example, with respect to the first building on a property in a new development or in a remote area far from any other occupied properties.

13 Accordingly, in my view the Board was required, at the outset, to examine each variance sought and to determine whether or not, with respect to both size and importance, which includes impact, it was minor.

14 The second test requires the committee to consider and reach an opinion on the desirability of the variance sought for the appropriate development or use of the land, building or structure. This includes a consideration of the many factors that can affect the broad public interest as it relates to the development or use.

15 Accordingly, in my view the Board was required to consider each variance sought and reach an opinion as to whether or not it, either alone or together with the other variances sought, was desirable for the appropriate use of the subject property. The issue was not whether the variance was desirable from the perspective of the **DeGasperis'** plans for their home but, rather, whether it was desirable from a planning and public interest point of view.

16 The third test requires the committee to consider and reach an opinion on whether or not the variance sought would maintain the general intent and purpose of the zoning by-law.

17 Accordingly, in my view the Board was required to engage in an analysis of the zoning by-law to determine its general intent and purpose and to consider whether the variance sought would maintain that general intent and purpose.

18 The fourth test requires the committee to consider and reach an opinion on whether or not the variance sought would maintain the general intent and purpose of the official plan.

19 Accordingly, in my view the Board was required to engage in an analysis of the official plan to determine its general intent and purpose and to consider whether the variance sought would maintain that general intent and purpose.

20 I pause here to observe that the proper performance of this prescribed four-step exercise will rarely be simple. It requires, without exception, a careful and detailed analysis of each application to the extent necessary to determine if each variance sought satisfies the requirements of each of the four tests.

21 I turn now to the reasons given by the Board and my analysis of how the Board interpreted and applied the four statutory tests.

22 In its reasons the Board expressed its view that obtaining a minor variance is not a "special privilege", a view contrary to a number of earlier decisions of the Board. In those decisions such as *Assaraf v. Toronto (City) Committee of Adjustment* (1994), 31 O.M.B.R. 257 (O.M.B.), the Board had held that a minor variance is a "special privilege" and will not be granted in the absence of need or hardship. The Board in this case rejected that view, stating at page 3 as follows:

A minor variance is not a "special privilege" that requires the applicant to justify the relief sought on the basis of need or hardship. The Planning Act authorizes variances to the Zoning By-law if four "tests" are met. Section 45 (1) does not create yet a fifth test of need or a sixth test of hardship. Provided the applicant can satisfy Section 45 (1), the application ought to be authorized if proper planning for the site will result, always mindful of what is in the public interest. It can be said an application is "needed" in every case involving a variance — otherwise the application would be redundant if the proposal adhered to the zoning by-law performance standards. To require proof of hardship is to import words and a test which do not exist upon a reasonable interpretation of Section 45 (1). One can think of a multitude of situations where no hardship is evident but where the application has merit and meets Section 45 (1). Are those applications to be arbitrarily denied? Provided the statutory criteria are applied and the application withstands the scrutiny of acceptable planning practice, then additional, unsanctioned, hurdles will not be imposed by the Board to evaluate minor variance requests.

23 I agree with the Board's analysis and interpretation of the law as to whether the obtaining a minor variance is a special privilege. However, in addition to what the Board stated I would add that the inclusion of the word "may" in section 45 (1) indicates that the jurisdiction given to a committee of adjustment to grant minor variances is permissive and confers on it a residual discretion as to whether or not grant them even when the four tests are satisfied. In exercising its

discretion, a committee is entitled to take into account anything that reasonably bears on whether or not an application should be granted and, in my view, need and hardship are factors that, in appropriate cases, can properly be taken into account. However, even when these factors are taken into account and an application for a minor variance is granted, that does not transform the granting of the minor variance into a special privilege.

24 I turn next to how the Board applied the four tests to the minor variances sought. With respect to variances #2, 3 and 4, there is nothing in the Board's reasons that indicates that the Board considered whether those variances were patently too large to qualify as minor. The only factor addressed in the Board's reasons appears to be the likely impact of the variances. It follows, therefore, that the Board's consideration of this test was inadequate.

25 The Board's application of the remaining three tests can be dealt together. In brief, I am persuaded that the Board's reasons, taken in their entirety, reveal that the Board failed to interpret and apply these tests correctly. In some instances, the Board erred in its interpretation of the tests; in others it failed to consider matters that were essential to their correct application. Throughout the Board's reasons, there are references to the evidence of witnesses whose evidence the Board accepted but those references do not state what the evidence was and why it was preferred over other evidence. Throughout the Board's reasons the focus is on the likely impact of the variances sought with no or little regard for anything else. Of equal importance is the omission of any analysis by the Board of the general intent and purpose of the by-law and the official plan and how the granting of the minor variances sought would maintain those intents and purposes.

26 Examples of some of the inadequacies of the Board's interpretation and application of these tests can be seen in the following excerpts.

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Collectively and individually, the other variances [My note: this refers to the variances other than variance #1] meet the general intent and purpose of the Official Plan. The site is designated Residential Density One (RD-1). The new development will be compatible with the existing area in terms of scale, function and physical character. The evidence presented by the applicants' planner pertaining to the Official Plan, and the opinion regarding intent and purpose, are preferred and accepted by the Board.

The Board accepts the evidence of the applicants' planner that the general purpose and intent of the Zoning By-law will be maintained for the length and height variances.

There is nothing here which satisfies the requirements set out above in paragraph 11 and paragraphs 14 to 19, inclusive. The second test requires consideration of "desirability" and not "compatibility". There is no analysis of either the zoning by-law or the official plan or how their respective intents and purposes are maintained. The evidence of the planner pertaining to the official plan is not specified and, because no transcript of the hearing is available, there is no way of determining what that evidence was. Nor are there any details given of the apparently contrary evidence given and why the Board preferred that of the applicants' planner.

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The Board prefers the evidence of the applicants' planner that the four tests in Section 45 (1) are met for the height and length relief.

This repeats the same error described above.

The remaining request for relief deals with the balconies, both at the front and the rear of the dwelling. There is no issue in the Board's view, the intent of the Official Plan is maintained — balconies are integral to residential structures. The real issue is the size of the balconies and the intent of the Zoning by-law. Balconies, be they functional or decorative, are limited to 3.8 square metres in area. The proposed balconies exceed the limit. But the Board must

consider the impact. The front balcony is located on the south side of the dwelling, away from the Ginsler property and adjacent to the service area of the Golf Club. No one is adversely impacted by the front balcony. It will not create a precedent for the area given the location and context. The Board accepts the applicant's planning evidence the four tests are met for the front balcony.

This repeats many of the same errors described above. The focus is on impact. There is nothing here which satisfies the requirements set out above in paragraph 11 and paragraphs 14 to 19, inclusive.

The rear balcony is large but it is intended only for the personal use of the occupants of the dwelling. The spectre of party revelers using the balcony to disrupt the neighbouring property uses was tempered by the offer of the applicants, through their counsel, to physically screen and eliminate access to the majority of the balcony and to turn most of it into a decorative feature of the home. About 32 square metres would be allocated to use by the applicants. Counsel for the objectors question the enforceability of such a restriction or condition. However, the Board is satisfied if the rear balcony is restricted physically as proposed by the applicants, enforceability should not be a problem. Any issue of overview to the neighbouring properties will also be eliminated. No adverse impacts will result. The four tests in Section 45 (1) will be met if the useable area of the rear balcony is confined.

This too repeats many of the same errors described above. The focus is on impact. There is nothing here which satisfies the requirements set out above in paragraph 11 and paragraphs 14 to 19, inclusive. Despite section 45 (9) of the Act, the restriction imposed requiring screening of the balcony and use of only "about 32 square metres" is beyond the scope of the Board's authority. The use that can be made of a balcony does not change the fact that the balcony still remains a balcony. As well, the notion that the restricted use of the balcony could or would be effectively enforced is unreasonable.

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In conclusion, the Board accepts and prefers the evidence of the applicants' planner that the variances for length, height and balconies meet the general purpose and intent of the Official Plan, meet the general intent and purpose of the Zoning By-law, that they are desirable for the appropriate development of the land and that they are minor, subject to the condition noted and subject to filing revised plans.

This too repeats many of the same errors described above. There is nothing here which satisfies the requirements set out above in paragraph 11. It is not sufficient for the Board to use template catchwords that refer to the four tests in order to show that it properly considered and applied those tests.

27 Accordingly, on my reading of the entirety of the Board's reasons, I am persuaded that the Board committed numerous errors in its interpretation and application of the four tests. The consequence of those errors must, however, be determined only after consideration of the proper standard of review that is applicable, namely, correctness or reasonableness.

28 Counsel did not refer us to any cases in which the standard of review was addressed in appeals from decisions of the Board involving applications for minor variances, nor could I find any. Nevertheless, I am satisfied that there is now sufficient guidance from the Court of Appeal and, as well, from this Court to require us to hold that the standard to be applied is that of reasonableness.

29 The most recent guidance from the Court of Appeal can be found in *Mississauga (City) v. Erin Mills Corp.* (2004), 71 O.R. (3d) 397, [2004] O.J. No. 2690 (Ont. C.A.). The relevant portion of the judgment in which the related but different issue before the Court is described and the issue of standard of review is addressed is found in the following excerpt from the reasons for judgment of Goudge, J.A.:

[33] The Board's fundamental task in each case was to determine the test to be used to decide if there was "a conflict" between the various subdivision agreements and the relevant development charge by-law. In other words, what

meaning should be given to that term in s. 17(2)? Having settled on a definition of conflict, the Board's task was to go on to apply it to each instance where the developer alleged that a conflict existed.

[34] In my view, the Board's interpretation of "conflict" in s. 17(2) is properly reviewed using a standard of correctness. The considerations relevant to the pragmatic and functional approach to determining the proper standard of review all point in this direction. Those considerations are well known: see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193.

[35] There is no privative clause protecting the Board's decisions when they come before the Divisional Court on appeal with leave pursuant to s. 96(1) of the Ontario Municipal Board Act. This suggests a less differential standard of review.

[36] The appeal to the Divisional Court can only be on a question of law. Thus, what is reviewed by the court is a finding of law, not one of fact. In this case the legal question is the interpretation to be given to the term "conflict" in a regulation to the 1997 DCA. This is not the Board's home statute nor is there any other reason to presume that the Board has unique experience in interpreting it. Neither is it apparent that the Board's general expertise in matters of planning and land use is engaged in defining this term. The Board would seem to have no greater expertise than the court in giving meaning to the concept of "conflict" between a contract and a by-law. This points to closer scrutiny of the Board's decision.

30 In the case at bar, however, the *Act* is the Board's home statute and there is good reason to presume that the Board does have "unique experience in interpreting it" in relation to the provisions dealing with minor variances. In *London (City) v. Ayerswood Development Corp.*, [2002] O.J. No. 4859 (Ont. C.A.), the Court of Appeal held that a reasonableness standard should be applied to decisions in which the OMB is interpreting its own statute. A similar analysis was made and the same conclusion reached by this Court in *Eastpine Kennedy-Steeles Ltd. v. Markham (Town)*, [2004] O.J. No. 644 (Ont. Div. Ct.), a case involving another provision of the *Act*. Accordingly, I conclude that reasonableness is the standard of review that must be applied here.

31 In the circumstances of this case, I am persuaded that the Board's Reasons cannot withstand the somewhat probing examination involved in the reasonableness test. The errors of the Board are so serious and extensive that they fail to meet the standard of reasonableness.

Appeal allowed.

TAB 16

1989 CarswellOnt 3493
Ontario Municipal Board

Vedova v. Port Stanley (Village) Committee of Adjustment

1989 CarswellOnt 3493, 23 O.M.B.R. 53

Vedova v. Village of Port Stanley Committee of Adjustment

Howden Q.C. Member

Judgment: April 21, 1989

Docket: V 8800607

Counsel: Stephen H. Gibson, for the Village of Port Stanley

Gary R. Vedova, appearing on his own behalf

Subject: Public; Municipal

Related Abridgment Classifications

Municipal law

[XVI Zoning](#)

[XVI.8 Zoning variances](#)

[XVI.8.b Types of variances](#)

[XVI.8.b.ii Frontage and set back](#)

[XVI.8.b.ii.F Miscellaneous](#)

Headnote

Municipal law --- Zoning — Zoning variances — Types of variances — Frontage and set back

Planning Act, 1983, S.O. 1983, c. 1, s. 44(1).

Applicant proposing to build carport at corner of two streets and with set back less than those required by by-law — Applicant's lot sufficiently large to allow placing of carport within by-law requirements but applicant preferring corner location — Future widening of streets required — Conflicting evidence offered as to effect of proposed carport on traffic safety — Committee of Adjustment dismissing application for minor variance to permit carport — Applicant unsuccessfully appealing dismissal — Minor variance not available to trade off adequate safety protections for aesthetic or personal preferences.

P.H. Howden, Q.C., Member:

1 Gary Vedova owns a lot at the north-west corner of Vimy Ridge St. and Oak St. in the Village of Port Stanley. It is irregular in shape, having a frontage of 65 ft. on the west side of Vimy Ridge St., flankage of 155 ft. on the northerly side of Oak St. and its westerly limit is 125 ft. in depth. It is irregular in elevation, flat near Oak St. and then a rise to another flat area near the middle of the lot followed by a further rise in the northerly part of the lot. Mr. Vedova's home is located deep into the lot near the north-west corner according to his site sketch (ex. 5). An asphalt pad is located at the corner of Vimy Ridge and Oak Sts. for the parking of his vehicles. Part of the pad is within his lot and the remainder extends easterly 20 ft. across the village road allowance to the travelled portion of the street.

2 Mr. Vedova wants to construct a carport over that part of the asphalt pad located within his lot. There are two large maple trees on either side of the pad and four pine trees grouped at its westerly end. He stated that a roof is required to protect his automobile from sap dripping from the maple trees and from the natural excretions of the inhabitants of the trees. He presented no design for the proposed carport. He described it as a simple structure composed of an A-frame roof of cedar shakes supported by four, 6" × 6" posts. Under cross-examination by counsel for the village, he added that the peak of the roof would be 14 ft. above the ground.

