Court File No. CV-21-00669471-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

AUDITOR GENERAL OF ONTARIO

Applicant

and

LAURENTIAN UNIVERSITY OF SUDBURY

Respondent

SUPPLEMENTARY BOOK OF AUTHORITIES OF THE AUDITOR GENERAL OF ONTARIO

Date: December 3, 2021

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(b) judgment may be entered in accordance with the verdict or the answers to the questions. R.S.O. 1990, c. C.43, s. 108 (5).

Same

(6) It is sufficient if five of the jurors agree on the verdict or the answer to a question, and where more than one question is submitted, it is not necessary that the same five jurors agree to every answer. R.S.O. 1990, c. C.43, s. 108 (6).

Discharge of juror at trial

(7) The judge presiding at a trial may discharge a juror on the ground of illness, hardship, partiality or other sufficient cause. R.S.O. 1990, c. C.43, s. 108 (7).

Continuation with five jurors

(8) Where a juror dies or is discharged, the judge may direct that the trial proceed with five jurors, in which case the verdict or answers to questions must be unanimous. R.S.O. 1990, c. C.43, s. 108 (8).

Specifying negligent acts

(9) Where a proceeding to which subsection 193 (1) of the *Highway Traffic Act* applies is tried with a jury, the judge may direct the jury to specify negligent acts or omissions that caused the damages or injuries in respect of which the proceeding is brought. R.S.O. 1990, c. C.43, s. 108 (9).

Malicious prosecution

(10) In an action for malicious prosecution, the trier of fact shall determine whether or not there was reasonable and probable cause for instituting the prosecution. R.S.O. 1990, c. C.43, s. 108 (10).

Section Amendments with date in force (d/m/y)

1994, c. 12, s. 41 - 28/02/1995; 1996, c. 25, s. 9 (17) - 19/04/1999

2006, c. 21, Sched. A, s. 16 - 19/10/2006

2019, c. 7, Sched. 15, s. 2 - 01/01/2020

Notice of constitutional question

109 (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.
2. A remedy is claimed under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

Failure to give notice

(2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

Form of notice

(2.1) The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.

Time of notice

(2.2) The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise. 1994, c. 12, s. 42 (1).

Notice of appeal

(3) Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

Right of Attorneys General to be heard

(4) Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

Right of Attorneys General to appeal

(5) Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceeding for the purpose of any appeal in respect of the constitutional question. R.S.O. 1990, c. C.43, s. 109 (3-5).

Boards and tribunals

(6) This section applies to proceedings before boards and tribunals as well as to court proceedings. 1994, c. 12, s. 42 (2).

Section Amendments with date in force (d/m/y)

1994, c. 12, s. 42 (1, 2) - 28/02/1995

Proceeding in wrong forum

110 (1) Where a proceeding or a step in a proceeding is brought or taken before the wrong court, judge or officer, it may be transferred or adjourned to the proper court, judge or officer.

Continuation of proceeding

(2) A proceeding that is transferred to another court under subsection (1) shall be titled in the court to which it is transferred and shall be continued as if it had been commenced in that court. R.S.O. 1990, c. C.43, s. 110.

Set off

111 (1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.

Same

(2) Mutual debts may be set off against each other even if they are of a different nature.

Judgment for defendant

(3) Where, on a defence of set off, a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant is entitled to judgment for the balance. R.S.O. 1990, c. C.43, s. 111.

Investigation and report of Children's Lawyer

112 (1) In a proceeding under the *Divorce Act* (Canada) or the *Children's Law Reform Act* in which a question concerning decision-making responsibility, parenting time or contact with respect to a child is before the court, the Children's Lawyer may cause an investigation to be made and may report and make recommendations to the court on all matters concerning decision-making responsibility, parenting time or contact with respect to the child and the child's support and education. 2020, c. 25, Sched. 1, s. 27 (2).

Same

(2) The Children's Lawyer may act under subsection (1) on his or her own initiative, at the request of a court or at the request of any person. R.S.O. 1990, c. C.43, s. 112 (2); 1994, c. 27, s. 43 (2).

Report as evidence

(3) An affidavit of the person making the investigation, verifying the report as to facts that are within the person's knowledge and setting out the source of the person's information and belief as to other facts, with the report attached as an exhibit thereto, shall be served on the parties and filed and on being filed shall form part of the evidence at the hearing of the proceeding. R.S.O. 1990, c. C.43, s. 112 (3).

Attendance on report

(4) Where a party to the proceeding disputes the facts set out in the report, the Children's Lawyer shall if directed by the court, and may when not so directed, attend the hearing on behalf of the child and cause the person who made the investigation to attend as a witness. R.S.O. 1990, c. C.43, s. 112 (4); 1994, c. 27, s. 43 (2).

Section Amendments with date in force (d/m/y)

1994, c. 27, s. 43 (2) - 03/04/1995

2020, c. 25, Sched. 1, s. 27 (2) - 01/03/2021

Note: On a day to be named by proclamation of the Lieutenant Governor, section 112 of the Act is repealed and the following substituted: (See: 2021, c. 4, Sched. 3, s. 14)

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. McCann, 2015 ONCA 451
DATE: 20150619
DOCKET: C58917

Strathy C.J.O., Pardu and Benotto JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Andrew McCann, Jamie Masse and Patrick Thompson

Applicants/Appellants

John Norris and Meara Conway, for the appellants

Michael Perlin, for the respondent

Heard and released orally: June 15, 2015

On appeal from the conviction entered on March 5, 2012 by Justice Rommel G. Masse of the Ontario Court of Justice.

ENDORSEMENT

[1] The appellants were convicted of attempt to commit mischief in the course of a peaceful protest at the Frontenac Penitentiary. The trial judge found that they had attempted to block cattle trucks from leaving the institution. They received a conditional discharge.

[2] The summary conviction appeal judge dismissed their appeal. They seek leave to appeal to this court and if leave is granted, they ask that their convictions be set aside or a new trial ordered.

[3] Although presented in various ways before us, the basis of their application and appeal is that the courts below erred in finding that their peaceful protest was not protected expression under s. 2(b) of the *Charter*.

[4] The impediment to this argument is that the appellants did not serve a notice of constitutional question as required by s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. A *Charter* argument was not made at first instance and in fact the appellants, who were self-represented, disclaimed a *Charter* argument.

[5] Although the appellants were represented on the summary conviction appeal, the summary conviction appeal judge give little consideration to the s. 2(b) argument, concluding that the trial judge's findings of fact were sufficient to conclude that the appellants' conduct was not protected by the *Charter*.

[6] Notice of a constitutional question is not simply a technicality. The jurisprudence of this court confirms that it is mandatory: *Paluska, Jr. v. Cava* (2002), 59 O.R. (3d) 469 (C.A.); *R. v. Briggs* (2001), 55 O.R. (3d) 417 (C.A.). Section 109(2) of the *Courts of Justice Act* provides that where notice has not been given, a remedy under s. 24(1) of the *Charter* shall not be granted. The

notice requirement is important for the reasons expressed in *Briggs* at para. 44 – to put the government on notice that the legislation is being challenged and to give it a full opportunity to support its validity. It also ensures that the court has the benefit of a full factual record.

[7] We agree with the respondent that the appellants' submissions raise the constitutional applicability of s. 430(3) of the *Code*. This court has no jurisdiction to grant relief in the absence of notice or in the absence of the circumstances discussed in para. 23 of *Paluska*, none of which exist here. Moreover, the appellants concede that the record before us does not permit us to assess the *Charter* arguments or to grant a *Charter* remedy.

[8] In the absence of grounds to grant leave on a *Charter* arguments, we are not prepared to grant leave on the appellants' alternative submissions as to the trial judge's failure to apply *Charter* values to the defence submissions.

[9] For these reasons, the application for leave to appeal is dismissed.

"G.R. Strathy C.J.O."
"G. Pardu J.A."
"M.L. Benotto J.A."

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Supreme Court of Canada | Cour suprême du Canada

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THE BRANT COUNTY BOARD OF EDUCATION and THE ATTORNEY GENERAL FOR ONTARIO

v.

CAROL EATON and CLAYTON EATON

- and -

THE ATTORNEY GENERAL OF QUEBEC,
THE ATTORNEY GENERAL OF BRITISH COLUMBIA,
THE CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW,
THE LEARNING DISABILITIES ASSOCIATION OF ONTARIO,
THE ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION,
THE DOWN SYNDROME ASSOCIATION OF ONTARIO,
THE COUNCIL OF CANADIANS WITH DISABILITIES,
LA CONFÉDÉRATION DES ORGANISMES DE PERSONNES HANDICAPÉES DU QUÉBEC,
THE CANADIAN ASSOCIATION FOR COMMUNITY LIVING,
PEOPLE FIRST OF CANADA,
THE EASTER SEAL SOCIETY,
LA COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

LE CONSEIL SCOLAIRE DU COMTÉ DE BRANT et LE PROCUREUR GÉNÉRAL DE L'ONTARIO

c.