3 The issue in this case is the location of the proposed carport at the corner of the two streets.

4 The village's zoning by-law requires all buildings (and a carport is a "building" as defined in the by-law) to be 12 ft. from the flanking street (being Oak St.). It also requires a frontyard set-back from Vimy Ridge St. of 25 ft. Mr. Vedova wants to build the carport where it would have a zero frontyard set-back from the Vimy Ridge St. road allowance and a sideyard of four feet from Oak St. He therefore applied for variance from the provisions of the by-law in both respects, and the committee of adjustment refused to grant his application.

5 Mr. Vedova acted for himself before the board. He stated that he is a solicitor who has practised in the field of real estate mainly in St. Thomas and for two years in Port Stanley and who is experienced in dealing with zoning by-laws and official plans. He is of the opinion that where a variance application satisfactorily meets all of the factors considered in establishing the zoning regulations, the variance can only be regarded as minor. He listed the following factors as the ones the municipality must consider regarding yard regulations:

- (i) sufficiency of building separations and set-backs to maintain the quality of an area;
- (ii) traffic visibility;
- (iii) traffic safety; and
- (iv) general aesthetics.

6 He stated that the carport in the proposed location would not produce any visual impact to neighbours, mostly because of the distance from them, elevation differences and the presence of the trees. As to traffic visibility and safety, he noted that drivers eastbound on Oak St. must stop at a stop sign at Vimy Ridge St. and the carport would not impede their vision looking up Vimy Ridge St. from their stopped position at the sign. He also said that the visibility of drivers proceeding southerly on Vimy Ridge St. would not be impeded because the solid roof would be 9 ft. above the ground. He concluded that because no one would be affected and the factors behind the by-law regulations are satisfied, the variance requested is minor.

7 The board does not accept this view. It is premised on the incorrect belief that all that is required for a variance to be minor is to maintain the general intent of the by-law. It was held some years ago by the Divisional Court that an applicant must satisfy all four tests set out in s. 44(1) of the *Planning Act, 1983*, S.O. 1983, c. 1, *Re 251555 Projects Ltd. and Morrison (1974)*, 5 O.R. (2d) 763, 51 D.L.R. (3d) 515. They are:

- (a) That the variance sought is desirable for the appropriate development or use of the land, building or structure;
- (b) that the general intent and purpose of the by-law is maintained;
- (c) that the general intent and purpose of the official plan is maintained; and
- (d) that in all the circumstances the variance sought is minor.

8 These are not simply tests to be met by strictly legal points, but by consideration of all of the relevant circumstances including the assistance of those experienced in land use planning, when such evidence is available.

9 Patrick Keenan was the only witness qualified by education and experience to express opinions on planning principles. He has advised the village on planning matters for 12 years. He concluded that the proposal, in its location at the corner of two streets, by eliminating the frontyard set-back entirely, by reducing the flankage requirement and being located within the daylight triangle referred to in s. 7.25.1 of the by-law, was not minor and in fact raised a policy issue which should only be addressed through an application to council to amend the by-law.

10 James Howie, the roads superintendent of the village, stated that the width of Oak St. is below village standards. He said that the goal of the village is to continue the drain now installed to the north along Vimy Ridge St., which will entail Oak St. being reconstructed. He confirmed that no plans exist now for the reconstruction and widening of Oak and Vimy Ridge Sts., but it should be done at the same time particularly because there are sight problems at this corner, pedestrians use these streets in the summer to go to the beach, and an accident resulted at this location three years ago. One corner of the proposed carport would be within the shoulder of Oak St. when it is reconstructed. Both he and Mr. Keenan noted that nothing in the by-law would prevent the later enclosing of the carport and that is the usual result of this type of proposal, in Mr. Howie's experience.

11 Daniel Young, a consulting engineer with a firm in London who has advised the village for 10 years, stated that, after walking the site and driving by it, sight lines were now impeded by the large maples and any structure at the proposed location would impede sight lines further. He referred to s. 7.25.1 regarding the daylight triangle. It reads, in part:

7.25. Visibility at Intersections

7.25.1 In residential, business, industrial, and institutional use zones on a corner lot a building or any other structure shall not be erected in such a manner as to materially affect vision between a height of two feet and ten feet above the centreline grade of the intersecting streets in the triangular area...

and it goes on to describe how the triangle is to be plotted.

12 Exhibit 7 shows about 40% of the proposed carport within the triangle. Mr. Young stated that there is an engineering principle embodied within this provision and in the front set-back requirement for corner lots which is there to ensure that motorists on one street can see sufficiently far ahead in order to take evasive action before reaching the corner. He reiterated that construction of any structure would further impede sight lines at this location, but that he could not say how materially they would be impeded without seeing the particular design.

13 The board has considered Mr. Vedova's position that the roof will be sufficiently high so that the only impediment to a driver's view would be one or two posts, and that he would undertake not to enclose the structure in future. However, without the particular detailed design before it, the board simply cannot make that finding, particularly in view of the change of grade up Vimy Ridge St. and the solid nature of the roof, part of which, on Mr. Vedova's own admission, will be lower than 10 ft. above grade. Furthermore, it appears that the board is being asked to allow a structure at a location where road widening will be required in the future and in the face of the opinion of a competent engineer that any added structure at this location will impede visibility. Mr. Vedova did not seriously question Mr. Young regarding his conclusion. The mere presence of a stop sign does not obviate the need for adequate sight lines to deal with various traffic situations that may occur both coming down Vimy Ridge St. and proceeding easterly on Oak St. The subject lot is sufficiently large to allow the placing of such a structure within the by-law requirements according to Mr. Young and Mr. Keenan, and this was conceded by Mr. Vedova although for economic and aesthetic reasons he prefers it to be at the corner. When all is said and done, the board will not trade off adequate safety protections for aesthetic or personal preferences by calling it minor.

14 The board was given no sufficient reason for rejecting the opinions of Messrs. Keenan and Young, and accepts them. The variance sought is neither minor nor desirable for appropriate development nor is the board satisfied that it is within the general intent of the by-law. For these reasons, the appeal will be dismissed and the application for variance is not granted.

TAB 17

**Statutory
Interpretation**

Theory and Practice

Randal N. Graham

that is appropriate. Consider, for example, s. 11(7) of the *Controlled Drugs and Substances Act*¹⁷ (CDSA), which permits the police to engage in warrantless searches where “exigent circumstances” exist. The phrase “exigent circumstances” is not defined in the CDSA. Nowhere in the statute is the judiciary given guidance as to what might constitute “exigent circumstances” for the purposes of the Act. Similarly, s. 63 of the *Criminal Code* prohibits tumultuous disturbances of the peace. “Disturbing the peace” is not defined. Nor does the Code describe how one could disturb the peace in a “tumultuous” manner. In instances such as these, the drafter has used an extremely broad term for the purpose of delegating the task of filling in the legislative blanks to the judiciary. Judges are able to determine what are “exigent circumstances” because of long exposure to fact situations involving police behaviour. Judges know what “disturbs the peace tumultuously” because of their great experience adjudicating offences against the public order. The legislator, by contrast, has neither the expertise nor the inclination to define these vague terms with specificity. Through the use of the vague language found in these statutes, the legislature acknowledges the judiciary’s expertise and grants courts the discretion to apply and interpret the law as they see fit.¹⁸

Finally, the use of vague language may demonstrate the drafters’ intent to permit the language of an enactment to take on a life of its own. One unfortunate aspect of a strictly originalist approach to interpretation is the refusal to acknowledge that the drafters may have *wanted* the courts to use dynamic interpretation when construing certain provisions. According to Peter Hogg, “what originalism ignores is the possibility that the framers were content to leave the detailed application ... to the courts of the future, and were content that the process of adjudication would apply the text in ways unanticipated at the time of drafting.”¹⁹ In other words, the drafters may actually be aware of the evolutive nature of statutory language, and hope that the courts employ a progressive or dynamic approach to interpreting the language used in their enactments. How the legislative drafters signal their intent to leave the stewardship of language to the courts is through the use of vague language, which lends itself to evolution through a dynamic interpretive process.

If the use of vague language implies a delegation of power from the drafters to the courts or an expression of the desire to permit language to evolve, what approach should interpreters take when confronted with vague legislative terms? In my view, the construction of vague language necessarily requires the use of dynamic interpretation. Where the legislature sees fit to express its intention in vague terms, the courts should be free to assume either that (1) the lawgiver

17 *Supra* note 3.

18 This point is underscored in cases involving statutes that are administered by administrative officials or tribunals. In such cases, the body charged with administering the statute is often staffed by experts in the relevant legislative field.

19 Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997), 1392.

TAB 18

1991 CarswellOnt 5983
Ontario Municipal Board

Rebello v. Toronto (City) Committee of Adjustment

1991 CarswellOnt 5983, 25 O.M.B.R. 477

Rebello v. City of Toronto Committee of Adjustment

Chapman Q.C. V-Chair

Oral reasons: January 29, 1991

Docket: V 890695

Counsel: P. Gemmink, for Maria Rebello

Subject: Public; Municipal

Related Abridgment Classifications

Municipal law

[XVI Zoning](#)

[XVI.8 Zoning variances](#)

[XVI.8.b Types of variances](#)

[XVI.8.b.vii Area](#)

[XVI.8.b.vii.A Gross floor area](#)

Municipal law

[XVI Zoning](#)

[XVI.8 Zoning variances](#)

[XVI.8.b Types of variances](#)

[XVI.8.b.xii Parking](#)

Headnote

Municipal law --- Zoning — Zoning variances — Types of variances — Area

Minor variances to allow fourth apartment in large house — Planning Act, 1983, S.O. 1983, c. 1, s. 44(1).

Municipal law --- Zoning — Zoning variances — Types of variances — Parking

Minor variances to allow fourth apartment in large house — Planning Act, 1983, S.O. 1983, c. 1, s. 44(1).

Owner appealed a decision of Committee not to allow three variances. The house was a large, well-maintained property, built at the turn of the century, which had a legal non-conforming use. It was larger than the current by-laws allowed. Owner lived in the home, which also had three legal apartments. Owner wished to build a fourth apartment in the home. The variances sought would increase the gross floor area a further 63.64 sq. m, allow an average size of 60 sq.m per apartment rather than 65 sq. m and allow parking spaces of 8.2 ft. in width rather than the required 8.53 ft.

Held: The appeal was allowed.

Government policy was to provide housing for people in financial straits and a fourth apartment would do that. The variances were minor, were within the general intent and purpose of the Official Plan and the general intent and purpose of the zoning by-law, and would provide a desirable and appropriate use of the property.

A.J.L. Chapman, Q.C., Vice-Chairman (orally):

1 The matter before the board this morning has been an appeal by Maria Rebello from a decision of the City of Toronto's committee of adjustment. Mrs. Rebello is the owner of 318 Crawford St. Crawford St. is a street in the west end of the City of Toronto that runs north and south and 318 Crawford St. is located on the west side of the street. The property is improved with an older, but what appears to be, well-maintained and well-constructed, three-storey dwelling

house. It sits on a lot, which is not a wide one, having a frontage of 26 ft., 3 in., on Crawford by a depth of about 127 ft. At the rear of the property, a three-car garage is constructed which is as wide as the property is wide and has room for three small or mid-size cars. Access to the garage is from a lane which runs north and south and which lies to the west of the subject property. The lane is owned by the City of Toronto and the garbage collection from the houses on the west side of Crawford is from that lane that lies to the west of them. The house was built perhaps around the turn of the century — an interesting note, but it has nothing to do with the decision — it was built and occupied originally by the then chief of police of the City of Toronto. At one time, it was a rooming house and it was purchased by the Rebello family about 20 years ago and during their ownership has been used as a three-apartment house. A sister of the owner resides on the ground floor. Another tenant resides on the second floor and a third tenant resides on the top or third floor. The basement has been made into liveable quarters minus a kitchen, all quite legally. They would like to put a kitchen in and create a fourth apartment which would, of course, mean more money to the owner. I agree with counsel for the appellant that there is nothing wrong with trying to use your house to its fullest advantage and getting as much money for it as you can.

2 In order to do this, three variances are requested. The first variance is to increase the gross floor area from 184 sq. m to 320 sq. m. That may not be entirely accurate because there was filed with me a variance application that, in or about 1972, granted a variance from the permitted gross floor area of 184 sq. m to whatever it is today less the 63.64 sq. m the existing gross floor area would be increased by, if this application is allowed.

3 The second variance requested is that the average size of all apartments in a converted house has to be 65 sq. m and if this is allowed the average size of all apartments will only be 60 sq. m.

4 The third variance that is requested is that the by-law requires, for four apartments in a converted house, three parking spaces, but the parking spaces have to be 8.53 ft. in width and they can provide the three, but they can only provide them if the spaces are acceptable at 8.2 ft. I am advised, and I accept it because I am sure it is right, that the difference in width for each space is something in the neighbourhood of four inches.

5 The law of the land is that there are two ways of amending a by-law. One is to have council pass an amending by-law but that is expensive and time-consuming and better designed for when you wish to affect a whole area and not just a site specific matter; and the other is that found in s. 44(1) of the *Planning Act, 1983*, S.O. 1983, c. 1, which simply says that if you can bend the by-law a little bit, we will allow you to do it, but whether you can bend it or not depends upon satisfying the committee of adjustment or, here today, the Ontario Municipal Board, on four points.

6 Those four points are that what you are asking for must be considered minor; what you are asking for must be considered to be within the general intent and purpose of the official plan; within the general intent and purpose of the zoning by-law, and be desirable for the appropriate use and development of the property. The law has also said that if you fail on just one of those tests, even though you pass on the other three, the application must fail. It is all or nothing. You have to satisfy all of them or the application fails.

7 If you look at the cases, and I have, it sometimes appears very difficult to rationalize the various decisions because they appear to be all over the map. One thing comes through loud and clear in all of them and that is that if you can establish unacceptable adverse impact on somebody, then probably what is being asked for can be considered not minor, and also not in keeping with the general intent and purpose of the official plan and zoning by-law. On the other hand, if you cannot find any unacceptable adverse impact, as a result of what is being asked for, on anybody, then probably you are safe in saying it is minor and it is in keeping with the general intent and purpose of the official plan and zoning by-law.

8 Now, why do I make that statement. Firstly, the courts have held that minor can never be calculated mathematically; what is minor in one case, mathematically might be considered not minor in another. It depends upon the circumstances. There is one case in the City of Toronto, *Classic Bookstore versus Coles Bookstore*, just over here on Yonge St., where [there was] a complete obliteration of a requirement — a requirement that you had to provide a loading bay which was completely obliterated. It went from 100% down to nothing and it was still considered minor because there were no

unacceptable impacts and it was desirable for the development of the property [see *Re McNamara Corp. Ltd. and Colekin Investments Ltd.* (1977), 15 O.R. (2d) 718, 76 D.L.R. (3d) 609, 2 M.P.L.R. 61 (Div. Ct.)]. Another example that I use when I try to explain to people, is that if you are trying to vary a side yard from four feet down to two feet and what is next door to your property is a man's garage with a solid brick wall, the four down to two feet could well be considered minor, but if what is next door to your property is a man's bedroom window, a variance from four feet to two feet might not be considered minor. It depends upon the circumstances.

9 One of the purposes of official plans and certainly one of the purposes of by-laws is to cut down on unacceptable adverse impacts between people. From a planning point of view, that is their purpose. They are planning documents and one of their reasons for being is to try to make life more liveable between neighbours. So if you can find these unacceptable impacts then it is not good planning, *i.e.*, not in keeping with the general intent and purpose of the planning documents, but if you cannot find them, you are probably safe in saying that it preserves the intent and purpose of the by-law and official plan. A very important aspect of any variance application, based on s. 44(1) of the *Planning Act*, 1983, is whether unacceptable impacts exist.

10 Now, having said that and that is all by way of general comment, this case has been made difficult for me and made much more difficult than I think it should have been, because of the eloquence of Mrs. Katz, who spoke eloquently and passionately on the question of her neighbourhood and her perceived effect of increased densities on that neighbourhood. It was, and I think she would be the first to admit it, a fairly general criticism of the application. By that I mean, it was more general in nature than it was site specific. In the sense that people often say that if you put that addition on, it is going to overlook my backyard or it is going to block out my sunlight or it is going to have this specific effect on me. Her concern was more to the effect that by-laws are designed with certain densities in mind and if you increase the densities, you eventually reach the point that the straw breaks the camel's back and you destroy a pleasant neighbourhood by simply putting too many people in it. I understand where she is coming from and to some extent I agree with her.

11 The policy statement of the government on housing, which, paraphrasing it, is that wherever possible, if you can do it, you have got to supply living accommodation for people and not just people who would like to have small lot coverages, not just people who would like to have comfortable homes, but for people who, because of financial straits, have to do with things that are perhaps less than they would eventually hope for. In particular, small basement apartments. That is true in the City of Toronto. There are all kinds of people out there who, because they do not have motor cars and one thing or another, have to live in the city, cannot afford to live in the suburbs, have to live close to public transportation and have to, at least for a period of their lives, live in basement apartments.

12 This property is located some 300 to 400 ft. south of Dundas St. and perhaps 250 to 300 ft. north of Queen St. and there is public transportation on both Queen and Dundas, so it meets that criterion of being accommodation that would help the single person or a man and his wife, or whoever, who are not able to live out of town, must work in town and, therefore, need public transportation.

13 On the question dealing with the three variances, the parking space reduction from 8.53 ft. down to 8.2 ft., I did not hear any evidence at all that that would create unacceptable impacts. I did hear evidence that three small vehicles or mid-size vehicles had been parked for a period of six months in the garage without any undue problems either in getting in or getting out or in the using of the laneway. I am, therefore, of the view that reduction in parking spaces where the majority of cars, no doubt, probably are the smaller type ones now, rather than the big old Caprices, can be considered a minor variance.

14 I would have the same comment on the question of reducing the average apartment size from 65 down to 60 sq. m. That seems to me something that is in the by-law to assure that people who live in the City of Toronto will at least have half-decent accommodation. This has been described as a pleasant area near to transportation and the difference of 5 sq. m in four apartments is such that I am not too concerned about it, but the important point is, as I see it, it does not have any effect on the neighbourhood. It is of more concern to the people who are going to live there and if somebody

does not want to live in an apartment that is only 63.64 sq. m, that is their problem, but there are people out there who may be very grateful to have a place of 63.64 sq. m, so I would consider that variance minor, as well.

15 The difficult one of course is the one that increases the gross floor area from 184 sq. m to 320 sq. m. There are two things that have to be said about that. The first thing that has to be said is that, in a sense a variance has already been granted for the bigger part of that and that all we are talking about really is increasing it from what is permitted today by a further 63.64 sq. m. But I do not think we can lose sight of the fact that they have already been quite generous because the building which is there was bigger than it should have been according to the by-law but it pre-dated the by-law. It is one of those things that is thought of as legal non-conforming. We still have to take into account that they were generous, so now they are being asked to be even more generous, albeit only by 63.64 sq. m.

16 The second thing I think is that this building exists, and it exists in that size, and it is not a case where we are putting on an addition to make the floor area bigger. We are just trying to use up space that exists today and not only that but space that could be used by another family or more people which has to do with density. If you wanted to put a superintendent in there or you wanted to put a staircase down from inside and let it go to four or five girls or four or five boys, whether they be students or working people or whoever was willing to bunk in on the first and basement floors, that would have exactly the same effect on the density, in the sense of the number of people in the building, as having an apartment there.

17 As I say, I did not hear any attack from Mrs. Katz of a site specific nature; it was more of a general concern for what was happening to her area. Her area apparently has been historically, and still is, an area in which recent immigrants to this country settle, before getting established and perhaps moving elsewhere, but what has happened recently is that people who have lived there at one time are again moving back into it but I gather there is still room for recent immigrants to come there. That strikes me as being a reason for providing accommodation and perhaps accommodation of a very modest nature because of the possible strained circumstances of a number of the immigrants. I am also well aware of the housing statement and the binding effect it has on this board. It is not absolutely binding. If it had been demonstrated to me by credible evidence that putting a basement apartment in there would have had unacceptable impact on the neighbours, then I would have had no hesitation in saying that, housing statement or no housing statement, this is not going to be. But that was not the evidence. The evidence was very general. There was a concern about parking on the street and I am sure that the parking is very tight, but the by-law itself requires only three parking spaces for the four apartments and they are supplying the three parking spaces and I found on the evidence that because spaces are a little smaller, that is not a problem. It might well have been a problem if they could only supply two parking spaces or the three that they could supply were simply too small to take any kind of a vehicle except a motor scooter or something of that nature. That is not the evidence. The evidence is that three cars have fitted in there without problems and three cars is all, by by-law, they are required to supply and, therefore, I really cannot see that parking is a problem in the sense that this is going to be the straw that breaks the camel's back on this street.

18 In the absence of credible evidence establishing, as a result of this application, unacceptable adverse impact, I ask about the fourth test. Here, the board has often felt that the best measure of whether it is desirable for appropriate development and use of the property is what the owner wants. After all, it is his property and he surely has some rights. I see nothing wrong with wanting to use useable space. There is everything down there but a kitchen and I have already said many times about the need for housing that is in good buildings and this is a good building, in a good neighbourhood, for people.

19 One of Mrs. Katz's general concerns was increased densities tend to attract transients. I do not know whether they do or do not, but by making this an apartment, Humberto Rebello was of the view that he could get a tenant that might be considered a little more stable than a transient and one that might well stay. Certainly, I think apartments tend to attract a more stable character. By that, I mean someone more willing to live in the area a while than in a rooming-house which has the implication of "I am here today, but I may be gone next week if a job opens up in Newfoundland".

20 As to the effect of this apartment on the infrastructure of the area, I do not feel there is any creditable evidence that would make me say no. All in all, I have reached the conclusion that in spite of the eloquence of Mrs. Katz, and she made my task difficult, under the circumstances here, the three variances meet all four tests in s. 44(1) of the *Planning Act, 1983*. Therefore, with great respect to the committee of adjustment, I am going to allow the appeal, set aside the decision of the committee of adjustment and the three variances, namely, the request that the fourth apartment be permitted even though the four apartments average 60 sq. m and they should average 65 sq. m, are granted; that the three parking spaces be permitted, even though they are 8.2 ft. in width and they should be 8.53 ft. and, most importantly, that the gross floor area is increased over what is permitted now by a further 63.64 m.

21 The board so orders.

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TAB 19

1991 CarswellOnt 4376

Ontario Municipal Board

Toronto (City), Re

1991 CarswellOnt 4376, 27 O.M.B.R. 1

In the Matter of Section 44(12) of the Planning Act, 1983

In the Matter of an appeal by The Corporation of the **City of Toronto** from a decision of the Committee of Adjustment of the **City of Toronto** whereby the Committee dismissed an application numbered A14/91 for a variance from the provisions of By-law 438-86, as amended, premises known municipally as 156, 158 and 170R Munro Street

Krushelnicki Member, McLoughlin Member

Judgment: September 23,

1991

Docket: V 910140

Counsel: Brad Teichman, for Woodgreen Community Housing Inc.

Frank W. Lowery, for Arthur Rouleau et al

Subject: Public; Municipal

Related Abridgment Classifications

Municipal law

XVI Zoning

XVI.8 Zoning variances

XVI.8.b Types of variances

XVI.8.b.i Use

Municipal law

XVI Zoning

XVI.8 Zoning variances

XVI.8.b Types of variances

XVI.8.b.xiv Miscellaneous

Headnote

Municipal law --- Zoning — Zoning variances — Types of variances — Use

Policy statements — Affordable housing — Minor variances — Planning Act, 1983, S.O. 1983, c. 1, s. 44(1) — Applications for multiple variances were rejected which were required to permit the construction of a 39-unit non-profit housing project — Applicant appealed — The appeal was allowed — The provincial land use planning for housing policy statement directed an intensification of land use — The proposed apartment and townhouse project conformed to the provisions of the policy statement by providing affordable housing which represented good planning and which was without serious adverse impacts on abutting and adjacent land uses.

Municipal law --- Zoning — Zoning variances — Types of variances — Miscellaneous issues

Adverse impact on surrounding uses — Planning Act, 1983, S.O. 1983, c. 1, s. 44(1) — Applications for multiple minor variances which were required to permit the construction of a 39-unit non-profit housing project were rejected by the Committee of Adjustment — Applicant appealed the refusals — The appeal was allowed — The provincial housing policy statement had directed an intensification of land use — The proposed apartment and townhouse project conformed to the provisions of the policy statement by providing affordable housing which represented good planning and was without serious adverse impacts on abutting and adjacent land uses.

Applications for multiple variances were rejected which were required to permit the construction of a 39-unit non-profit housing project. Applicant appealed.

Held: The appeal was allowed.

The provincial land use planning for housing policy statement directed an intensification of land use. The proposed apartment and townhouse project conformed to the provisions of the policy statement by providing affordable housing which represented good planning and which was without serious adverse impacts on abutting and adjacent land uses.

Table of Authorities

Statutes considered:

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

Planning Act, R.S.O. 1990, c. P.13

Generally — referred to

s. 44(1) — considered

s. 44(18) — referred to

Regulations considered:

Building Code Act, 1992, S.O. 1992, c. 23

General, O. Reg. 403/97

Generally

Words and phrases considered:

MINOR VARIANCE

A considerable amount of concern was expressed regarding the percentages by which the variances do not comply with either the maximum or the minimum by-law standards. The courts have ruled that this test in itself does not mean a variance is or is not minor in nature [within the meaning of s. 44(1) of the *Planning Act, 1983*, S.O. 1983, c. 1]. The test, to a great extent, is the degree of adverse impact. The land use planner's evidence [was] that if a variance is equal to or improves the existing situation it is minor in nature. This, however, is only one consideration . . . the cumulative effect of this series of variances must also be considered when assessing impact.

Decision of the Board:

1 In November 1990 Woodgreen Community Housing Inc. (Woodgreen), as agent for the **City of Toronto (City)**, applied to the Committee of Adjustment (Committee) for relief from the provisions of Zoning By-law 438-86 to permit the construction of a 33 unit apartment building on a site comprising the properties known municipally as 156, 158 and 170R Munro Street. On January 16, **1991** the Committee refused the application. Woodgreen, under the authority of the **City**, has appealed the decision of the Committee to this Board. A large number of local residents are opposed to the development.

2 In support of its case Woodgreen called as witnesses a representative of Woodgreen, the architect who designed the development, a planner and a planning technician from the **City** on the questions of the adequacy of parking spaces, driveways, etc., a geologist who is a remedial specialist in the matters pertaining to soil contamination, a structural engineer to provide evidence relating to construction on certain soil conditions and flood proofing, an acoustical engineer, a land use planner on the requirements of the Official Plan, by-laws and other planning documents, and a community development officer from the Ministry of Housing who is familiar with Federal and Provincial programs for the provision of affordable housing, funding and the operation of the accommodation on an ongoing basis.

3 In addition to evidence of a number of local residents who appeared on their own behalf and as spokespersons for groups of concerned residents in the immediate area, the Board heard the evidence of an architect and planner opposed to the development and that of a civil engineer who is a resident. The Board, with the concurrence of counsel for Woodgreen,

took into evidence the letters of opposition of thirty local residents to ensure all concerns respecting the development were before the Board. The Board also considered the letters of opposition placed in evidence by Woodgreen.

4 At the outset of the hearing counsel for the residents, who is himself a resident of Munro Street, could not appear because of conflicting commitments. The Board, therefore, gave status to a number of residents who live adjacent to the site. Subsequently, counsel for the residents was in attendance and conducted the case for the residents opposing the variances.

5 Woodgreen is part of the Woodgreen Community Centre operation which has served community needs in part of the east area of the City since 1937. Its catchment area is bounded by the City limits to the north, Lake Ontario to the south, Victoria Park Avenue to the east and Sherbourne Street to the west.

6 Woodgreen Community Housing Inc. was formed in 1984 and incorporated in 1985 as a non-profit company for the purpose of providing residential accommodation and incidental facilities for low income individuals and families. It receives funding from the United Way, grants from Metropolitan Toronto and the Province, and is a registered charity under the Income Tax Act.

7 The subject property is on the west side of Munro Street, a short distance to the north of Dundas Street East. The boundaries of the immediate neighbourhood, which is within the Woodgreen Centre catchment area, are Gerrard Street East to the north, Dundas Street East to the south, Broadview Avenue to the east, and the Don Valley Parkway to the west.