CAROL EATON et CLAYTON EATON

- et -

LE PROCUREUR GÉNÉRAL DU QUÉBEC,
LE PROCUREUR GÉNÉRAL DE LA COLOMBIE-BRITANNIQUE,
LA CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW,
LA LEARNING DISABILITIES ASSOCIATION OF ONTARIO,
L'ASSOCIATION DES CONSEILS SCOLAIRES PUBLICS DE L'ONTARIO,
L'ASSOCIATION SYNDROME DOWN DE L'ONTARIO,
LE CONSEIL DES CANADIENS AVEC DÉFICIENCES,
LA CONFÉDÉRATION DES ORGANISMES DE PERSONNES HANDICAPÉES DU QUÉBEC,
L'ASSOCIATION CANADIENNE POUR L'INTÉGRATION COMMUNAUTAIRE,
LES PERSONNES D'ABORD DU CANADA,
LA SOCIÉTÉ DU TIMBRE DE PÂQUES,
LA COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

CORAM:
The Rt. Hon. Antonio Lamer, P.C.
The Hon. Mr. Justice La Forest
The Hon. Mme Justice L'Heureux-Dubé
The Hon. Mr. Justice Sopinka
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Madam Justice McLachlin
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Major

Appeal heard:
October 8, 1996

Judgment rendered:
October 9, 1996

Reasons delivered:
February 6, 1997

Reasons for judgment by:
The Hon. Mr. Justice Sopinka

Concurred in by:
The Hon. Mr. Justice La Forest
The Hon. Mme Justice L'Heureux-Dubé
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Madam Justice McLachlin
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Major

Concurring reasons by:
The Rt. Hon. Antonio Lamer, P.C.

Concurred in by:

The Hon. Mr. Justice Gonthier

CORAM:
Le très hon. Antonio Lamer, c.p.
L'honorable juge La Forest
L'honorable juge L'Heureux-Dubé
L'honorable juge Sopinka
L'honorable juge Gonthier
L'honorable juge Cory
L'honorable juge McLachlin
L'honorable juge Iacobucci
L'honorable juge Major

Appel entendu:
le 8 octobre 1996

Jugement rendu:
le 9 octobre 1996

Motifs déposés:
le 6 février 1997

Motifs de jugement par:
L'honorable juge Sopinka

Souscrivent à l'avis de l'honorable juge Sopinka:
L'honorable juge La Forest
L'honorable juge L'Heureux-Dubé
L'honorable juge Gonthier
L'honorable juge Cory
L'honorable juge McLachlin
L'honorable juge Iacobucci
L'honorable juge Major

Motifs au même effet par:
Le très hon. Antonio Lamer, c.p.

Souscrit à l'avis du très hon. Antonio Lamer, c.p.:
L'honorable juge Gonthier

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Andrea F. Raso
Brenda J. Bowlby

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Robert E. Charney
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Janet L. Budgell

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Written submissions only by Cheryl Milne for the Canadian Foundation for Children, Youth and the Law, and the Learning Disabilities Association of Ontario.

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The Down Syndrome Association of Ontario:
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Robert Fenton

Avocats à l'audience:

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Andrea F. Raso
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Le procureur général de l'Ontario:
Dennis W. Brown
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Janet L. Budgell

Pour les intervenants:

Le procureur général du Québec:
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Argumentation écrite seulement par Lisa Mrozinski pour le procureur général de la Colombie-Britannique.

Argumentation écrite seulement par Cheryl Milne pour la Canadian Foundation for Children, Youth and the Law et la Learning Disabilities Association of Ontario.

L'Association des conseils scolaires publics de l'Ontario:
Brenda J. Bowlby

L'Association Syndrome Down de l'Ontario:
W. I. C. Binnie, c.r.
Robert Fenton

The Council of Canadians with Disabilities, la Confédération des organismes de personnes handicapées du Québec, the Canadian Association for Community Living, and People First of Canada:

David W. Kent
Melanie A. Yach
Geri Sanson

The Easter Seal Society:
Mary Eberts
Lucy K. McSweeney

La Commission des droits de la personne et des droits de la jeunesse:
Philippe Robert de Massy

Le Conseil des canadiens avec déficiences, la Confédération des organismes de personnes handicapées du Québec, l'Association canadienne pour l'intégration communautaire et les Personnes d'abord du Canada:
David W. Kent
Melanie A. Yach
Geri Sanson

La Société du timbre de Pâques:
Mary Eberts
Lucy K. McSweeney

La Commission des droits de la personne et des droits de la jeunesse:
Philippe Robert de Massy

Citations	Références
Ontario Special Education Tribunal, November 19, 1993.	Tribunal de l'enfance en difficulté de l'Ontario, le 19 novembre 1993.
Ontario Divisional Court: (1994), 71 O.A.C. 69, [1994] O.J. No. 203 (QL).	Cour divisionnaire de l'Ontario: (1994), 71 O.A.C. 69, [1994] O.J. No. 203 (QL).
Ontario Court of Appeal: (1995), 22 O.R. (3d) 1, 123 D.L.R. (4th) 43, 77 O.A.C. 368, 27 C.R.R. (2d) 53, [1995] O.J. No. 315 (QL).	Cour d'appel de l'Ontario: (1995), 22 O.R. (3d) 1, 123 D.L.R. (4th) 43, 77 O.A.C. 368, 27 C.R.R. (2d) 53, [1995] O.J. No. 315 (QL).

PARAGRAPH NUMBERING

The reasons are published in the SCRs by order of precedence and the paragraph numbering included in those reasons has been prepared accordingly. For this case, the reasons will be published in the following order:

Lamer C.J. (paras. 1 to 4)
Sopinka J. (paras. 5 to 81)

N.B.: The paragraph numbering will now appear in the SCRs.

NUMÉROTATION DES PARAGRAPHES

les motifs sont publiés dans le RCS par ordre de préséance et les paragraphes contenus dans ces motifs ont été numérotés en conséquence. Dans le présent cas, les motifs seront publiés dans l'ordre suivant:

Le juge en chef Lamer (par. 1 à 4)
Le juge Sopinka (par. 5 à 81)

N.B.: La numérotation des paragraphes figurera désormais dans le RCS.

eaton *v.* brant co. bd. of educ.

The Brant County Board of Education and the Attorney General for Ontario *Appellants*

v.

Carol Eaton and Clayton Eaton *Respondents*

- and -

**The Attorney General of Quebec,
the Attorney General of British Columbia,
the Canadian Foundation for Children, Youth and the Law,
the Learning Disabilities Association of Ontario,
the Ontario Public School Boards' Association,
the Down Syndrome Association of Ontario,
the Council of Canadians with Disabilities,
la Confédération des organismes de personnes handicapées du Québec,
the Canadian Association for Community Living,
People First of Canada,
the Easter Seal Society,
la Commission des droits de la personne et
des droits de la jeunesse** *Interveners*

Indexed as: Eaton *v.* Brant County Board of Education

File No.: 24668.

1996: October 8; 1996: October 9.

Reasons delivered: February 6, 1997.

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

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Equality rights -- Physical disability -- Child with physical disabilities identified as being an "exceptional pupil" -- Child placed in neighbourhood school on trial basis -- Child's best interests later determined to be placement in special education class -- Whether placement in special education class and process of doing so absent parental consent infringing child's s. 15 (equality) Charter rights -- If so, whether infringement justifiable under s. 1 -- Whether Court of Appeal erred in considering constitutional issues absent notice required by Courts of Justice Act -- Canadian Charter of Rights and Freedoms, ss. 1, 15 -- Courts of Justice Act, R.S.O. 1990, c. C.43, s. 109(1) -- Education Act, R.S.O. 1990, c. E.2, ss. 1(1), 8(3) -- Regulation 305, R.R.O. 1990, s. 6.

The respondents are the parents of a 12-year-old girl with cerebral palsy who is unable to communicate through speech, sign language or other alternative communication system, who has some visual impairment and who is mobility impaired and mainly uses a wheelchair. Although identified as an "exceptional pupil" by an Identification, Placement, and Review Committee (IPRC), the child, at her parents' request, was placed on a trial basis in her neighbourhood school. A full-time assistant, whose principal function was to attend to the child's needs, was assigned to the classroom. After three years, the teachers and assistants concluded that the placement was not in the child's best interests and indeed that it might well harm her. When the IPRC determined that the child should be placed in a special education class, the decision was appealed by the child's parents to a Special Education Appeal Board which unanimously confirmed the IPRC decision. The parents appealed again to the Ontario Special Education Tribunal (the "Tribunal"), which also unanimously confirmed the decision. The parents then applied for judicial review to the Divisional Court, Ontario Court of Justice (General Division), which dismissed the application. The Court of Appeal allowed the subsequent appeal and set aside the Tribunal's order. At issue here are whether the Court of Appeal erred (1) in proceeding, *proprio motu* and in the absence of the required notice under s. 109 of the *Courts of Justice Act*, to review the constitutional validity of the *Education Act*, and (2) in finding that the decision of the Tribunal contravened s. 15 of the *Canadian Charter of Rights and Freedoms*.

Held: The appeal should be allowed.