8 The site, as shown on Schedule "A" which forms part of this decision, is L-shaped and is made up of the properties at 156 and 158 Munro Street which front the west side of the street and 170R Munro Street, a back lot behind the homes from 160 to 178 Munro Street. In addition, the site includes a laneway to the north between 178 and 180 Munro Street. There are semi-detached two storey brick dwellings on 156 and 158 Munro Street with a brick garage to the rear. Also on 156 Munro Street is what is described in a 1988 survey as a frame garage fronting the west side of the street. 170R Munro Street is vacant.

9 Residential development abuts the north and east lot lines. To the south is a City works building which is in use and to the west between the west lot line and the Don Valley Parkway is an incinerator owned by Metropolitan Toronto, which is closed.

10 The site is owned by the City and is part of an inventory of lands acquired for the purpose of providing affordable housing. The land will be leased to Woodgreen for a period of 49 years with an option for renewal. In addition to the lease agreement, which is in a form agreed to by the City and the Ministry of Housing, Woodgreen will be required to enter into a Social Housing Agreement with the City which ensures the continued use of the property for affordable housing and provides standards for the operation of the affordable housing accommodation. The agreement ensures that financing for the development of the site and ongoing contributions to assist with the operations will be provided. The Board will comment further on these agreements.

11 In 1987 Woodgreen proposed the development of 39 units on the property which was to consist of 8 bachelor and 8 one bedroom units in a three storey apartment building on the south part of the site at 156 and 158 Munro Street and 23 stacked townhouses with two bedroom and three bedroom units at 170R Munro Street behind the houses running from 160 to 178 Munro Street. Applications were made for amendments to the Official Plan and the zoning provisions of Zoning By-law 438-86 to allow an increase in the permitted density from 1.0 times the lot to 1.29 times and to provide for any other required relief. After meetings with the local residents who expressed concerns over the location of the townhouse units, vehicular access to the site and other matters, Woodgreen decided to rework the development proposal. At the present time the Official Plan and zoning applications are being held in abeyance pending the Board's decision on the variances required to permit the current development proposal.

12 The development now proposed for the site, which is the subject of the application for minor variances, is for an apartment building situated on the south portion of the site (156-158 Munro Street). The building will consist of an east and west wing containing four storeys and three storeys, respectively, which are separated by a courtyard. The portion of the site to the north (170R Munro Street) will be used as landscaped open space.

13 The variances required, as described in the revised Notice - Preliminary Zoning By-law Review, are:

- 1) Front yard setback is less than the required average front yard (sic) setback of the adjoining buildings of 3.33 m by 2.852 m.
- 2) The gross floor area will exceed the permitted maximum of 1.0 times the area of the lot to 1.08 times.
- 3) The rear yard setback is less than the required minimum of 7.5 m. Rear yard setback shown is 0.4 m.
- 4) The maximum depth of 14 m is exceeded by 34.17 m. (With respect to the depth variance the original application states that the relief applied for is for a building with a depth of 50.90 m. Subsection 44(18) requires the Board to deal with the original application).
- 5) The minimum distance of 15 m between external facing walls is deficient by 5.75 m.
- 6) 25 parking spaces are required - 5 parking spaces are provided.
- 7) 5.5 m minimum width for a two-way driveway is required. Width shown is only 3.5 m.

14 In addition to authorization of the variances, various permissions and approvals are required which concern the removal and disposal of contaminated soil, filling the site, and flood proofing a part of the west wing.

15 Woodgreen's response to the concerns of the residents regarding the original 39 unit apartment house and townhouse development was to provide their architect with terms of reference for a new development which are:

- 1) the development should contain approximately 35 units;
- 2) the density should be about 1.1 times the lot area;
- 3) the design should reflect family type housing;
- 4) impacts on abutting land uses should be reduced; and
- 5) an alternative parking standard should be applied.

16 The design, as previously stated, now consists of a four storey east wing, a three storey west wing and a basement, all of which are contained in a single apartment building situated on the south area of the site. The south area was chosen for the location of the building because of the steep slope on the west edge of the property. This siting leaves the north area available for use as landscaped open space in response to a concern of the residents of 160 to 178 Munro Street with respect to the original proposal which placed stacked townhouses at the foot of their rear yards. The location of the west wing in the southwest corner of the property moves a large part of the mass of the development to the rear of the property and away from the residential land uses on Munro Street. The west wing abuts the landscaped open space to the north, the **City** works building to the south, the courtyard to the east and the inactive Metropolitan **Toronto** incinerator site to the west.

17 The east wing comprises four storeys and a basement and fronts onto Munro Street. It contains an elevator. On the west side of this wing is the driveway to the 5 underground parking spaces in the basement below the courtyard which separates the wings. The driveway is adjacent to the **City** works building to the south.

18 The west wing has three storeys without an elevator. The contour of the west edge of the site allows the rear part of the basement of the west wing to be used for residential accommodation. Thus, from the Don Valley Parkway the west wing appears to be four storeys high, whereas from Munro Street it appears to be only three storeys high.

19 The wings are made up of an aggregate of:

Residential Component	Units
Bachelor	7
Bachelor B.F.{*}	1
One bedroom	10
One bedroom B.F.{*}	1
Two bedroom	14
	33

Notes: * Barrier Free

20 The mechanical, electrical and elevator equipment, storage lockers, laundry, communal storage and a garbage storage room is in the basement of the east wing. The basement of the west wing has a children's playroom with a kitchen and storage area, a janitor's office and a garbage storage room in the below-grade area and to the west there is a one bedroom unit and a two bedroom unit which form part of the residential component.

21 The representative of Woodgreen stated that the site meets the criteria of Woodgreen in that it is within the catchment area, twenty-four hour public transportation is within one block at Dundas Street East, and the area has a wide variety of amenities and services within a reasonable distance to serve the day-to-day needs of the residents. Further criteria are that the development can provide affordable housing consistent with the Land Use Planning for Housing Policy Statement of the Province and that a demonstrated need for this type of housing can be substantiated.

22 Needs studies carried out on an ongoing basis indicate continuing problems pertaining to the elderly, day care and the lack of affordable housing. An interest list maintained by Woodgreen shows that at March 31, 1991, 459 individuals made up of single persons, couples, families and single parent families were in need of affordable housing. Income statistics taken from the 1986 Census Statistics indicate 43.1 per cent of the unattached individuals in the area of the proposed development have low incomes and 37.7 per cent of the households have incomes of less than \$20,000. Eligibility for the units in the subject development will be based on income requirements estimated in 1991 by the Ministry of Housing to be \$14,484 or less for a bachelor and one bedroom unit and \$19,600 or less for a two bedroom unit. The housing will provide for deep core need individuals and will be geared to a maximum of 25 per cent of their income. The minimum rent charge in 1991 would be \$42 per month. Persons with moderate incomes will not qualify for residence. A project consisting entirely of residents with deep core requirements does not present any particular difficulties. There will be a tenant selection process which will include an introductory meeting, a building orientation, orientation to the neighbourhood, an application process, a financial check, a qualification check, a reference check, if necessary, and interview. The number of persons living in each unit will be strictly controlled.

23 The funding for the construction of the project is under the Homes Now program of the Province. The object of this program which sunsets on September 30, 1991, is to provide 30,000 housing units of which 70 per cent will be affordable to persons with low incomes.

24 Woodgreen will enter into a 35 year operating agreement with the Ministry of Housing which will govern the operation of the apartment building when it is occupied. This agreement is in addition to the Lease Agreement and the Social Housing Agreement with the City which ensure the property is used for affordable housing purposes and the rent structures and other such matters are adhered to. A provision of the Social Housing Agreement is that Woodgreen will comply with the terms of the agreement with the Ministry of Housing.

25 The project will be eligible for additional funding to enable enhanced management functions to be carried out. This program provides for a staff member of Woodgreen to be assigned to the project to ensure proper property management is carried out. The staff member will develop a relationship with the tenants and will assist by directing tenants with special needs to the appropriate service provider. The staff person will make frequent attendances at the site and will be available on short notice after hours and on weekends.

26 The community development officer from the Ministry of Housing concurs with the evidence of Woodgreen's representative with respect to need, the enhanced management program, the Homes Now program and the dedication of the total project to persons with deep core needs.

27 Under the Homes Now program the Province will guarantee the capital cost of the project and will provide annual operating grants. The criteria under Homes Now are an identified site, a capable sponsoring agency, in this case Woodgreen, and a demonstrated need. This project meets the three criteria. Woodgreen is considered to be a very capable organization. In 1988 it opened a similar type 36 unit residential operation at 841 Queen Street East and has three other proposals in various stages of development.

28 The project has undergone the Ministry of Housing cycle of approvals of site search and selection, a conditional allocation of units, meeting the financial guidelines, proposed management and operation standards, and technical and construction standards. The criterion to be completed is the obtaining of the land use approvals by September 30, 1991. Woodgreen has met all the criteria of the Ministry of Housing to date.

29 The community development officer confirmed the effectiveness of the 35 year operating agreement in the management of affordable housing developments.

30 The need for affordable housing in Metropolitan Toronto does not have to be studied. An optimum vacancy rate, according to Canada Mortgage and Housing Corporation, is 3 per cent. At this level in the private rental market there is a good choice in rental accommodation. In April of 1991 the rates for all types of units (bachelor, one, two and three bedroom units) was less than 3 per cent. In the same month in the City of Toronto the waiting list of the local housing authority was for 8,200 households and in Metro Toronto the number was 14,500. The need is so great that any double counting is insignificant in relation to the total requirement. These lists represent only people who have applied. The type of housing required by these individuals and families is not being supplied by the private rental market.

31 In considering need, the criteria are overcrowding, poor condition of the dwelling unit and a large proportion of the income paid in rent. These are the persons in "deep need" of adequate accommodation.

32 The site is in an appropriate location for persons needing the services of various organizations and in its distance from services and public amenities needed to serve residential accommodation.

33 On the question of the impact of this deep core need project on the community, the community development officer's evidence is that it is a response to the unsuccessful projects of the past. The project is small scale and it will not dominate the community and will have a different relationship with the community. A feature of the program is that the residents have to live independently. Stress on the community is a function of management of the project. The enhanced management program will deal with relationships with the community at large and the residents of abutting and adjacent lands. In her experience this type of development melds with the existing community and few problems are encountered.

34 The opinion of the geologist who is a soil remediation specialist is:

....that soils on the site below approximately 1.5 m are suitable for residential land use and meet the M.O.E. Guidelines for the decommissioning and clean up of sites in Ontario (1990). Rehabilitation of the site must be done to the satisfaction of the Ministry of Environment and the City of Toronto Environmental Protection Office. A plan

must be approved which includes the removal of the contaminated soil and dust control measures during excavation and filling of the site.

He recommends that a condition of the approval of the application be the clean up of the site which would include protective measures for dust control. This latter provision will help to satisfy the concern of a resident whose rear yard abuts the lands at 170R Munro Street with respect to dust during the construction period.

35 The structural engineer considered various structural systems based on the building configuration and the site conditions and is of the opinion that a reinforced concrete superstructure consisting of concrete flat plate slabs supported on concrete walls and columns is appropriate. The lowest concrete slab would not be supported on soil but by foundations consisting of drilled concrete caissons founded either on hard till or weathered shale bedrock. The caissons will also serve to stabilize the slope.

36 The structural engineer is further of the opinion that the building can be easily designed to resist any pressure which may result from a small portion of the west wing being in the regional storm flood plain. The one in two slope of the grade with nominal surface cover such as grass, will be stable in flood conditions. It is his understanding that there will not be any detrimental effect on the total flow of water in the valley by the encroachment of the west wing. Caissons were also recommended in the original proposal. A building built on the incinerator property to the west would not impact on the proposed development. New construction on this property would have to accommodate the development on the subject property.

37 The Metropolitan **Toronto** and Region Conservation Authority (M.T.R.C.A.) on July 17, **1991**, gave approval in principle to the site development plan for the subject property. Construction of the apartment building and the filling associated with the contaminated soil removal must be approved by the Authority. The Authority has directed Woodgreen to provide with its permit application submission information respecting flood proofing, the engineering for the soil clean up, a sediment control plan to be implemented during the construction period and a landscaping plan that establishes indigenous vegetation on the valley slope and provides a natural screening of the building from within the valley. This latter requirement may help to allay the concerns of the residents with respect to the recent growth and the return of some fauna to this area.

38 The acoustical engineer was instructed to report upon noise levels of the neighbourhood on the development, the development on the neighbourhood, and the internal impacts of noise on the development in order to satisfy the objectives of the **City of Toronto** requirements for a Noise Impact Statement. The scope of the report is stated to be to define the minimum noise attenuation requirements for the control of indoor and outdoor environmental levels.

39 The major noise sources, both future and current contained in his report, are the Don Valley Parkway (road traffic), Dundas Street East (road traffic and streetcars), Munro Street (road traffic), and C.N./C.P. rail at the west side of the Don River (rail traffic). There are no existing or known potential noise sources emanating from stationary sources or aircraft.

40 He concludes that by the use of a proper air conditioning system placed in an appropriate location the impact of the neighbourhood on the interior of the development can be brought down to acceptable levels. All agreements and offers of lease should contain clauses warning of the need to keep windows closed to achieve acceptable noise levels and to inform that this is the reason for the air conditioning. Also, a warning should be registered on title and included in all agreements and lease documents stating that sound levels on balconies continue to exceed acceptable levels which may interfere with the enjoyment of the residences. The effective use of glazing, air conditioning, insulation and other construction materials can do much to achieve acceptable sound levels. With the exception of the positioning of a central air conditioning system, the noise from which can be minimized, the development will have little impact on the neighbourhood. Traffic from the site will have little impact on the neighbourhood. The impact of the building on itself can be minimized if the construction and other requirements outlined in Section 4 of his report are carried out. Woodgreen intends to implement the recommendations contained in his report.

41 The land use planner reviewed the Official Plan and the provisions of By-law 438-86 which apply to the proposed development.

42 The property is in an area designated a Low Density Residence Area in the Part I Official Plan and the recently approved Part II Official Plan for the South Riverdale Planning Area. Prior to the adoption of the Part II Official Plan the west side of Munro Street was designated and zoned for uses which the planner describes as the most permissive commercial/industrial uses in the City. The Part II Official Plan also redesignated the adjacent industrial lands to a Restricted Industrial designation.

43 The Low Density Residence Area designation permits all types of residential buildings, including an apartment building up to a density of 1.0 times lot coverage. The provision of assisted housing is consistent with the Housing Goals (subsection 2A.1) and the Housing Target for 1985 (subsection 2A.2). The goals speak of the provision of decent housing, the equitable distribution to meet the needs of various income groups, the preservation and improvement of existing houses and existing neighbourhoods and the provision of housing to meet the needs of the elderly and handicapped. The target was to provide 40,000 new dwelling units by the end of 1985. Of this target 50 per cent of the units are to be suitable for low-to-moderate income households and a further 25 per cent of the target of 40,000 dwelling units and 25 per cent of the low-to-moderate income component should be housing suitable for families with children.

44 The zoning of the lands is R3 Z1.0 which implements the Official Plan provisions and permits an apartment building at 1.0 times the area of the lot. The reduction of the density from 1.29 times to 1.08 times reduces the density to a level which has no impact on abutting or adjacent land uses. A density of 1.0 times the lot coverage would allow 30.5 units to be constructed. It was conceded by both the civil engineer who is a local resident and the architect/planner who gave evidence in opposition that if the 1.08 times variance was the only impediment to the development it probably would not be opposed.

45 The front yard setback of 0.478 m is slightly less than that of the residences to the north which are at 0.52 m. The required setback of 3.33 m results from a line drawn from the front of the residence at 160 Munro Street to the northeast corner of the works building located to the immediate south of the subject property. The architect/planner concedes that the front yard setback should be about the same as the existing homes, disregarding the works building.

46 In his evidence the planner dealt with the variances resulting from the physical design as a group. He included in this design standards category the front yard setback of 3.33 m which has been discussed, the building depth variance in excess of 14.0 m, the distance between facing walls where there are windows in the walls of 9.25 m where 15.0 m is required and the required rear yard standard of 7.5 m where a setback of 0.4 m is proposed.

47 The front yard setback is intended to maintain an average of the existing setbacks of adjacent lots. In this case the subject property abuts a building to the south that does not have a setback typical of the residential properties to the north of the proposed development. This inconsistency requires a front yard setback of 3.33 m where a setback in the range of 0.52 m is appropriate which would be consistent with the character of the west side of Munro Street. The planner notes that the building for by-law purposes is one building notwithstanding that the two wings will give the appearance of two separate structures. The 14 m depth limitation is an arbitrary standard which is intended to be conservative to protect existing development. He maintains that the intention was to establish more appropriate standards for apartment buildings based on studies of a particular area. In the interim he contends that it was assumed that the Committee of Adjustment would provide the appropriate variances pending the completion of the studies and subsequent amendments to the zoning regulations. The rear yard setback is intended to provide sufficient open space between abutting land uses. In this case the west portion of the property abuts the incinerator property which is not suitable for development. The required separation distance of 15.0 m between the interior walls of the east and west wings is intended to preserve privacy between the units. The reduction of this standard to 9.25 m has little impact due to the limited number of windows. The Board has concluded from the evidence that the use of balconies would not be affected substantially by the proposed reduction of about 5 m between the wings of the buildings.

48 The planner concurs with the evidence of the representative of Woodgreen, the planner from the City and the planning technician from the City that 5 parking spaces can be justified on the basis of the provision of "alternative housing". The City has passed By-law 253-91 which provides for reduced parking standards for "alternative housing" and "social housing". This by-law implements reduced standards based on studies and surveys of "social housing" conducted by the Alternative Housing Subcommittee and considered by the Land Use Committee and City Services Committee. Without prejudging that by-law, it is worth noting that the variance for a reduction in the required parking spaces from 25 spaces would not be necessary except for outstanding appeals against it. The reduced standard requires 2 parking spaces for the first 20 dwelling units plus 1 parking space for each 10 dwelling units or fraction thereof in excess of the first 20 units. Under the reduced standard the project is required to provide 4 parking spaces. The development includes 5 parking spaces.

49 The planning technician also dealt with the width of the driveway which is 3.5 m and the by-law standard which is 5.5 m. In her opinion a 3.5 m driveway is adequate for the limited 5 parking space complement. She advised that outside of the central area of the City, which is to the west of the Don Valley Parkway, no loading or drop-off facility is required. The Commissioner of Public Works in a letter to the Administrator and Secretary-Treasurer of the Committee of Adjustment dated January 8, 1991 stated that he is satisfied that 5 parking spaces and a driveway width of 3.5 m are adequate.

50 The land use planner continued his evidence with a discussion of the impact of the variances on adjacent properties. He viewed the development as having four components, namely the east wing, the courtyard, the west wing and the landscaped open space to the north. The front yard setback of the east wing will provide a better relationship to the houses to the north. This wing complies in height and side yard setbacks. The length of this wing is only slightly in excess of the permitted length of a semi-detached residence which is 17.0 m. The increased length has a small impact on the shadowing of the rear yard and side yard of the property at 160 Munro Street, as shown in the shadow studies for March 21 and September 21 at 2:00 p.m. over the "as-of-right" construction at the same time and dates. The shadowing at 10:00 a.m. on the same dates extends near to the rear lot lines of the properties at 160 and 162 Munro Street. The "as-of-right" construction on the same dates and at the same times would place about 50 per cent of these rear yards, and a small part of 164 Munro Street, in shadow. He concurs with the concern expressed by the resident of 160 Munro Street that the overview from the balconies on the front of the east wing on the north side could adversely impact on the privacy of 160 Munro Street. The courtyard is at the same grade as the rear yard to the north and will have no adverse impact on abutting land uses. The location and the three storey height of the west wing will have no impact on adjacent residential uses except for a very minor amount of shadowing of the rear yard of 160 Munro Street, as shown by the shadow studies made at 2:00 p.m. on March 21 and September 21. He considers the rehabilitation of the landscaped open space to the north and the stabilization of the slope to be improvements to the area.

51 The proposed development complies with the policies of the Land Use Planning for Housing Policy Statement which concerns the intensification of land use and the provision of affordable housing in a variety of housing forms. In this regard he concurs with the evidence of the representative from Woodgreen and the community development officer.

52 The last matter he dealt with is titled in his reporting letter the "Possible Impact from Adjacent Properties". The properties to the west and south of the subject site are designated for industrial uses. These uses must be compatible with the residential designation on the subject lands. In his opinion the potential for conflict is reduced because these lands are publicly owned. The property to the south is a storage facility and the incinerator property is entirely in the flood plain of the Don River and, as such, it may never be redeveloped.

53 He is satisfied that the application should be approved for the reasons stated in his reporting letter, which are:

variances are required to develop the lot to the density permitted in the zoning by-law;

services, both hard and soft, exist to service the project;

the project is consistent with the Provincial Housing Policy in respect of the provision of affordable housing and intensification;

assisted housing of this type, that is alternative housing, is particularly needed in this area;

the project is consistent with and supportive of the approved Official Plan of the **City of Toronto**;

the impact on adjacent properties resulting from the variances is minimal.

He concluded his evidence with the opinion that the subject application satisfies the four tests specified in subsection 44(1) of the Planning Act for the authorization of minor variances.

54 The architect/planner who gave evidence in opposition is experienced in the field of restoration, renovation and the design of "social housing". The neighbourhood is described by him as a pleasant area with modest housing and residents of low and moderate income. The evidence of various witnesses has reinforced his impression that it will be difficult to develop the site for the number of units proposed. The shape of the site and the width of the rear portion of the lot at 170R Munro Street limits the location of the building. He finds it peculiar that the building would be crowded on the south portion of the lot. The 1988 proposal is considered by him to be more compatible with existing development. The site presents major problems with noise, top soil conditions and the construction which requires the use of caissons. These conditions add to the cost of construction. Access to the site is limited. The present siting is poorly designed and planned. The site could be redeveloped without the need for rezoning but with respect to the proposal under consideration a rezoning application should be made. The old housing on 156 and 158 Munro Street is in fair condition and could be renovated. A number of local residents concur with him on this matter.

55 The apartments are small and designed to the minimum standards of the Building Code and the Ministry of Housing. The layouts are acceptable. A major problem is that many bedrooms have small windows in the corners of the rooms which make it difficult to look out. The design is deficient with respect to privacy. Living room windows and balconies do not have a sufficient separation distance. Rooms generally do not have a pleasant relationship between the occupant position and the window. Some apartments will not have good sunlight. The west face of the west wing and the north faces of both wings are deficient in this regard. The most serious area of this deficiency occurs on the sides of the wings that face each other. Sunlight is blocked, especially at the lower levels.

56 The deck area is quite unsuitable as outdoor amenity space. It is situated at the bottom of a three storey wing and a four storey wing. The intention is that it will be a quiet area. However, it will be subjected to pedestrian traffic travelling to and from the west wing and the recreation area. Northwest winds will create a wind tunnel effect.

57 The proposed development is not compatible with the existing residential development. The east wing is 59 per cent higher than the houses at 160 to 166 Munro Street and somewhat higher than 59 per cent when compared to the houses from 168 to 178 Munro Street which are approximately one foot lower than those to the immediate north of the east wing.

58 The mass of proposed development is not similar to the existing residences. His rationale for this statement is based on a comparison of the 150,000 and 122,000 cubic foot volumes of the east and west wings, respectively, with the volume of each of the ten houses from 160 to 178 Munro Street which is 16,800 cubic feet and 11 per cent of the east wing. He concedes that this is the first time he has employed this volume test to compare the compatibility of properties.

59 The scale of the proposed building is not similar in scale to the development in the neighbourhood but the scale is not as dissimilar as are the height and mass. The subject building has a typical modern apartment look as evidenced by the windows and balconies. These features are designed to a larger scale than those in existing houses which have smaller windows, doors and porches.

60 The materials to be used in the new construction, which the perspective shows as a yellow brick, is not similar to the vast variety of materials used in the existing homes which includes brick, stone, wood, painted brick, etc.

61 He described the style of the apartment building as a modern style with post modern touches and a flat roof which is not similar to the characteristics of the existing homes which are, in his terms, **Toronto** vernacular - Georgian.

62 At 141-143 Hamilton Street, which is to the immediate east of Munro Street, is a new three storey building with a basement showing above-grade which he considers to be compatible with the older construction. It contains a mixture of apartments. The front wall material is stucco and the sides are brick.

63 The east and west wings would not be seen by a person walking north on Munro Street until a point is reached which is beyond the works building to the south of the subject property which would block the view. After this point, for a short distance, the development will present a massive presence.

64 The front yard setback would be most compatible if it is in line with the main wall of the houses to the north. The length of the east wing is of particular concern because of the shadowing of the rear yards of 160 and 162 Munro Street. The rear yard setback, due to fire regulations, makes it impossible to have large windows in the west wall. The small windows are a way of getting around the fire code which limits the size of windows based on separation distances from abutting properties. He did not comment on the adequacy of the number of parking spaces but stated that from a design standpoint the underground parking works but it is expensive construction. Concern was expressed about the ability of the driveway to accommodate emergency and delivery vehicles. This concern was raised by a number of residents.

65 The proponent's architect has been ingenious at working out what he calls his mandate which he thinks includes an instruction to construct on the south end of the site. However, the physical form is not appropriate in the opinion of the objectors' architect, and he is of the opinion that a redesign should take place.

66 In summary, the latter believes that variances are not minor in nature and the property should be rezoned. The development is not compatible with the neighbourhood which is a requirement of the Official Plan. The appeal, in his opinion, should not be allowed.

67 The local residents are not opposed to affordable or alternative housing. The concerns are the density of the development in terms of increased population, the impact on traffic, on-street parking by the residents and their visitors, streetside garbage collection, the capacity of municipal services including sanitary sewers, crime, access by emergency vehicles, noise from the development, the size of the landscaped open space, control over the number of people in the units, the amount of public housing in the vicinity, an apartment use in a mainly single-family area, the removal of trees from 170R Munro Street, the dangers of the area to children, air pollution from the Don Valley Parkway and the contaminated soil, the lack of services and amenities, the renovation of the existing houses for use by seniors and the handicapped, the effectiveness of the enhanced management program, the possible special educational needs of some children, the quality of life in the area, and the maintenance of the property.

68 The resident of 160 Munro Street, whose property is to the immediate north of the proposed east wing, is concerned about shadowing, overview from balconies fronting on Munro Street, the operation of the chimney on their home, and a lack of safety due to potential access to their roof from the east wing. The architect and planner stated that the chimney height could be extended. As to this matter and the matter of persons gaining access to the roof of 160 Munro Street from the development, these conditions would exist with respect to any development built to the height and the side yard setback permitted, which standards this development complies with.

69 The civil engineer placed in evidence a brief which is a distillation of the concerns of residents living mainly on Munro, Hamilton, Mount Stephen and Blackburn Streets which are in the vicinity of the subject property. Most of their concerns have been listed above. However, in his brief and his evidence some additional concerns were raised and some concerns were emphasized.

70 He stated that the area comprises predominantly small scale homes of two and two and one-half storeys. There is a diverse mix of people, occupations and income levels. The residents want to maintain the population density. The project

is viewed as one which crams persons with special needs onto an inadequate site. If the shape of the site was different it might be possible to accommodate the project at a density of 1.0 times the lot area without serious impact on abutting land uses and the neighbourhood. The community is not opposed to the development of this property. Other properties on Munro Street may be ready for redevelopment. The present proposal, however, is too high and too deep. If 1.08 times the area of the lot was the only variance required, the opposition to the development would be reduced considerably. The front setback does not appear to be a major concern. He is of the same mind as the proponents that it is unlikely that the Metropolitan **Toronto** incinerator lands to the west will be developed. If this is the case, a rear yard setback of 0.4 m may not be significant. The purpose of the minimum 7.5 m requirement is for amenity reasons and fire protection. The variance for the distance between external facing walls is a qualitative matter and is strictly internal to the project.