Per: La Forest, L'Heureux-Dubé, **Sopinka**, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The purpose of s. 109 of the *Courts of Justice Act* is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but also to the people. Moreover, this Court has the ultimate responsibility of determining whether an impugned law is constitutionally infirm and it is important that the Court, in making that decision, have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.

Two conflicting strands of authority dealing with the issue of the legal effect of the absence of notice exist. One favours the view that in the absence of notice the decision is *ipso facto* invalid, while the other holds that a decision in the absence of notice is voidable upon a showing of prejudice. It is not necessary to express a final opinion as to which approach should prevail (although the former was preferred) because the decision of the Court of Appeal is invalid under either strand. No notice or any equivalent was given in this case and in fact the Attorney General and the courts had no reason to believe that the Act was under attack. Clearly, s. 109 was not complied with and the Attorney General was seriously prejudiced by the absence of notice.

While there has not been unanimity in the judgments of the Court with respect to all the principles relating to the application of s. 15 of the *Charter*, the s. 15 *Charter* issue can be resolved on the basis of principles in respect of which there is no disagreement. Before a violation of s. 15 can be found, the claimant must establish that the impugned provision creates a distinction on a prohibited or analogous ground which withholds an advantage or benefit from, or imposes a disadvantage or burden on, the claimant. The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability.

The principal object of certain of the prohibited grounds is the elimination of discrimination resulting from the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which the disabled will never be able to gain access. It is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not prevent the disabled from participation, which results in discrimination against the disabled. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning is simply inappropriate here. It is recognition of the actual characteristics and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

Disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. Disability means vastly different things, however, depending upon the individual and the context. This produces, among other things, the "difference dilemma" whereby segregation can be both protective of equality and violative of equality depending upon the person and the state of disability.

The Tribunal set out to decide which placement was superior, balanced the child's various educational interests taking into account her special needs, and concluded that the best possible placement was in the special class. It also alluded to the requirement of ongoing assessment of the child's best interests so that any changes in her needs could be reflected in the placement. A decision reached after such an approach could not be considered a burden or a disadvantage imposed on a child.

For a child who is young or unable to communicate his or her needs or wishes, equality rights are being exercised on that child's behalf, usually by his or her parents. Moreover, the requirements for respecting these rights in this setting are decided by adults who have authority over this child. The decision-making body, therefore, must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective--one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child's best interests. A decision-making body must determine whether the integrated setting can be adapted to meet the special needs of an exceptional child. Where this is not possible, that is where aspects of the integrated setting which cannot reasonably be changed interfere with meeting the child's special needs, the principle of accommodation will require a special education placement outside of this setting. For older children and those who are able to communicate their wishes and needs, their own views will play an important role in the determination of best interests. For younger children and for persons who are either incapable of making a choice or have a very limited means of communicating their wishes, the decision-maker must make this determination on the basis of the other evidence before it.

The application of a test designed to secure what is in the best interests of the child will best achieve that objective if the test is unencumbered by a *Charter*-mandated presumption favouring integration which could be displaced if the parents consented to a segregated placement. The operation of a presumption tends to render proceedings more technical and adversarial. Moreover, there is a risk that in some circumstances, the decision may be made by default rather than on the merits as to what is in the best interests of the child. That a presumption as to the best interests of a child is a constitutional imperative must be questioned given that it could be automatically displaced by the decision of the child's parents. This Court has held that the parents' view of their child's best interests is not dispositive of the question.

The child's placement which was confirmed by the Tribunal did not constitute the imposition of a burden or disadvantage nor did it constitute the withholding of a benefit or advantage. Neither the Tribunal's order nor its reasoning can be construed as a violation of s. 15. The approach that the Tribunal took is one that is authorized by the general language of s. 8(3) of the Act. In the circumstances, it is unnecessary and undesirable to consider whether the general language of s. 8(3) or the Regulations would authorize some other approach which might violate s. 15(1).

Per: **Lamer C.J.** and Gonthier J.: Sopinka J.'s analysis of the arguments made under s. 15(1) of the *Charter* and his conclusion that the child's equality rights were not violated were agreed with.

Slaight Communications Inc. v. Davidson was incorrectly applied below in that the Court of Appeal found the constitutional imperfection of the *Education Act* to reside in what the Act does not say--the statute must authorize what it does not explicitly prohibit, including unconstitutional conduct. *Slaight Communications*, however, held exactly the opposite--that statutory silences should be read down to not authorize breaches of the *Charter*, unless this cannot be done because such an authorization arises by necessary implication. Whatever section of the Act or of Regulation 305 grants the authority to the Tribunal to place exceptional students, *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*.

Cases Cited

By Sopinka J.

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 1, 123 D.L.R. (4th) 43, 77 O.A.C. 368, 27 C.R.R. (2d) 53, [1995] O.J. No. 315 (QL), allowing an appeal from a judgment of the Divisional Court (1994), 71 O.A.C. 69, [1994] O.J. No. 203 (QL), dismissing an application for judicial review of a decision of the Ontario Special Education Tribunal. Appeal allowed.

Christopher G. Riggs, Q.C., *Andrea F. Raso* and *Brenda J. Bowlby*, for the appellant the Brant County Board of Education.

Dennis W. Brown, *Robert E. Charney* and *John Zarudny*, for the appellant the Attorney General for Ontario.

Stephen Goudge, Q C., and *Janet L. Budgell*, for the respondents.

Isabelle Harnois, for the intervener the Attorney General of Quebec.

Written submissions only by *Lisa Mrozinski* for the intervener the Attorney General of British Columbia.

Written submission only by *Cheryl Milne* for the interveners Canadian Foundation for Children, Youth and the Law and the Learning Disabilities Association of Ontario.

Brenda J. Bowlby, for the intervener the Ontario Public School Boards' Association.

W.I.C. Binnie, Q.C., and *Robert Fenton*, for the intervener the Down Syndrome Association of Ontario.

David W. Kent, *Melanie A. Yach* and *Geri Sanson*, for the interveners the Council of Canadians with Disabilities, la Confédération des organismes de personnes handicappées du Québec, the Canadian Association for Community Living and People First of Canada.

Mary Eberts and *Lucy K. McSweeney*, for the intervener the Easter Seal Society of Canada.

Philippe Robert de Massy, for the intervener la Commission des droits de la personne et des droits de la jeunesse.

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

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SUPREME COURT OF CANADA

THE BRANT COUNTY BOARD OF EDUCATION
and THE ATTORNEY GENERAL FOR ONTARIO

v.

CAROL EATON and CLAYTON EATON

- and -

THE ATTORNEY GENERAL OF QUEBEC,
THE ATTORNEY GENERAL OF BRITISH COLUMBIA,
THE CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW,
THE LEARNING DISABILITIES ASSOCIATION OF ONTARIO,
THE ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION,
THE DOWN SYNDROME ASSOCIATION OF ONTARIO,
THE COUNCIL OF CANADIANS WITH DISABILITIES,
LA CONFÉDERATION DES ORGANISMES DE PERSONNES HANDICAPÉES DU QUÉBEC,
THE CANADIAN ASSOCIATION FOR COMMUNITY LIVING,
PEOPLE FIRST OF CANADA,
THE EASTER SEAL SOCIETY,
LA COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

CORAM: The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

SOPINKA J.

The issue in this case is whether a decision of the Ontario Special Education Tribunal (the "Tribunal") confirming the placement of a disabled child in a special education class contrary to the wishes of her parents contravenes the equality provisions of s 15(1) of the *Canadian Charter of Rights and Freedoms*. The Court of

Appeal held that it did. I have concluded that the decision of the Tribunal was based on what was in the best interests of the child and that in the circumstances no violation of s. 15(1) of the *Charter* occurred. The Court of Appeal went on to consider the validity of s. 8 of the *Education Act*, R.S.O. 1990, c. E.2 (the Act) and found it to be constitutionally deficient in authorizing the Tribunal to proceed as it did. No notice of a constitutional question had been given in accordance with s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I conclude that the constitutional issue was not open to the Court of Appeal but, in any event, in view of the fact that the decision of the Tribunal complied with s. 15(1) of the *Charter*, it was not necessary to consider whether s. 8 was constitutionally valid.

Facts

6 The respondents, Carol and Clayton Eaton, are the parents of Emily Eaton, a 12-year-old girl with cerebral palsy. Emily is unable to speak, or to use sign language meaningfully. She has no established alternative communication system. She has some visual impairment. Although she can bear her own weight and can walk a short distance with the aid of a walker, she mostly uses a wheelchair.

7 When she began kindergarten, Emily attended Maple Avenue School, which is her local public school. The Identification, Placement, and Review Committee ("IPRC") of the Brant County Board of Education (the "appellant") identified Emily as an "exceptional pupil" and, at the request of her parents, determined that she should be placed on a trial basis in her neighbourhood school. A

full-time educational assistant, whose principal function was to attend to Emily's special needs, was assigned to her classroom. At the end of the school year, the IPRC determined that Emily would continue in kindergarten for the following year. This arrangement was continued into Grade 1. A number of concerns arose as to the appropriateness of her continued placement in a regular classroom. The teachers and assistants concluded, after three years of experience, that the placement was not in Emily's best interests and might well harm her.