71 The proponents concede that the parking situation on Munro Street and the other streets in the area is chaotic. The engineer is not satisfied that sufficient testing has been done and studies conducted to ensure that the proposed parking supply of 5 spaces is adequate. However, if 5 spaces are sufficient, a reduced two-way driveway width of 3.5 m may not be too narrow. The general concern with respect to parking is intensified by the added through traffic on Munro Street resulting from the Gerrard Street East bridge to the north being closed for repairs.

72 A similar concern is raised by the engineer pertaining to the sufficiency of the shadow studies on 160 and 162 Munro Street. The noise impact, particularly from increased pedestrian traffic on the street, is also a concern.

73 The variances do not meet the minimum or maximum by-law standards, as the case may be, by amounts that range from 10 per cent for the gross floor area to 92 per cent in the case of the rear yard setback (Exhibit 41). The cumulative effect of these variances indicates to the engineer that the proposal constitutes an overdevelopment of the property. Some of the opposition to the revised development and the required variances results from the lack of an effective consultation process with the local residents.

74 The Board's attention was directed by him to the Residence Area provisions of the Official Plan which state, in part:

LOW DENSITY RESIDENCE AREAS AND MEDIUM DENSITY RESIDENCE AREAS

2.8 (a) *Low Density Residence Areas and Medium Density Residence Areas* will be regarded as stable. No changes will be made through zoning or other public action which are out of keeping with the character of such areas. Council will not redesignate any such area to any other land use category provided for in this Plan without first having considered a study of the area undertaken for the purpose of recommending policies for adoption in Part II of this Plan. Council will not effect such redesignation except by adoption of policies, as may appear appropriate in light of the study, in Part II of this Plan. Council may, however, pass by-laws to permit:....

(c) *In Low Density Residence Areas*, Council may pass by-laws to permit *residential* buildings having a *gross floor area* up to 1.0 times the area of the *lot*, provided that appropriate regard is had for the effect of such buildings upon the stability and general residential amenity and character of the *Residence Area* and surrounding areas.

The proposed development is not compatible with existing development and does not maintain the character of the area. The cumulative effect of the variances would permit a development that would adversely impact on the stability of the area which has a substantial amount of "assisted" or "alternative" housing by doubling the population on Munro Street in the immediate area of the subject property. The approval of the variance application would set a precedent for overdevelopment. In his opinion the appeal should be dismissed.

75 The four tests contained in subsection 44(1) for the authorization of a minor variance are - the development must constitute an appropriate use of the property; the general intent and purpose of the Official Plan and Zoning By-law 438-86 must be maintained; and, the variances must be minor in nature.

76 A major concern raised by the residents is related to what is described as the lack of information on the original and revised proposals. It is not a requirement of the Planning Act that the proponent of a development provide information

to the public. However, Woodgreen made a good attempt to advise the neighbourhood of what it proposed to do on the site. Woodgreen then reacted to concerns about the original proposal and revised its plan which is now before the Board in the form of an application for minor variances. The letters taken into evidence and the testimony of the residents, the civil engineer and the architect and planner satisfy the Board that before this hearing commenced the local residents had a good understanding of the proposed development. Details of the proposed operation of the apartment building, capital costs, agreements, ongoing grants, and a variety of other matters have been the subjects of the unrestricted evidence placed before the Board by the parties.

77 The question has been raised as to whether the proposed development requires an Official Plan amendment and zoning by-law amendment before it can proceed. On this subject, and in this case, the Board finds on the evidence of the land use planner that these amendments are not required and subsection 44(1) is the appropriate vehicle to deal with the relief applied for.

78 The elements of the development are the east wing, the courtyard, the west wing, and the landscaped open space to the north. The variances can be divided into two classes, those which impact on the proposed development and those which impact on abutting land uses.

79 The west wing abuts lands to the west owned by Metropolitan **Toronto** and to the south the lands are owned by the **City**. Neither of these municipalities have appeared to give evidence in opposition to any aspect of the proposed development which includes the rear yard variance of 0.4 m in the area of the incinerator lands of Metropolitan **Toronto**. The M.T.R.C.A. is satisfied with the proposed flood proofing and construction methods to be employed for the small portion of the west wing in the flood plain. The only impact the west wing may have on abutting land uses is a small amount of shadowing of the southwest corner of the rear yards of 160 and 162 Munro Street at certain times of the day and year. The Board finds this impact not to be significant.

80 The courtyard area has no adverse impact on abutting land uses and no variances are required.

81 The landscaped open space to the north (170R Munro Street) is not the subject of a variance. It exceeds the minimum by-law standard of 50 per cent open space by 8 per cent. The removal of the contaminated soil and the landscaping far outweighs the removal of any trees which may be lost due to the need for soil rehabilitation.

82 The east wing complies in height and side yard setbacks with the zoning standards. The civil engineer and the architect and planner agree that the front yard setback should be similar to that of the properties to the north which are set back approximately 0.52 m. The proposed setback of 0.478 m is found not to have any material adverse impact. This variance does not impact upon the matters raised by the resident at 160 Munro Street pertaining to the height of the chimney and access to their roof. It is conceded that if the setback were 3.33 m the overview of the bay windows at the front of this house would be reduced. However, the consensus of the witnesses on both sides who gave technical evidence is that the front yard setbacks should line-up. The architect has stated that some form of privacy panels will be placed on the north balconies of the east wing to protect against the overview.

83 The evidence of the planner and planning technician from the **City** and that of the land use planner satisfies the Board that 5 parking spaces and a 3.5 m driveway are adequate. There is no compelling evidence to convince the Board that the studies and surveys that are the foundation of the reduced parking standards in By-law 253-91 are inappropriate in this case. The engineer conceded that if 5 parking spaces are adequate a driveway width of 3.5 m could handle the traffic. There is no indication that the development will have any appreciable impact on the traffic on Munro Street and adjacent streets from the standpoint of volume and on-street parking. The surveys and studies undertaken with regard to the reduced parking standards indicated little demand for visitor parking. Visitor parking is a component of the reduced standards.

84 The Board prefers the evidence of the land use planner on the gross floor area variance of 1.08 times the lot area. In itself this variance does not directly impact on abutting land uses. At 1.0 times the area of the lot 30.5 units rather

than 33 units can be constructed. This difference in the number of units is negligible from the standpoint of impact on abutting land use. The engineer and the architect and planner do not see this variance as being significant when considered separately.

85 The uncontradicted evidence of the acoustical engineer is that the development will not generate any noise that will adversely impact on the neighbourhood. As to noise on the street generated by pedestrians from the development, there is no evidence to support a finding that street noise will be appreciably increased.

86 The 5.75 m variance to the 15 m distance between external facing walls only impacts internally. A greater separation distance may be desirable. However, it must be kept in mind that the potential residents have a choice as to whether they live in the development. During their inspection of the building which is part of the enhanced management program, they can assess the impacts on privacy.

87 The last variance is the length of the building which exceeds the maximum depth permitted. The impact of this variance relates solely to the small amount of shadowing caused by the west wing on the rear yards at 160 and 162 Munro Street, which has been discussed, and the partial shadowing of the same rear yards by the amount the east wing exceeds the as-of-right length. It is acknowledged that at certain times of the day and year a considerable portion of these rear yards is in shadow. However, the predominant amount of shadow would be caused by the depth of the east wing that exceeds the maximum permitted depth of 14 m for an apartment building. It is noted that the same subsection of the by-law permits a semi-detached house to be built to a depth of 17 m. The year round shadowing, as indicated by the March and September studies, is not found to cause substantial adverse impact.

88 A number of residents concerns have already been commented upon in this decision. The Board will now deal with the remainder of these matters, most of which are indirectly related to the merits of the application before us.

89 On the question of the volume of garbage that will be generated and collected by streetside pick-up, Woodgreen will contract with its maintenance component for both the cleaning and maintenance of the building which includes placing the garbage on the street for the collection. The garbage storage rooms in each of the wings will be equipped with a garbage compactor to reduce volume. A residents' building maintenance committee will be formed to oversee these activities. Woodgreen will undertake a waste management study for its properties which will include recycling.

90 The capacity of existing municipal services to serve the requirements of the proposed development has been raised. The area is fully serviced. No department of any municipality, school board, or other public agency or authority has raised any concern about the adequacy of hard or soft municipal services or amenities such as water, sewers, roads, hospitals, public transportation, parks, schools, libraries, etc. It must be kept in mind that there will be a mix of residents which includes seniors, single persons, single parent families and families. The size of the development and the tenant mix will not put any extreme demand on any particular service or amenity. The residents of the development, both old and young, will be in the same position as their counterpart neighbours in the immediate area with respect to available services and amenities. It has been pointed out that there is not a supermarket within easy walking distance. According to the land use planner this is not an unusual situation. There is, however, a wide variety of smaller food stores in the area.

91 Reference was made to the special educational needs of children. This matter can only be dealt with, if necessary, when the apartment building is occupied.

92 There is no evidence which persuades the Board that the development will impact upon the incidence of crime or that access to the site by fire fighters, police, and other emergency personnel will be hampered by the proposed access to the site.

93 Special concern was expressed with respect to the well being and safety of children who may be resident. The inoperative incinerator to the west may be an attraction to the curious as may be the nearby entrance to the Don Valley Parkway. One resident is particularly concerned with the air quality which is poor due to the contaminated soil in the area and pollution mainly from traffic on the Parkway. The proposed fencing will provide some safeguards for children.

However, the same parental supervision will have to be exercised for the protection of small children in this urban development as would be exercised if they resided in the existing homes on Munro or Hamilton Streets.

94 It may be appropriate for Woodgreen to have the air quality tested if this data is not already available. The contaminated soil will be removed under the control of approved plans which will take into consideration dust control during the soil rehabilitation period and the construction of the apartment building. Reliance can be placed on Woodgreen to look to the best interests of the residents in these areas through its enhanced management program.

95 The Land Use Planning for Housing Policy Statement directs an intensification of land use. The rehabilitation of the semi-detached houses on 156 and 158 Munro Street could be undertaken but it would not comply with the policy of increasing the supply of affordable housing by land use intensification. The as-of-right construction is restricted because of the configuration of the site and probably, at best, 12 units could be built which would be a density of 0.466 times. The intensification of the land use in this case is actually 0.08 times the area of the lot. The Official Plan and Zoning By-law 438-86 permit a density of 1.0 times the area of the lot. With the exception of the evidence of partial shadowing of the rear yards of 160 and 162 Munro Street, which has been discussed, there is no evidence that supports a finding of any material adverse impact on abutting and adjacent land uses. The shadowing impact on these rear yards is not significant in that it is short in its duration and frequency and effects on a slightly larger portion of the yards than a 17 m permitted residence would effect.

96 The amount of public housing in the area is significant and this fact is not challenged. The reason for this situation is that the housing is placed in the catchment areas where it is required. This permits area residents in non-acceptable accommodation to continue to live in their community. The goals and policies of the Official Plan pertaining to Low Density Residence Areas and Housing do not conflict with the proposed development. There is no evidence that convinces the Board that the development will destabilize the neighbourhood or be out of keeping with the character of the area. The architect and planner stated that in terms of character there is nothing stopping a development completely modern in design. He agrees with the land use planner that the neighbourhood will change over time. An apartment house is a permitted use. The goal to preserve and improve existing housing and existing residential areas does not conflict with the introduction of an apartment building in proximity to a number of now restricted industrial uses and a variety of housing stock.

97 Counsel for the residents made reference to Housing Policy 2A.13 which states that Council should "...seek a balance between owner-occupied and rental housing within the City, and in particular areas of the City". The Board does not interpret this to mean that every area of the City should proportionately have the same balance of these housing tenures. Policy 2A.2 states that a balance should be sought in the balance of low and moderate income households. This policy is also city-wide and not area specific. There is no evidence upon which the Board can properly conclude that the proposed development will have an adverse impact on the quality of life of existing residents or new residents in the development.

98 The evidence of the architect and planner that some improvements could be made to the units in the areas of such items as the size and placement of windows is also unchallenged. There also may be different designs for the building which may be more acceptable. The Board, however, must deal with the application before it. The units are intended to provide good accommodation at a reasonable cost. There is no evidence to suggest that individuals and families will not be able to live comfortably in this accommodation.

99 A considerable amount of concern was expressed regarding the percentages by which the variances do not comply with either the maximum or the minimum by-law standards. The courts have ruled that this test in itself does not mean a variance is or is not minor in nature. The test, to a great extent, is the degree of adverse impact. The land use planner's evidence that if a variance is equal to or improves the existing situation it is minor in nature. This, however, is only one consideration. As counsel for the residents submits, the cumulative effect of this series of variances must also be considered when assessing impact.

100 On the evidence the Board finds, with respect to subsection 44(1), that the proposed development represents an appropriate use of the land, that the general intent and purpose of the Official Plan and Zoning By-law 438-86 are maintained and the variances are of a minor nature. The Board finds further that the proposed development conforms to the provisions of the Land Use Planning for Housing Policy Statement by providing affordable housing which represents good planning and is without serious adverse impact on abutting and adjacent land uses.

101 The evidence is such that the internal and external impacts of the proposed development have been found not to be of such weight that the application should be denied. However, this finding is predicated on certain standards of development, construction and operation of the development after its completion, which will mitigate any potential significant adverse impacts. Certain of these standards, namely the removal of the contaminated soil, construction in the flood plain and the lease, social housing, and operating agreements, are subject to adequate control by the appropriate bodies which include the M.T.R.C.A., the **City of Toronto** and the Province of Ontario and do not warrant the imposition of conditions by the Board for this reason. The variance of 1.08 times the area of the lot is significant in that it limits the density of the development and establishes landscaped open space of 58 per cent of the site. In addition, the sound attenuation measures are of great importance to the future residents. It is the intention of Woodgreen to incorporate into the development the recommendations contained in the Noise Control Feasibility Study (Exhibit 28). The overview of 160 Munro Street from the balconies on the north side of the east wing requires some form of privacy barrier. These matters will be the subject of conditions imposed by the Board, which are unopposed by Woodgreen.

102 The order of the Board is, therefore, that the appeal is allowed and the minor variances as applied for are authorized subject to the following conditions:

- 1) that the property be developed substantially in accordance with the site plan (Exhibit 14(1));
- 2) that the recommendations contained in the Noise Control Feasibility Study (Exhibit 28) be implemented; and
- 3) that some form of privacy barrier be installed on the balconies on the north side of the east wing.

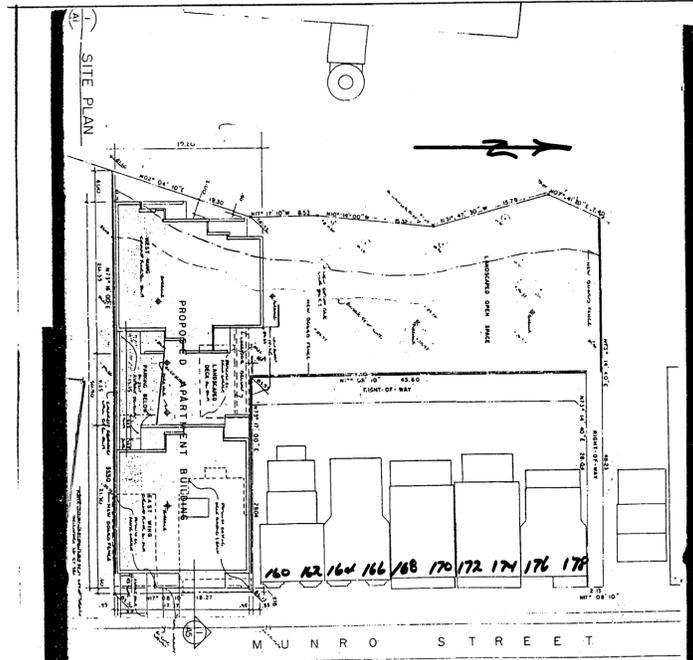
APPENDIX "A"



Ontario
Ontario Municipal Board
Commission des affaires municipales de l'Ontario

V 910140

SCHEDULE "A"



Graphic 1

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TAB 20

2006 CarswellOnt 3996
Ontario Municipal Board

Toronto Standard **Condominium Corp.** No. **1517** v. **Toronto** (City)

2006 CarswellOnt 3996, [2006] O.M.B.D. No. 707, 35 M.P.L.R. (4th) 152, 54 O.M.B.R. 102

Toronto Standard Condominium Corporation #1517 has appealed to the Ontario Municipal Board under subsection 45(12) of the Planning Act, R.S.O. 1990, c. P.13, as amended, from a decision of the Committee of Adjustment of the City of Toronto (Toronto and East York Panel) which granted an application by Concord Adex Developments Corp. numbered AO680/05TEY for variance from the provisions of By-law 438-86, as amended, respecting 361-397 Front Street West and 12-16 Blue Jays Way

OMB File No. V050599

S.W. Lee V-Chair

Judgment: June 21, 2006 *

Docket: PLO51279

Counsel: K.M. Kovar for Concord Adex Developments **Corp**
W.H.O. Mueller for **Toronto** Standard **Condominium** Corporation #1517
T. Wall for City of **Toronto**

Subject: Public; Municipal

Related Abridgment Classifications

Municipal law

XVI Zoning

XVI.8 Zoning variances

XVI.8.b Types of variances

XVI.8.b.xii Parking

Headnote

Municipal law --- Zoning — Zoning variances — Types of variances — Parking

Portion of two-way driveway to underground parking facilities of two existing **condominium** towers was 5.0 metres wide rather than 5.5 metres as required by zoning by-law — During construction, developer experienced delay during building permit process in securing railway authorities' agreement to permit encroachment solely for construction purposes to enable driveway to be constructed to 5.5 metre width — In order to avoid encroachment, developer revised building permit plans, reducing driveway to 5.0 metres, which plans bore city's stamps on their face — Committee of adjustment granted developer minor variance — **Condominium** corporations appealed — Appeal dismissed — Variance authorized subject to conditions that no right turn be permitted at base and north wall be redesigned to eliminate encroachment at levels of winged mirrors — Deficiency was small in degree and minor in amplitude — Ramp was designed for residents' vehicles, not for bicycles, loading, or servicing — Additional 0.5 metres would not act as important feature for improvement of operational efficiency or safety — General intent and purposes of official plan and by-law were met by variance — Adequacy and passageway for purposes of ramp of residents' motor vehicles were met — There was no evidence that variance would have any effect on usage, passageway, or queuing, on any on or off site inconveniences — Slope or curvature were not substandard, ramp was workable and efficient, and there was no evidence that additional 0.5 metres could decisively add to benefits or decisively address concerns raised — There was no evidence of bad faith nor intentional hiding of errors on developer's part.

Table of Authorities**Cases considered by *S.W. Lee V-Chair*:**

DeGasperis v. Toronto (City) Committee of Adjustment (2005), 2005 CarswellOnt 2913, (sub nom. *Vincent v. Degasperis*) 200 O.A.C. 392, 12 M.P.L.R. (4th) 1, (sub nom. *Rosedale Golf Assn. v. DeGasperis*) 256 D.L.R. (4th) 566, (sub nom. *Rosedale Golf Assn. v. DeGasperis*) 51 O.M.B.R. 1 (Ont. Div. Ct.) — considered

McNamara Corp. v. Colekin Investments Ltd. (1977), 15 O.R. (2d) 718, 2 M.P.L.R. 61, 76 D.L.R. (3d) 609, 1977 CarswellOnt 332, 21 M.P.L.R. 61 (Ont. Div. Ct.) — considered

Statutes considered:

Planning Act, R.S.O. 1990, c. P.13
s. 45(1) — considered

APPEAL by **condominium** corporations from decision of committee of adjustment granting developer minor variance in respect of width of driveway.

***S.W. Lee V-Chair*:**

1 These proceedings relate to a driveway constructed to the underground parking facilities of two existing **condominium** towers at the address set out in the title of proceedings in the City of **Toronto**. A portion of the driveway has a width of 5.0 metre whereas the applicable zoning by-law requires a 5.5metre. The driveway is currently used for a two-way traffic operation.

2 To correct this deficiency, Concord Adex, the developer applied to the Committee of Adjustment for a minor variance. It was successful. The decision was appealed to this Board by the **condominium** corporations. The Board may add, parenthetically, that the **condominium** corporations have launched legal actions against the developer and the City with respect to this non-conformity and all parties agree that the Board's decision should precede the legal actions.

3 The Board heard an array of evidence of conflicting expert evidence in these proceedings, which include land use planners and traffic engineers. The Board also heard evidence in relation to a civil engineer adduced by the appellant as to the feasibility of conformity and the relative costs of correction if the driveway is to be widened either to the north or to the south. In addition, non-expert evidence was also adduced, including the residents.

4 The driveway leading to the underground parking facilities is a two-way traffic ramp, having a total length of 36 metre from grade to the garage entrance. The driveway is also located at the south portion of the site. There is a grade difference between the subject site and the property to the south owned by the railway authorities CN Rail, not only because of the sloping nature of the ramp, but because of the nature of the site as well. It is a gentle ramp and relatively straight in the sense that there is little curvature. At the bottom, the ramp turns at an angle to the garage door, but remaining at level.

5 The agreed statement of facts indicates that there was delay experienced by Concord during the building permit process in securing the necessary agreement of the railway authorities to permit Concord to encroach, solely for construction purposes, over railway owned lands in order to enable the driveway to be constructed as intended, to conform to the zoning by-law driveway width of 5.5metre. Accordingly, in order to avoid the encroachment, revised building permit plans were prepared and submitted to the Chief Building Official of the City whereby the width of the driveway was reduced by 0.5 metre. These building permit plans bear the stamps of the City of **Toronto** on their face.

6 It is trite to state that a relief under Section 45(1) of the *Planning Act* requires the satisfaction of the requisite tests, traditionally known as the four tests. There has been a wealth of jurisprudence enunciated pertaining to these provisions over the years, from both the Courts and the Board. In light of the most recent decision rendered by the Divisional Court in *DeGasperis v. Toronto (City) Committee of Adjustment*, [2005] O.J. No. 2890 (Ont. Div. Ct.), some doubts have been cast on the state of the law that may pertain to the application of this relief addressing the questions of performance **standards**. In the course of our analysis, the Board would make the requisite enunciations in the rightful place.

7 It is necessary to re-iterate the long-standing affirmation recognized by the Board for at least three decades that the legislature has in s. 45(1) of the *Planning Act* created a statutory process whereby a relief is made available to avoid the strait-jacket or rigid applications of the zoning by-law. The relief in question has been designed so that an independent tribunal, whether it is a Committee of Adjustment or the Board, can review and determine whether it can be granted on an individual case using the statutory tests set out. This relief stems from the Legislature's recognition that a zoning by-law, if it is to be applied unflinchingly with scant regard for individual circumstances and without due regard to the matters at hand, can result in very odd, undesirable and in some cases wrong situations because the facts in the planning world can be sometimes stranger than fiction. The relief is not to be regarded as an extraordinary remedy. In fact, the relief should be granted in some circumstances, not because non-conformity would be less costly, expedient or convenient, but because nonconformity can, in fact, be satisfactory and acceptable from a planning standpoint.

8 The first question to be answered is whether it is "minor" or not. Neither of the land use planners in these proceedings, Mr. Stagl for the applicant nor Mr. Rendl, for the appellant has made the assertion that it is a matter of the degree of numerical deviation. This is important as both planners have rightfully rejected the mistaken interpretation of certain enunciations of the judgement of DeGasperis. Neither accepted that the question of the size of deviation is determinative to the question whether it is "minor" or not. In this case, a deficiency of 0.5 metre appears, on the surface, to be quite innocuous, but both planners agree that that in itself is insufficient, incomplete or unnecessary to answer this question.

9 The leading case *McNamara Corp. v. Colekin Investments Ltd.* (1977), 15 O.R. (2d) 718 (Ont. Div. Ct.) has this to say in terms of variance on a performance standard:

The Legislature by s. 42(1) confided to committees of adjustment and ultimately to the Municipal Board the authority to allow "minor variances". The statute does not define these words and their exact scope is likely incapable of being prescribed. The term is a relative one and should be flexibly applied: *Re Perry et al. and Taggart et al.*, [1971] 3 O.R. 666, 21 D.L.R. (3d) 402 (Ont. H.C.). No hard and fast criteria can be laid down, the question whether a variance is minor must in each case be determined in the light of the particular facts and circumstances of the case. In certain situations total exemption from a by-law will exclude a variance from falling within the category of "minor variances". But not necessarily so. In other situations such a variance may be considered a minor one. It is for the committee and, in the event of an appeal, the Board to determine the extent to which a by-law provision may be relaxed and a variance still classed as "minor".

10 The recent case of DeGasperis has this to say on the question of being minor:

A minor variance is, according to the definition of "minor" given in the Concise Oxford Dictionary, one that is "lesser or comparatively small in size or importance". This definition is similar to what is given in many other authoritative dictionaries and is also how the word, in my experience, is used in common parlance. It follows that a variance can be more than a minor variance for two reasons, namely, that it is too large to be considered minor or that it is too important to be considered minor. The likely impact of a variance is often considered to be the only factor which determines whether or not it qualifies as minor but, in my view, such an approach incorrectly overlooks the first factor, size. Impact is an important factor but it is not the only factor. A variance can, in certain circumstances, be patently too large to qualify as minor even if it likely will have no impact whatsoever on anyone or anything. This can occur, for example, with respect to the first building on a property in a new development or in a remote area far from any other occupied properties.

11 The dicta of *Re: Namara* have not been overruled or overturned by the most recent DeGasperis case. This is not surprising as the ratio decidendi of *Re: Namara* has stood the test of time because the judgment recognizes and pays homage to two very important underlying principles. Firstly, whether it is "minor" or not cannot be regarded as a robotic exercise of the degree of numeric deviation, but must be held in light of the fit of appropriateness, the sense of proportion, a due regard to the built and planned environ, the reasons for which the requirement is instituted, the suggested mitigation conditions to address the possible concerns and last, but not the least, the impact of the deviation.

Secondly, Re: Namara recognizes that the performance **standards** of the zoning-law are not an end, but a means to an end. The decision maker must therefore chase after the question whether the planning objectives would be fulfilled if the variance were to be allowed. She must not embark on a tautological and circular exercise of why one cannot abide by the requirements. Neither should she use a yardstick of means, median or any singular numeric approach as a measurement for an appropriate minor variance. Furthermore, a long line of Board cases has held that the assessment of whether it is minor or not cannot be fathomed on an *a priori* basis. It has been our consistent practice that the question of minor is best to be assessed on an empirical, a concrete and fact-specific basis. In other words, a seemingly "small" deviation may not qualify as "minor". On the other hand, a seemingly "large" deviation or an obliteration of the numeric requirement may be quite appropriate. In short, the numbers themselves are devoid of meaning unless the context is known and rationale for those numbers are known.

12 The Board finds that the driveway width in this nature should not be confused with what is the driveway linking to the public roadway. In fact, the evidence of Mr. Mark, the traffic engineer for the appellant, in giving his evidence has made that confusion in the course of his analysis. Nor should the width of this driveway be confused with the requisite width of the traveled width of a road allowing a two-way traffic even though the former does allow the operation of both inbound and outbound traffic.

13 Unlike a roadway, the speed limit, the use and convention of the ramp such as this would ensure that this is quite different from a highway or a public traveled transportation facility. The Board agrees with Mr. Stagl's analysis that such a driveway is to allow adequate and unobstructed access to parking facilities and from that standpoint, there is evidence to support that the deficiency satisfies the test amply. This does not mean drivers can avoid due caution and care. On the contrary, it is imperative that drivers should exercise such caution. In fact, as our analysis would bear, the proposed conditions would ensure and strengthen the cautionary behavior of drivers. Exhibit 8 sets out a number of examples whereby the City has approved a number of projects allowing driveway or ramp provisions less than 5.5 metre. These include apartment buildings and residential towers. These comparables obviously are not determinative but illustrative that they have been done in other instances and that the City has not been unduly punctilious or strict in applying the requirement of 5.5 metres and the deficiency of that nature can be regarded as small in degree and minor in amplitude.