8 The IPRC determined that Emily should be placed in a special education class. Emily's parents appealed this decision to a Special Education Appeal Board, which unanimously confirmed the IPRC decision. The parents appealed again to the Tribunal, which also unanimously confirmed the decision. The Tribunal heard from a large group of witnesses and made numerous findings of fact which are described below. The parents then applied for judicial review to the Divisional Court, Ontario Court of Justice (General Division), which dismissed the application. However, the Court of Appeal allowed the subsequent appeal and set aside the Tribunal's order. The court held that s. 8 of the Act should be read to include a direction that, unless the parents of a disabled child consent to the placement of that child in a segregated environment, the appellant must provide a placement that is the least exclusionary from the mainstream and still reasonably capable of meeting the child's special needs. The court also ordered that the matter be remitted to a differently constituted Tribunal for rehearing. With leave of this Court, the appellant appealed from that decision. Shortly after the conclusion of argument, the Court gave judgment allowing the appeal with costs and with reasons to follow.

II. Relevant Statutory Provisions

9 In the *Education Act*, exceptional pupils are defined as follows:

> **1.**–(1) ...
>
> "exceptional pupil" means a pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program by a committee ... of the board.

10 Section 8(3) sets out the Minister of Education's responsibility for the provision of special education in Ontario:

> **8.** ...
>
> (3) The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement, and for these purposes the Minister shall,
>
> (a) require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and
>
> (b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.

11 Regulation 305 (Special Education Identification Placement and Review Committees and Appeals), R.R.O. 1990, under the *Education Act*, requires that every board of education set up an IPRC and establishes the process by which exceptional students are identified and placed, and the process by which parents may appeal the IPRC's decision.

> 6.–(1) An exceptional pupil shall not be placed in a special education program without the written consent of a parent of the pupil.
>
> (2) Where a parent of an exceptional pupil,
>
> (a) refuses or fails to consent to the placement recommended by a committee and to give notice of appeal under section 4; and
>
> (b) has not instituted proceedings in respect of the determinations of the committee within thirty days of the date of the written statement prepared by the committee,
>
> the board may direct the appropriate principal to place the exceptional pupil as recommended by the committee and to notify a parent of the pupil of the action that has been taken.

12 The *Courts of Justice Act*, s.109(1), states that:

> **109.**–(1) Where the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature or of a regulation or by-law made thereunder is in question, the Act, regulation or by-law shall not be adjudged to be invalid or inapplicable unless notice has been served on the Attorney General of Canada and the Attorney General of Ontario in accordance with subsection (2).

13 The *Canadian Charter of Rights and Freedoms* states that;

> **15.**(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

III. Judgments in Appeal

Tribunal

14 The respondents requested that the Tribunal set aside the placement decision of the IPRC, and asked that the Tribunal direct that Emily be placed full time, in a regular, age-appropriate class, with full accommodation of her special needs. The Tribunal heard from the respondents, speech, occupational and physical therapists familiar with Emily, parents of some of Emily's classmates, a witness who, himself, had received a segregated education before high school, Emily's teachers, special assistants and principal at Maple Avenue School, the Board Superintendent, and a special education teacher with the Board.

15 The Tribunal stated the principal question as "whether Emily Eaton's special needs can be met best in a regular class or in a special class." The Tribunal considered the wishes of Emily's parents; the empirical evidence available from Emily's three school years in a regular classroom setting; the evidence from the

literature on placement; the testimony of experts in the matter of classroom placement; the Ontario Ministry of Education and Training's proposed directions regarding the integration of exceptional pupils; and the *Charter* and Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, in reaching its conclusion that the IPRC placement decision was the best placement for Emily.

16 The Tribunal observed at the outset that it is the extent of Emily's special needs which provokes consideration of a special placement, and not the fact that her needs are different from the mainstream. The Tribunal then reviewed Emily's needs under a number of headings and made numerous findings of fact upon which it based its decision.

17 Intellectual and Academic Needs: Despite the difficulty in assessing Emily's intellectual abilities owing to her inability to communicate, the Tribunal nevertheless found that there was considerable evidence that Emily had a profound learning deficit, and that there was a wide and significant intellectual and academic gap between her and her peers. The Tribunal considered the testimony presented on the subject of the "parallel curriculum" approach in which an adapted curriculum is delivered in the regular classroom setting. However, the Tribunal concluded that "[e]xperience demonstrates that in practice, "parallel curriculum" benefits the receiver when it is realistically parallel. But when a curriculum is so adapted and modified for an individual that the similarity - the parallelism - is objectively unidentifiable, the adaptation becomes mere artifice and serves only to isolate the student." The Tribunal concluded that it was clear from the evidence that "a 'parallel' learning program

specifically designed to meet [Emily's] intellectual needs, isolates her in a disserving and potentially insidious way."

18 Communication Needs: Emily has very limited abilities to communicate. Carol Eaton and Emily's educational assistants testified "that to learn sign, Emily needs repetitive, hand-over-hand instruction". The evidence suggested that despite this approach, Emily cannot yet communicate using sign. The importance of communication was emphasized by the Eatons' witness, Robert Williams, an adult with cerebral palsy who communicates by means of assistive technology. The Tribunal concluded that "Emily's need to communicate is going to be met only with very individualized, highly specialized, extremely intense, one-on-one instruction. Because this need is of such over-riding importance for Emily, it makes sense to address it, at least initially, and until she demonstrates some minimal competence, in a setting where there will be maximum opportunity for such instruction."

19 Emotional and Social Needs: The Tribunal relied on the testimony of Emily's parents, teachers and educational assistants in assessing these needs. The teachers and educational assistants testified that Emily's classmates tend not to involve themselves with Emily in class or at play. The Tribunal concluded that "...although the empirical evidence is that there is limited, if any, interaction between Emily and her classmates, it may be possible that some of her social and emotional needs are nevertheless being met. Because she does not communicate effectively, it is conceivable that she is enjoying the experience and cannot tell us. However, her classroom behaviours--the increasing incidents of crying, sleeping and vocalization--

suggest that this is not the case. There appears to be little if any, social interaction between Emily and her peers in the regular class."

20 Physical and Personal Safety Needs: The Tribunal found that Emily's physical disabilities by themselves ought not to be a deciding factor in evaluating whether her needs can be met best in a regular or special class since it is reasonable to expect that the adaptations necessary would be made in order to accommodate Emily in the regular classroom even if a special classroom may be better designed to address her special physical needs. However, the Tribunal was concerned with Emily's tendency to place objects in her mouth. Emily's parents asserted that they were not concerned, and were confident that Emily would not swallow harmful objects. The Tribunal found that "a home setting that is adjusted to a child with pervasive muscular dysfunction, and idiosyncratic communication abilities, and who regularly mouths objects, is significantly different from a regular classroom setting." The Tribunal found that it was not reasonably possible to cleanse the classroom of mouthable materials or to establish the level of adult supervision necessary in the regular, integrated classroom.

21 The Tribunal then considered Emily's three years of experience in the integrated classroom. The Tribunal found "that the desired outcome of integration for an exceptional child, namely, fulfilment of intellectual and especially social and emotional needs through regular and natural interaction, has not been realized in Emily's case." It observed that the frequency and intensity of Emily's expressions of

discontent – crying, sleeping, vocalizing – had been increasing over the three-year period.

22 The Tribunal agreed that integration confers great psychological benefit on disabled children, but that in Emily's case, the three years of experience in the regular classroom with the adult intervention necessary to meet her profound needs even minimally "has the counter-productive effect of isolating her, of segregating her in the theoretically integrated setting." The Tribunal found that "this is a far more insidious outcome than would obtain in a special class".

23 Accordingly, the Tribunal concluded that "[i]t is our opinion that where a school board recommends placement of a child with special needs in a special class, contrary to the wishes of the parents, and where the school board has already made extensive and significant effort to accommodate the parents' wishes by attempting to meet that child's needs in a regular class with appropriate modifications and supports, and where empirical, objective evidence demonstrates that the child's needs are not being met in the regular class, that school board is not in violation of the *Charter* or the OHRC [Ontario *Human Rights Code*]."

Ontario Divisional Court (Adams J. for the Court) (1994), 71 O.A.C. 69

24 The respondents applied for judicial review of the Tribunal's decision and sought to quash it on several grounds. First, they argued that the Tribunal was not expert since it was protected by a privative clause of the "final and binding" style

only. Second, the Tribunal committed the following errors: it conducted its own literature search after the hearing, and it failed to place a legal burden (arising from the *Charter* and Ontario *Human Rights Code*) on the Board to establish that a special education class was clearly better than a regular class for Emily.

25 The court found that the specialized Tribunal had dealt comprehensively and thoughtfully with all the issues raised before it and with the central focus being what was best for Emily. Adams J. stated that the Tribunal had accepted that a regular class was to be preferred where consistent with the child's best interests and had been conscious of the *Charter* and Ontario *Human Rights Code*.