14 Two of the other four tests require applications of and probing into the planning instruments that have been enacted by the municipality and completed its review and appeal process. They require the decision-maker to inquire whether the general intent and purposes of the Official Plan and zoning by-law can be met. Both of the planners agree tacitly that the more pertinent consideration is the zoning by-law rather than the Official Plan as there is no issue that both the Part 1 and Part 2 Plans do allow and encourage a high intensity development of this nature. The Board has noted, as pointed out by Mr. Stagl, that in section 16.18 of the Official Plan, the minimum width of a public lane serving residential and park lands are 5.0 metre.

15 The relevant portion of the by-law, Zoning By-law 438-86 sets out the 5.5 metre requirement. Mr. Stagl, in his analysis, has traced from the parent provision of the by-law that this numeric requirement has either replaced or amplified the requirement of adequate and unobstructed driveways or passageway. These indeed are the principal intent and purposes underlying the requisite provisions. They are not to be confused with the design objectives of a transportation facility whereby speed, turning maneuver, traffic volume and other safety factors resulting from speeds are the principal concerns.

16 It is also important to note that this ramp is to be designed for the residents' vehicles, not for loading or servicing, as there are facilities for the latter. Although there is disagreement at the hearing whether this ramp should allow bicycles traffic, the Board is satisfied from the design of the underground parking floor plans that this ramp is not designed for bicycles traffic. The Lea Consulting Report dated November 7, 2005, indicates that with due caution from drivers, this ramp operates efficiently as designed. The Board agrees. On the other hand, the Board has not been presented with any cogent or persuasive evidence that a 0.5 metre of additional width would act as an important marginal feature for the improvement of operational efficiency, conveniences, or safety. The Board is well-satisfied that the general intent and

purposes of the Official Plan and by-law are met by this variance and that the adequacy and the passageway for the purposes of a ramp of residents' motor vehicles are met.

17 As for whether this would meet the test of the desirable for appropriate development or use of the land, building or structure, the Board finds that the test is met. There is no evidence that the variance would have any effect on usage, passageway, queuing, on any on or off site inconveniences. The slope or curvature are not substandard. This ramp is only for residential vehicles and there is no pick-ups, drop-offs or service vehicles uses. All the technical evidence shows that this ramp with its 5.0 metre width is workable and efficient. Furthermore, there has not been any demonstrable evidence to show that an extra 0.5 metres can add decisively to the benefits or address decisively to those concerns raised.

18 The questions of safety is debated at length in these proceedings. There is no doubt that there have been incidents scratches and marks on the walls and two incidents, one involving a \$2,400 and another \$3,400 claim. Mr. Mark, in his report to the Board, maintains that 6.0 metre is what should be required. When crossed-examined, he conceded that the TAC Geometric Design Guide on which he based his opinions represent guidelines but not **standards**. This is critical as the introduction of TAC specifically delineates that this Guide does not attempt to establish **standards** and indeed does not use the term. He also admitted he has had little project experience in the City of **Toronto**, especially for such multi-unit, high intensity projects and he is not aware of 5 metre requirement for the public lane set out in the Official Plan. The Board prefers on the whole the evidence proffered by Mr. Leingruener. In the a.m. peak, as expected, the traffic flow is predominately outbound; in the p.m. peak, the traffic flow is predominately inbound and there are more potential conflict between inbound and outbound traffic at the p.m. peak; however, the duration for such opposing traffic is not high. Nonetheless, to eliminate those instances where there may be conflict, the proposed conditions set out in Exhibit 6 will go a long way to enhance cautions. For example, if flashing red or amber signals are provided at certain locations, drivers would be more aware of on-coming traffic. If the central dividing line is painted and repainted at regular intervals, alertness can be heightened. The two additional conditions suggested should also be included: one indicating no right-turn on red at the base, two, the north wall lights redesigned to eliminate encroachment at the levels of wing mirrors.

19 In conclusion, the Board finds that the variance should be authorized as the four tests are fully addressed. Mr. Mueller urged the Board to find that these proceedings are designed for the collateral purposes to minimize the damages of the legal actions and to frustrate or stay the legal proceeding launched on behalf of his client. The Board is not persuaded that these proceedings represent any bad faith in the legal or moral sense. It is unfortunate that the original plan to conform is not adhered to; but one must not lose sight of the fact as well that a construction job of this size is a major undertaking and a remission such as this, regrettable as it may be, does happen. It is fortunate that it is caught at last. The Board has not heard any evidence that the respondent had done this intentionally or attempted to hide the errors and our decision is not made to avoid the further expenses that may accrue for corrections. It is our finding that the proposed conditions will go a long way to ensure driver's cautions.

20 Accordingly, the Board orders that the appeal be dismissed and the variance is authorized subject to the conditions set out in Exhibit 6 as amended by the two additional conditions. Exhibit 6 (Attachment "1") is attached hereto to this decision.

Appeal dismissed.

APPENDIX

ATTACHMENT "1"

Requested Variance

361-397 Front Street

City of **Toronto**

§ Variance from the following Section of Zoning By-law 1994-0806 (as amended):

1. Section 4(5)(h), for a driveway width of 5.0 metres for a two-way operation leading to parking facilities, whereas By-law 1994-0806 requires a minimum driveway width of 5.5 metres for a two-way operation.

subject to the following conditions

1. A white stop bar painted at the bottom of the ramp for incoming vehicles. The stop bar will be located in a position that will provide the driver with clear access to the garage door sensor and will situate the vehicle away from the potential zone of conflict between turning vehicles.
2. A white stop bar be painted at the stop sign at the top of the ramp.
3. The yellow centre line be repainted with a highly visible and reflective paint. All pavement markings should be maintained regularly.
4. The garage door opening mechanisms/detectors are connected to a signal system that can differentiate and manage the respective inbound and outbound calls.
5. Flashing red or amber signals be provided at specific locations to inform drivers of potential on-coming traffic.
6. The signals would be grouped in respect to inbound and outbound traffic.
7. When an inbound call is made through the garage door opener sensor, the signals located inside the garage and on the parapet wall (for outbound traffic) are activated. These would be flashing amber signals to indicate that drivers should proceed with caution.
8. When an outbound call is detected by the garage sensor, the signals located at the bottom (mounted on the wall beyond the garage) and the top of the ramp will be activated. The signal at the bottom of the ramp will flash red to inform drivers that they must yield the right of way to on coming traffic. The signal at the top of the ramp would be a flashing amber signal to inform drivers that they should proceed with caution.
9. An intelligent controller device will be required to manage this operation.
10. The right-of-way is provided to outbound traffic since there is insufficient room for vehicle queues in the garage. The ramp, as indicated by the survey undertaken will have sufficient capacity to queue up to five inbound vehicles. The probability of five vehicles queuing in one instance is anticipated to be minimal at this time based on the surveys undertaken.
11. The gates located on the ramp west of the garage access should be relocated further west and be closed. The extra space will allow vehicles to make a three point turn if access to the garage is not granted. Additional caution is required for this occasional manoeuvre.
12. The metal cover above the garage door sensor and intercom should be enlarged to increase the sensor's line of sight. This will reduce the number of vehicles stopping in the outbound lane to open the garage door. An alternate technology may also be considered.
13. Painting the walls of the ramp white to increase reflectivity and visibility.

NOTE: Residents will need to be informed of the system's purpose and operation once designed and installed.

Footnotes

- * A corrigendum issued by the court on July 7, 2006 has been incorporated herein.

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TAB 21

1991 CarswellNS 464
Nova Scotia Court of Appeal

R. v. Pharmaceutical Society (Nova Scotia)

1991 CarswellNS 464, 108 N.S.R. (2d) 320, 14 W.C.B. (2d) 517, 294 A.P.R. 320, 69 C.C.C. (3d) 136

Craig Winsor (appellant) v. Her Majesty The Queen (respondent)

R. v. Winsor

Clarke C.J.N.S., Hart, Matthews J.J.A.

Oral reasons: November 26, 1991

Docket: Doc. 02357

Counsel: *Ralph W. Ripley*, for the appellant.

A. *William Moreira* and *K.L. Greenwood*, for the respondent.

Subject: Intellectual Property; Property; Criminal; Constitutional

Related Abridgment Classifications

Commercial law

VI Trade and commerce

VI.5 Competition and combines legislation

VI.5.a Constitutional issues

VI.5.a.ii Charter of Rights and Freedoms

Criminal law

IV Charter of Rights and Freedoms

IV.26 Principle against self-incrimination [s. 13]

Headnote

Criminal Law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — Rights and freedoms — Life, liberty and security of person — Privilege against self-incrimination

Matthews, J.A. [orally]:

1 The issue on this appeal is whether the appellant, having been served with a subpoena to attend and give evidence on behalf of the Crown in respect to an indictment which charges the Nova Scotia Pharmaceutical Society, the Pharmacy Association of Nova Scotia and ten other defendants with two counts of conspiracy to unduly lessen competition contrary to s. 32(1)(c) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, as amended, is compelled to testify in that action.

2 The appellant's factum sets out as the statement of facts:

1. The appellant, Craig J. Winsor, is a Pharmacist, and is both a member of the Nova Scotia Pharmaceutical Society, and the Pharmacy Association of Nova Scotia.

2. The appellant became a member of the Nova Scotia Pharmaceutical Society on October 12th, 1979, when the Registrar of the Nova Scotia Pharmaceutical Society accepted his application for membership in the Society, and approved his credentials, time served, etc. as acceptable for membership in that Society.

3. The appellant became a member of the Pharmacy Association of Nova Scotia on October 12th, 1979, and has been a member of that organization from that date to the present.

4. The Nova Scotia Pharmaceutical Society is a body corporate, which was created by a statute of the Legislature of the Province of Nova Scotia, passed on the 4th day of April, 1876.

5. The Nova Scotia Pharmaceutical Society was charged, along with other individuals and bodies corporate, that it did unlawfully conspire, combine, agree or arrange among themselves, together and with various other national persons and bodies corporate, not all of the identities of whom are known, but who are or were pharmaceutical chemists registered as such under the laws of the Province of Nova Scotia and/or the proprietors and operators of pharmacies licensed to carry on business in the Province of Nova Scotia, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of product, to wit prescription drugs and pharmacists' dispensing services, sold or offered for sale within the Province of Nova Scotia, to subscribers or beneficiaries of private, pre-paid prescription insurance plans, and did, as a result, thereby committing an indictable offence contrary to Section 32(1)(c) of the *Competition Act*, R.S.C. 1970, c. C-23.

6. The Nova Scotia Pharmaceutical Society and the Pharmacy Association of Nova Scotia, were also charged, along with other individuals and bodies corporate, that they did between January 1974 and June 30, 1986 unlawfully conspire, combine, agree or arrange among themselves, together with various other national persons and bodies corporate, not all of the identities of whom are known but who are or were pharmaceutical chemists registered as such under the laws of the Province of Nova Scotia and/or the proprietors and operators of pharmacies licensed to carry on business in the Province of Nova Scotia, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, to wit prescription drugs and pharmacists' dispensing services sold or offered for sale for cash or on credit to members of the public within the Province of Nova Scotia, and did thereby commit an indictable offence contrary to Section 32(1)(c) of the *Competition Act*.

7. The Appellant was served with a subpoena to attend, to give evidence on behalf of the Crown in relation to the charges referred to in paragraph 5 and 6 above. The Appellant, is an officer, director and shareholder of a body corporate, C. & S. Pharmacy Limited, which was incorporated on February 18th, 1986, and operates, among other things, a pharmacy at the Cape Breton Shopping Plaza, Sydney River, County of Cape Breton, Province of Nova Scotia.

8. In the course of its investigation, the Crown has compiled a series of documents, which it intends to introduce at trial, which are commonly called "usual and customary charges to cash customers forms", which were routinely used and filed by pharmacies. At least one of the documents that the Crown intends to introduce at trial is a 'usual and customary charges to customers form', from C. & S. Pharmacy Limited, which was prepared after February 21st, 1986.

3 The respondent agrees with those facts and adds:

2. The purpose for which the Crown has subpoenaed the Appellant to testify at the trial is to give evidence concerning certain records maintained by the Claims Department of Maritime Medical Care Inc. during the time that the Appellant was employed by that company.

3. The record referred to in Paragraph 8 of the Appellant's factum, prepared by C. & S. Pharmacy Limited in February, 1986, is not among the Maritime Medical Care records to which the Crown intends the Appellant should speak in his evidence, it having been prepared following his departure from Maritime Medical Care Inc.

4. Neither the Appellant personally, nor the company of which he is proprietor, are charged with any offence in these proceedings.

4 Madam Justice Roscoe, sitting in chambers, in a decision dated August 1, 1990, found that the appellant was a compellable witness at trial and dismissed his application to quash the subpoena.

5 The appellant has placed before this Court three issues:

(A) Did the Learned Trial Judge give due or proper consideration to the effect of Section 11(c) of the *Canadian Charter of Rights and Freedoms*?

(B) Did the Learned Trial Judge fail to give due or proper consideration to the fact that the Appellant, as a member of the Nova Scotia Pharmaceutical Society Limited, had no limitation on his liability for any fines imposed by the Nova Scotia Pharmaceutical Society if convicted on the charges and indictment laid against the Nova Scotia Pharmaceutical Society pursuant to the *Competition Act*.

(C) Did the Learned Trial Judge fail to give due or any weight to the fact that the *Competition Act*, R.S.C. 1970, c. C-23 is legislation enacted by the Federal Parliament under its authority to enact Federal legislation under Section 91(27) of the *Constitution Act* 1867?

6 The chambers judge correctly categorized the argument on behalf of the appellant as being

based upon the common law right not to be compelled to testify against one's self and s. 11(c) of the *Canadian Charter of Rights and Freedoms* which states that:

Any person charged with an offence has the right

.....

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence,

7 In a well reasoned decision, in some detail she considered the facts, the arguments, the applicable law and concluded that the Pharmaceutical Society is "a distinct separate entity from its members, and I find that since Mr. Winsor is not personally an accused person, he is a compellable witness for the prosecution".

8 We see no error on the part of the chambers judge which would permit this Court to interfere with the conclusions she reached. We dismiss the appeal.

9 We should add that for the purposes of this judgment we do not consider it necessary to decide whether or not members of the Nova Scotia Pharmaceutical Society enjoy limited liability although neither counsel made reference to s. 15 of the Nova Scotia *Interpretation Act*, R.S.N.S. 1989, c. 235, which may have a bearing on this issue.