26 The court held that the Tribunal was worthy of curial deference given the structure of the legislation, the subject matter, and the composition of the Tribunal, but in any event there was no error of law. The court held that the Tribunal's post-hearing review of "the literature" to which the experts generally referred did nothing more than confirm its assessment of the evidence before it and the various admissions of the applicants' experts with regard to that research. Accordingly there was no denial of natural justice.

27 The court rejected the idea that the *Charter* creates a presumption in favour of one pedagogical theory over another. The issue of burden was academic in this case because the Tribunal found that the evidence clearly established that Emily's best interests would be better served in the special class.

28 The court echoed the Tribunal's reminder to the School Board that this placement did not relieve the Board and the parents of the obligation to collaborate creatively in a continuing effort to meet Emily's present and future needs.

Court of Appeal (Arbour J.A. for the Court) (1995), 22 O.R. (3d) 1

29 The respondents raised several issues on appeal before the Ontario Court of Appeal. First, they contended that the Divisional Court erred in its application of the *Charter* to the process of placing disabled students in appropriate educational settings. Second, they raised a number of legal errors committed by the Tribunal which, they submitted, ought to have been reviewed by the Divisional Court.

30 Arbour J.A. discussed the scope of judicial review appropriate in this case. Owing to the privative clause, the subject matter of the legislation, and the composition of the Tribunal, she held that the Tribunal was worthy of curial deference. However, in constitutional matters, she held that the standard of review was one of correctness.

31 Arbour J.A. dealt with the alleged errors of law first and concluded at p. 8 that although the Tribunal erred in conducting its own review of the literature after the hearing, this error of law "does not come within the ambit of reviewable error within the standard set out above since the analysis conducted by the Tribunal does little more than confirm that there is an ongoing pedagogical debate about the various models for the placement of disabled students, and that, solely from the pedagogical point of view,

integration has not yet been proven superior." Consequently, even if the error was reviewable it would not result in the invalidation of the decision.

32 Arbour J.A. then turned to the constitutional issue. She noted that the respondents submitted that the *Charter* and the Ontario *Human Rights Code* both require a presumption in favour of the integration of disabled students, and that, therefore, the Board had to establish why Emily's needs would be better met in a segregated classroom. Arbour J.A. found at p. 9 that the Tribunal asked itself "'whether Emily Eaton's special needs can be met best in a regular class or in a special class'".

33 Arbour J.A. held that the Tribunal clearly rejected any notion of a presumption in favour of inclusion, and that the Tribunal simply found that the integrated classroom had not been successful. The Tribunal never answered the question as it framed it, namely, whether Emily's needs could be met best in a regular class or a special class.

34 The respondents contended that the "best interests of the child" test is not satisfactory in determining the appropriate placement for a disabled child because this test could prove insensitive to the equality rights of the child. They stated that there ought to be a presumption in favour of integration. Accordingly, Arbour J.A. looked at whether Emily's placement in a special classroom amounted to discrimination within the meaning of s. 15 of the *Charter*. She found that Emily was prevented from attending the regular class because of her disability. Thus, a distinction had clearly

been made on a prohibited ground. Arbour J.A. then turned to the question of whether the distinction resulted in the imposition of a burden or disadvantage. She held at p. 13 that "[a]lthough one should not ignore the intended recipient's perception of whether the measure designed to enhance her equality is in fact a burden rather than a benefit, that subjective perception is not in itself determinative of the issue." Arbour J.A. applied *R. v. Turpin*, [1989] 1 S.C.R. 1296, in which scrutiny of the larger social, historical and political context was mandated, and found that the history of disabled persons, which the *Charter* seeks to redress and prevent, is a history of exclusion from the mainstream of society. In fact, "[i]n all areas of communal life, the goal pursued by and on behalf of disabled persons in the last few decades has been integration and inclusion" (at p. 15). Arbour J.A. concluded that, when analysed in its larger context, a segregated educational placement is a burden or disadvantage, and is therefore discriminatory within the meaning of s. 15.

35 Arbour J.A. stated at pp. 15-16:

> Inclusion into the main school population is a benefit to Emily because without it, she would have fewer opportunities to learn how other children work and how they live.
>
> ...
>
> When a measure is offered to a disabled person, allegedly in order to provide that person with her true equality entitlement, and that measure is one of exclusion, segregation, and isolation from the mainstream, that measure, in its broad social and historical context, is properly labelled a burden or a disadvantage.

36 The School Board suggested that distinctions based on disability are not like those based on race or sex in the context of access to education because equality

in education requires that the students be treated according to their actual abilities or disabilities. Arbour J.A. criticized this argument saying that although it may be easier to justify differences in access to educational facilities on the basis of disability than it would be if differences were based on race, this analysis must belong to s. 1. There is no reason to create a hierarchy of prohibited grounds within s. 15 which would elevate distinctions based on some to a more suspect category than others. Arbour J.A. stated at p. 17 that "[i]f anything, one should be wary of accepting as inevitable and innocuous classification on the basis of ... disability, without the rigorous analysis required by s. 15.

37 The Eatons stated that they were not attacking the *Education Act*, because, in the appropriate case and using the appropriate test, a Tribunal could order that a child like Emily be put in a special segregated class. They were attacking only the reasoning of the Tribunal. Not only did the respondents not attack the *Education Act*, but they also expressly disavowed any intention of doing so. No motion pursuant to s. 109 of the *Courts of Justice Act* had been given.

38 Arbour J.A. expressed considerable difficulty with this argument. She held that if it is true that the *Charter* mandates a presumption in favour of integration, then the deficiency must be in the failure of the *Education Act* to so provide. She stated at p. 19 that the Act infringed s. 15(1) because it "provides no impediment to the method and reasoning employed by the ...Tribunal in the present case...."

39 Arbour J.A. went on to consider s. 1 of the *Charter* and concluded that, "since it [the *Education Act*] permits a *Charter* infringement, without further guidance, I cannot say that the Act infringes the equality rights of disabled students as little as possible".

40 Arbour J.A. found that the appropriate remedy was to declare that s. 8 of the Act should be read to include a direction that, unless the parents of a disabled child consent to the placement of that child in a segregated environment, the school board must provide a placement that is the least exclusionary from the mainstream and still reasonably capable of meeting the child's special needs.

41 Arbour J.A. held that the Tribunal would not have inevitably arrived at the same conclusion had it appreciated that the *Charter* required that segregated placement be used only as a last resort. Therefore Arbour J.A. directed that the matter be remitted to a differently constituted Tribunal for re-hearing in accordance with the constitutional principles set out in her reasons.

IV. Issues

42 This appeal raises the following issues:

1. Did the Court of Appeal err in proceeding, *proprio motu* and in the absence of the required notice under s. 109 of the *Courts of Justice Act* to review the constitutional validity of the *Education Act*?

2. Did the Court of Appeal err in finding that the decision of the Tribunal contravened s. 15 of the *Charter*?

43 The other issues raised below were not pursued in this Court.

V. Analysis

The Constitutionality of the Education Act and Regulations

44 Section 109 of the *Courts of Justice Act* provides that:

> **109.**–(1) Where the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature or of a regulation or by-law made thereunder is in question, the Act, regulation or by-law shall not be adjudged to be invalid or inapplicable unless notice has been served on the Attorney General of Canada and the Attorney General of Ontario in accordance with subsection (2).

45 No notice in compliance with this section was given either in the Divisional Court or in the Court of Appeal and no issue was raised with respect to the constitutionality of the Act. Moreover, in the Court of Appeal the respondents expressly disavowed any intention of attacking the Act or the Regulations. The Attorney General for Ontario relied on the respondents' position in the courts below and made no submissions on the constitutionality of the Act and had no opportunity to adduce evidence or make submissions to support the Act under s. 1 of the *Charter*. I am satisfied that the Attorney General for Ontario was prejudiced by the absence of notice.

46 In the order of the Chief Justice of this Court dated February 13, 1996, he stated:

> The Court of Appeal *proprio motu* found that s. 8 of the Act was a restriction to s. 15 of the *Charter* and proceeded to salvage the section by reading certain words into it. This initiative as regards s. 15 was not taken as regards s. 7.
>
> As the law as it now stands has been amended through reading in, in order to salvage the restriction to s. 15, it is for this reason and this reason only that I will state the following constitutional questions:
>
> 1. Do s. 8(3) of the *Education Act*, R.S.O. 1990, c. E.2, as amended, and s. 6 of *Regulation 305* of the *Education Act*, infringe Emily Eaton's equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
>
> 2. If the answer to question 1 is in the affirmative, are s. 8(3) of the *Education Act*, and s. 6 of *Regulation 305* of the *Education Act*, justified as a reasonable limit under s. 1 of the *Canadian Charter of Rights and Freedoms*?

47 The order stating constitutional questions did not purport to resolve the question as to whether the decision of the Court of Appeal to raise them was valid in the absence of notice or whether this Court would entertain them. The fact that constitutional questions are stated does not oblige the Court to deal with them.

48 The purpose of s. 109 is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a

law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.

49 While this Court has not yet addressed the issue of the legal effect of the absence of notice, it has been addressed by other courts. The results are conflicting. One strand of decision favours the view that in the absence of notice the decision is *ipso facto* invalid, while the other strand holds that a decision in the absence of notice is voidable upon a showing of prejudice.

50 In *N (D.) v. New Brunswick (Minister of Health & Community Services)* (1992), 127 N.B.R. (2d) 383, the Court of Appeal considered a situation in which the trial judge, on his own motion, set aside provisions of the *Family Services Act*, S.N.B. 1980, c. F-2.2, as contrary to the *Charter*. There had been no notice under s. 22 of the *Judicature Act*, R.S.N.B. 1973 c. J-2, as required. The Court of Appeal held, at p. 388, that "the wording of s. 22(3) leaves no doubt that notice is mandatory. For this reason, the trial judge ought not to have decided the case on a *Charter* issue raised on his own initiative without notice to the Attorneys General".

51 However, in *Ontario (Workers' Compensation Board) v. Mandelbaum, Spergel Inc.* (1993), 12 O.R. (3d) 385, a majority of the Ontario Court of Appeal came

to a different conclusion, Arbour J.A. dissenting. Grange J.A. considered an argument that, pursuant to *N.(D.) v. New Brunswick (Minister of Health & Community Services)*, *supra*, s. 109 notice was mandatory so that failure to give notice rendered a decision a nullity. He found further support for this position in the short judgment of Callaghan A.C.J.H.C. in *Roberts v. Sudbury (City)*, Ont. H.C., June 22, 1987, unreported, where Callaghan A.C.J.H.C. allowed an appeal from a decision made without notice and sent the matter back to the District Court for a rehearing. Grange J.A. also reviewed two Saskatchewan cases, *R. v. Beare* and *R. v. Higgins* heard together and both reported at (1987), 31 C.R.R. 118 (Sask. C.A.). In one case notice had been served, while in the other it had not. The cases concerned the validity of the *Identification of Criminals Act*, R.S.C. 1970, c. I-1. In both cases the trial court upheld the validity of the Act. The Court of Appeal found that there was no prejudice because the Attorney General was able to present an argument in the *Higgins* case that would have applied to the *Beare* case as well. Therefore, there was no actual prejudice in the *Beare* case resulting from the failure to file notice under *The Constitutional Questions Act*, R.S.S. 1978, c. C-29. Grange J.A. also referred to *Citation Industries Ltd. v. C.J.A., Loc. 1928* (1988), 53 D.L.R. (4th) 360 (B.C.C.A.), in which the Court of Appeal dealt with a similar section under the *Constitutional Question Act*, R.S.B.C. 1979, c. 63. In that case, all counsel asked that the matter be heard on the merits even though notice had not been given to the provincial Attorney General. Seaton J.A. agreed to hear the merits because (at p. 363) "[a]t this stage nothing turns on the absence of earlier notice". Grange J.A. observed (at pp. 390-91) that:

> Neither of the courts in Saskatchewan or British Columbia specifically dealt with the argument that the judgments under appeal were nullities.

> Nevertheless, both relied heavily on a lack of prejudice to the Attorney General in his argument on appeal. In the case at bar, counsel for the Attorney General was invited to show prejudice and was unable to do so. In my view, that should be the controlling factor. The failure to give notice was entirely inadvertent.... We have heard full argument on the question. Nothing would be gained by sending it back but repetition and expense.

52 Arbour J.A. dissented. She held that s. 109 creates a mandatory requirement of notice, and that the presence or absence of prejudice is irrelevant. "An adjudication made in violation of that mandatory language must be considered a nullity" (at p. 394).

53 In view of the purpose of s. 109 of the *Courts of Justice Act*, I am inclined to agree with the opinion of the New Brunswick Court of Appeal in *N. (D.) v. New Brunswick (Minister of Health and Community Services)*, *supra*, and Arbour J.A. dissenting in *Mandelbaum*, *supra*, that the provision is mandatory and failure to give the notice invalidates a decision made in its absence without a showing of prejudice. It seems to me that the absence of notice is in itself prejudicial to the public interest. I am not reassured that the Attorney General will invariably be in a position to explain after the fact what steps might have been taken if timely notice had been given. As a result, there is a risk that in some cases a statutory provision may fall by default.

54 There is, of course, room for interpretation of s. 109 and there may be cases in which the failure to serve a written notice is not fatal either because the Attorney General consents to the issue's being dealt with or there has been a *de facto* notice which is the equivalent of a written notice. It is not, however, necessary to express a

final opinion on these questions in that I am satisfied that under either strand of authority the decision of the Court of Appeal is invalid. No notice or any equivalent was given in this case and in fact the Attorney General and the courts had no reason to believe that the Act was under attack. Clearly, s. 109 was not complied with and the Attorney General was seriously prejudiced by the absence of notice.

55 It was suggested that notwithstanding the above, this Court should entertain the question of the validity of the provisions of the Act which were addressed by Arbour J.A. It might be suggested that a refusal to do so would be based on a technical ground. The absence of notice and the absence of a record developed in the courts and tribunals below are far from technical defects. Moreover, as a general rule, we are only authorized to make the disposition that the court appealed from ought to have made (*Supreme Court Act*, R.S.C., 1985, c. S-26, s. 45). There is, however, an additional reason for not dealing with the constitutionality of the Act. Arbour J.A. felt constrained to do so because she was of the view that the decision of the Tribunal was discriminatory and violated s. 15(1) of the *Charter*. On the basis of *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, she felt obliged to consider whether the Act purported to authorize this result. I am respectfully of the opinion that Arbour J.A. erred in this regard. If she had concluded, as I do, that the reasoning and decision of the Tribunal did not discriminate contrary to s. 15 of the *Charter*, it would have been unnecessary for her, and it is unnecessary for me, to consider the constitutional validity of the Act.

56 I will turn to the issue of the validity of the decision of the Tribunal.

Does the Decision of the Tribunal Contravene s. 15 of the Charter?

57 The placement of children in special education programs and services is carried out pursuant to the provisions of s. 8 of the *Education Act* and the Regulations thereunder. Prior to 1980, there was no mandatory requirement that school boards provide such programs and a disabled person could be denied status as a resident pupil at elementary school if that person was "unable by reason of mental or physical handicap to profit by instruction in an elementary school" (*The Education Act, 1974*, S.O. 1974, c. 109, s. 34(1)).

58 A change in attitude with respect to disabled persons was initiated by the report of Walter B. Williston entitled *Present Arrangements for the Care and Supervision of Mentally Retarded Persons in Ontario* (1971). With it came a recognition of the desirability of integration and de-institutionalization. The change in attitude was reflected in changes in the *Education Act*.

59 The current legal framework for the education of exceptional pupils was adopted on December 12, 1980 when Royal Assent was given to *The Education Amendment Act, 1980*, S.O. 1980, c. 61. The Act and Regulations made it mandatory for all school boards to provide special education programs and services for exceptional pupils. The policy of the Ministry of Education is that "[e]very exceptional child has the right to be part of the mainstream of education to the extent to which it is profitable" (*Special Education Information Handbook* (1984)).

60 Ontario Regulation 305, R.R.O. 1990, adopted as O. Reg. 554/81, deals exclusively with Special Identification Placement and Review Committees and appeals. It provides for the identification of exceptional pupils, a determination of their needs and placement into an educational setting where special education programs and services can be delivered. The specific program modification and services required by each exceptional pupil are outlined in the pupil's education plan. Parents and guardians are involved in the identification and placement process and provision is made for appeal of the identification with a placement decision of the board.

61 This is the process that culminated in a decision by the Tribunal in the present case. After a three-year trial period in a regular class, the IPRC, after consultation with teacher assistants and Emily's parents, determined that she should be placed in a special education class. Emily's parents appealed to a Special Education Appeal Board which unanimously confirmed the IPRC decision. The parents appealed again to the Ontario Special Education Tribunal which unanimously confirmed the decision of the Special Education Appeal Board in a hearing lasting 21 days.

62 While there has not been unanimity in the judgments of the Court with respect to all the principles relating to the application of s. 15 of the *Charter*, I believe that the issue in this case can be resolved on the basis of principles in respect of which there is no disagreement. There is general agreement that before a violation of s. 15 can be found, the claimant must establish that the impugned provision creates a

distinction on a prohibited or analogous ground which withholds an advantage or benefit from, or imposes a disadvantage or burden on, the claimant.

63 In *Miron v. Trudel*, [1995] 2 S.C.R. 418, at p. 485, McLachlin J. stated:

> The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established. The onus then shifts to the party seeking to uphold the law, usually the state, to justify the discrimination as "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*.

At p. 487 she added:

> Furthermore, if the law distinguishes on an enumerated or analogous ground but does not have the effect of imposing a real disadvantage in the social and political context of the claim, it may similarly be found not to violate s. 15: *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872.

64 In *Egan v. Canada*, [1995] 2 S.C.R. 513, at p. 584, Cory and Iacobucci JJ. stated:

> The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether

> the challenged law has drawn a distinction between the claimant and others, based on personal characteristics.
>
> Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others.

65 Both Gonthier J. (the Chief Justice and La Forest and Major JJ. concurring) in *Miron* and La Forest J. (the Chief Justice and Gonthier and Major JJ. concurring) in *Egan* were of the view that a distinction must be shown to be based on irrelevant personal characteristics. On this view, relevance to the legislative goal or functional value of the legislation where such is not itself discriminatory can negate discrimination. The majority view as expressed in *Miron* was that relevance may assist as a factor in showing that the case falls into the rare class of case in which a distinction on a prohibited or analogous ground does not constitute discrimination. While this does not purport to be an exhaustive treatment of the differences between the majority and the minority on this point, it is a sufficient synopsis of them for the purposes of this appeal.

66 The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability. Avoidance of

discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 169, McIntyre J. stated that the "accommodation of differences ... is the true essence of equality". This emphasizes that the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.

67 The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution

of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

68 The interplay of these objectives relating to disability is illustrated by the evolution of special education in Ontario. The earlier policy of exclusion to which I referred was influenced in large part by a stereotypical attitude to disabled persons that they could not function in a system designed for the general population. No account was taken of the true characteristics of individual members of the disabled population, nor was any attempt made to accommodate these characteristics. With the change in attitude influenced by the Williston Report and other developments, the policy shifted to one which assessed the true characteristics of disabled persons with a view to accommodating them. Integration was the preferred accommodation but if the pupil could not benefit from integration a special program was designed to enable disabled pupils to receive the benefits of education which were available to others.

69 It follows that disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. However, with respect to disability, this ground means vastly different things depending upon the individual and the context. This produces, among other things, the "difference dilemma" referred to by the Interveners whereby

segregation can be both protective of equality and violative of equality depending upon the person and the state of disability. In some cases, special education is a necessary adaptation of the mainstream world which enables some disabled pupils access to the learning environment they need in order to have an equal opportunity in education. While integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality. Schools focussed on the needs of the blind or deaf, and special education for students with learning disabilities indicate the positive aspects of segregated education placement. Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides.

70 These are the basic principles in respect of which the Tribunal's decision should be tested in order to determine whether that decision complies with s. 15(1). In applying them, I do not see any purpose in distinguishing between the order of the Tribunal and the reasons for that order. That was a distinction that was sought to be made in the Court of Appeal but, in my view, the reasons and the order are to the same effect and cannot be dealt with separately in this case. Either both are valid, as I conclude, or both are invalid.

The Tribunal's Decision

A Distinction

71 It is quite clear that a distinction is being made under the Act between "exceptional" children and others. Other children are placed in the integrated classes. Exceptional children, in some cases, face an inquiry into their placement in the integrated or special classes. It is clear that the distinction between "exceptional" and other children is based on the disability of the individual child.

Burden

72 In its thorough and careful consideration of this matter, the Tribunal sought to determine the placement that would be in the best interests of Emily from the standpoint of receiving the benefits that an education provides. In arriving at the conclusion, the Tribunal considered Emily's special needs and strove to fashion a placement that would accommodate those special needs and enable her to benefit from the services that an educational program offers. The Tribunal took into account the great psychological benefit that integration offers but found, based on the three years experience in a regular class, that integration had had "the counter-productive effect of isolating her, of segregating her in the theoretically integrated setting".

73 Moreover, in deciding on the appropriate placement, the Tribunal considered each of the various categories of needs relevant to education. It found that it was not possible to meet Emily's intellectual and academic needs in the regular class without "isolating her in a disserving and potentially insidious way". It found that Emily's communication needs would be best met in the special class. It expressed doubt as to whether her emotional and social needs were being met in the regular class.

While it is not clear that the special class would meet these particular needs better, it did appear to the Tribunal that there was little, if any, social interaction between Emily and her peers in the regular class. Although not central to the Tribunal's decision, it also found that certain adaptations to the classroom, such as the provision of a special desk, physical assistance and extra supervision from educational assistants were reasonable, but that it would not be reasonably possible to accommodate Emily's particular safety needs without radically altering the classroom or establishing a very isolating level of adult supervision.

74 The Court of Appeal, at p. 9, was of the view that the Tribunal stated the principal issue as "'whether Emily Eaton's special needs can be met best in a regular class or in a special class'", but that it never actually answered this question. Rather, the Court of Appeal held that the Tribunal found that the integrated placement was inadequate without finding that the segregated placement would be any better. It held that the Tribunal ought not to have ordered a segregated placement unless it found that the segregated placement was better than the integrated placement.

75 In my view, the Tribunal did answer the question which it set itself, namely, which placement was superior. While it did not specifically state that the segregated placement was superior to the integrated placement, its findings clearly indicated this conclusion. The Tribunal grouped its findings into several categories of needs and interests implicated in education. With respect to Emily's communication needs, the Tribunal clearly found that "[b]ecause this need is of such over-riding importance for Emily, it makes sense to address it, at least initially, and until she

demonstrates some minimal competence, in a setting where there will be maximum opportunity for [individualized, highly specialized, extremely intense, one-on-one instruction]". While the Tribunal did not indicate how Emily's academic or social needs would be better met in the segregated placement than in the integrated placement, it clearly concluded that these needs were not only unsatisfied, but that she was being isolated in a "disserving and potentially insidious way". The Tribunal also found that, with respect to Emily's physical safety, the special classroom was superior to the integrated classroom. The Tribunal looked at several categories of needs and pointed out that some, including the most important for Emily, would be better met in the segregated classroom. With respect to the others, while an express conclusion was not drawn as to how the segregated classroom would be superior, the inefficacy of the integrated classroom was established.

76 The Tribunal, therefore, balanced the various educational interests of Emily Eaton, taking into account her special needs, and concluded that the best possible placement was in the special class. It is important to note that the placement proposed was in a class located in a regular school where "the special class is integrated with the regular classes through morning circle and a buddy system which may include hand-over-hand art activities, music, reading, outings such as walks and recess, special activities like assemblies, mini olympics, interactive games, including rolling balls and playing catch" according to the testimony of the teacher of the class in which the Board proposed to place Emily. In addition, the Tribunal alluded to the requirement of ongoing assessment of Emily's best interests so that any changes in her needs could be reflected in the placement. Finally, the Tribunal stated:

> ... our decision in favour of a special class placement does not relieve the school board and the parents of the obligation to collaborate creatively in a continuing effort to meet her present and future needs. Emily's is so unusual a case that unusual responses may well be necessary for her. Such achievements can only be realized through cooperation, and most important, compromise.

It seems incongruous that a decision reached after such an approach could be considered a burden or a disadvantage imposed on a child.

77 We cannot forget, however, that for a child who is young or unable to communicate his or her needs or wishes, equality rights are being exercised on his or her behalf, usually by the child's parents. Moreover, the requirements for respecting these rights in this setting are decided by adults who have authority over this child. For this reason, the decision-making body must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective, one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child's best interests. A decision-making body must determine whether the integrated setting can be adapted to meet the special needs of an exceptional child. Where this is not possible, that is, where aspects of the integrated setting which cannot reasonably be changed interfere with meeting the child's special needs, the principle of accommodation will require a special education placement outside of this setting. For older children and those who are able to communicate their wishes and needs, their own views will play an important role in the determination of best interests. For

younger children, and those like Emily, who are either incapable of making a choice or have a very limited means of communicating their wishes, the decision-maker must make this determination on the basis of the other evidence before it.

78 The Court of Appeal was of the view that the Tribunal's reasoning infringed s. 15(1) because the *Charter* mandates a presumption in favour of integration. This presumption is displaced if the parents consent to a segregated placement. This is reflected in the remedy that the Court of Appeal found to be appropriate. Section 8 of the Act was to be read to include a direction that, unless the parents of a disabled child consent to the placement of the child in a segregated environment, the presumption applies.

79 In my view, the application of a test designed to secure what is in the best interests of the child will best achieve that objective if the test is unencumbered by a presumption. The operation of a presumption tends to render proceedings more technical and adversarial. Moreover, there is a risk that in some circumstances, the decision may be made by default rather than on the merits as to what is in the best interests of the child. I would also question the view that a presumption as to the best interests of a child is a constitutional imperative when the presumption can be automatically displaced by the decision of the child's parents. Such a result runs counter to decisions of this Court that the parents' view of their child's best interests is not dispositive of the question. See *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

80 I conclude that the placement of Emily which was confirmed by the Tribunal did not constitute the imposition of a burden or disadvantage nor did it constitute the withholding of a benefit or advantage from the child. Neither the Tribunal's order nor its reasoning can be construed as a violation of s. 15. The approach that the Tribunal took is one that is authorized by the general language of s. 8(3) of the Act. I have concluded that the approach conforms with s. 15(1) of the *Charter*. In the circumstances, it is unnecessary and undesirable to consider whether the general language of s. 8(3) or the Regulations would authorize some other approach which might violate s. 15(1).

81 In the result, the appeal is allowed, the judgment of the Court of Appeal is set aside and the judgment of the Divisional Court is restored. The appellants are entitled to costs in this Court. I would not award any costs in the Court of Appeal.

SUPREME COURT OF CANADA

THE BRANT COUNTY BOARD OF EDUCATION
and THE ATTORNEY GENERAL FOR ONTARIO

v.

CAROL EATON and CLAYTON EATON

- and -

THE ATTORNEY GENERAL OF QUEBEC
THE ATTORNEY GENERAL OF BRITISH COLUMBIA
THE CANADIAN FOUNDATION FOR CHILDREN, YOUTH AND THE LAW,
THE LEARNING DISABILITIES ASSOCIATION OF ONTARIO,
THE ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION,
THE DOWN SYNDROME ASSOCIATION OF ONTARIO,
THE COUNCIL OF CANADIANS WITH DISABILITIES,
LA CONFÉDERATION DES ORGANISMES DE PERSONNES HANDICAPÉES DU QUÉBEC,
THE CANADIAN ASSOCIATION FOR COMMUNITY LIVING,
PEOPLE FIRST OF CANADA,
THE EASTER SEAL SOCIETY,
LA COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

CORAM: The Chief Justice and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

THE CHIEF JUSTICE:

1 I concur with Justice Sopinka's analysis of the arguments made under s. 15(1) of the *Canadian Charter of Rights and Freedoms* and his conclusion that there was no violation of Emily Eaton's equality rights. However, I wish to address briefly

an issue which he has chosen not to explore in light of his conclusion on s. 15(1) — the incorrect manner in which the court below applied my judgment in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, to find that the source of the alleged discrimination against Emily Eaton was the *Education Act*, R.S.O. 1990, c. E.2. Although it is, strictly speaking, unnecessary to address this question, because the *Charter* was not violated, I think it important that I address it because I do not want to leave the impression that I believe this portion of the Court of Appeal's judgment was correct.

2 To understand how the Court of Appeal erred in its application of *Slaight Communications*, it is necessary to recapitulate briefly an aspect of the proceedings in that court. After having found that the separate placement of Emily Eaton violated s. 15(1) of the *Charter*, Arbour J.A. went on to consider the source of the discrimination. This issue arose because the order to place Emily Eaton in a special classroom was taken pursuant to the regime for special education which is centred on the *Education Act*, but was made by an administrative tribunal, the Ontario Special Education Tribunal. However, Arbour J.A. characterized the respondents' argument as an attack neither on the Act, nor on the order of the Tribunal, but on the reasoning of the Tribunal. Then, citing *Slaight Communications*, she went on to hold at p. 19 that the "legislative scheme provides no impediment to the method and reasoning employed by the IPRC, Appeal Board and Tribunal", and for that reason was unconstitutional.

3 Arbour J.A.'s judgment can be summarized as follows — the constitutional imperfection of the *Education Act* resides in what it does not say; what it does not prohibit explicitly, the statute must authorize, including unconstitutional conduct. However, in *Slaight Communications*, where I dissented in the result but spoke for the

majority on this very issue, I held exactly the opposite — that statutory silences should be read down to not authorize breaches of the *Charter*, unless this cannot be done because such an authorization arises by necessary implication. I developed this principle in the context of administrative tribunals which operate pursuant to broad grants of statutory powers, and which can potentially violate *Charter* rights. Whatever section of the Act or of Regulation 305, R.R.O. 1990, grants the authority to the Tribunal to place students like Emily Eaton — a question which I need not address — *Slaight Communications* would require that any open-ended language in that provision (if there were any) be interpreted so as to not authorize breaches of the *Charter*.

4 For the reasons stated above, I agree with Sopinka J. in his disposition of this appeal.

SUPREME COURT OF CANADA

CITATION: Martin *v.* Alberta (Workers' Compensation Board), 2014 SCC 25 **DATE:** 20140328
DOCKET: 35052

BETWEEN:

Douglas Martin
Appellant
and
Workers' Compensation Board of Alberta, Appeals Commission for Alberta Workers' Compensation and Attorney General of Canada
Respondents
- and -
Workers' Compensation Board of British Columbia, Commission de la santé et de la sécurité du travail and Workers' Compensation Board of Nova Scotia
Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: (paras. 1 to 63)
Karakatsanis J. (McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell and Wagner JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Douglas Martin *Appellant*

v.

Workers' Compensation Board of Alberta,
Appeals Commission for Alberta Workers' Compensation
and Attorney General of Canada *Respondents*

and

Workers' Compensation Board of British Columbia,
Commission de la santé et de la sécurité du travail and
Workers' Compensation Board of Nova Scotia *Interveners*

Indexed as: Martin *v.* Alberta (Workers' Compensation Board)

2014 SCC 25

File No.: 35052.

2013: December 10; 2014: March 28.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Workers' compensation — Entitlement to compensation —Worker claiming compensation due to chronic onset stress — Provincial policy imposing criteria for eligibility for compensation on chronic onset stress claims — Whether provincial policy applies in determining eligibility under Government Employees Compensation Act — Whether provincial policy conflicts with Government Employees Compensation Act — Whether denial of claim was reasonable — Government Employees Compensation Act, R.S.C. 1985, c. G-5, ss. 2 and 4 — Workers' Compensation Act, R.S.A. 2000, c. W-15, s. 1 — Workers' Compensation Board of Directors' Policy 03-01, Part II, Application 6.

M, an employee of Parks Canada, was notified that disciplinary action would result if he did not provide an adequate response to a request filed under access to information legislation. M alleged that this letter, following the stress of years of conflict over another workplace issue, triggered a psychological condition. He initiated a claim for compensation for chronic onset stress.

Under s. 4 of the *Government Employees Compensation Act*, R.S.C., 1985, c. G-5 (*GECA*), federal workers who suffer workplace injuries are entitled to compensation at the same rate and under the same conditions as provided under the provincial law where the employee is usually employed, and compensation is determined by the same board, officers or authority as determine compensation under provincial law. The *GECA* and the *Workers' Compensation Act*, R.S.A. 2000,

c. W-15 (*WCA*), both define "accident" as including a wilful and intentional act of someone other than the claimant and a fortuitous or chance event occasioned by a physical or natural cause. Alberta's Workers' Compensation Board of Directors' Policy 03-01, Part II, Application 6 (Policy) made under the *WCA* identifies four criteria which must be met in order to establish eligibility for compensation for chronic onset stress. The third and fourth criteria require that the work-related events are excessive or unusual in comparison to the normal pressures and tensions experienced by the average worker in a similar occupation and that there is objective confirmation of the events.

M's claim was denied by the Alberta Workers' Compensation Board, the Dispute Resolution and Decision Review Body, and the Appeals Commission for the Alberta Workers' Compensation Board (Commission) on the basis that it did not meet the third and fourth criteria set out in the Policy. On judicial review, the Alberta Court of Queen's Bench concluded that s. 4(1) of the *GECA* set out a complete eligibility test for federal workers and the provincial Policy did not apply. The matter was returned to the Commission to be determined solely by the *GECA*. The Alberta Court of Appeal restored the Commission's decision, finding that the provincial Policy did apply.

Held: The appeal should be dismissed.

In enacting the *GECA*, Parliament intended that provincial boards and authorities would adjudicate the workers' compensation claims of federal government employees — including both entitlement to and rates of compensation — according to provincial law, except where the *GECA* clearly conflicts with provincial legislation. Where Parliament intended to impose different conditions, it has done so expressly. Where a direct conflict with the provincial law exists, the *GECA* will prevail, rendering that aspect of the provincial law or policy inapplicable to federal workers. This interpretation is supported by the text of s. 4, the scheme and history of the *GECA*, and Parliament's stated intentions.

In this case, the provincial Policy's interpretation of "accident" in the context of psychological stress claims does not conflict with the *GECA*. The *GECA*'s permissive and flexible definition of "accident" is consistent with Parliament's intention to delegate the administration of workers' compensation to the provincial agencies, and enables different provinces to define eligibility for compensation differently. In determining whether a worker's chronic onset stress was caused by an accident arising out of and in the course of employment, it was not inconsistent with the *GECA* or unreasonable for Alberta to require that the work-related events are excessive or unusual in comparison to the normal pressures and tensions experienced by the average worker in a similar occupation and that there is objective confirmation of the events. Those requirements reflect Alberta's interpretation of "accident" in the context of psychological stress claims.

The Commission's decision to deny compensation in this case was reasonable. It was open to the Commission to find that the predominant cause of M's psychological injury was his reaction to a letter from his employer requesting compliance with an access to information request, and that such a request was not excessive or unusual in terms of normal pressures and tensions in a similar occupation.

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APPEAL from a judgment of the Alberta Court of Appeal (Fraser C.J. and Watson and McDonald JJ.A.), 2012 ABCA 248, 65 Alta. L.R. (5th) 220, 536 A.R. 121, 353 D.L.R. (4th) 499, [2012] 11 W.W.R. 1, 1 C.C.E.L. (4th) 193, [2012] A.J. No. 879, 2012 CarswellAlta 1444, allowing an appeal from a decision of Ouellette J., 2010 CarswellAlta 2817, which set aside a decision of the Appeals Commission for Alberta Workers' Compensation, 2009 CanLII 66292, and ordered a reconsideration. Appeal dismissed.

Andrew Raven, *Andrew Astritis* and *Amanda Montague-Reinholdt*, for the appellant.

Douglas R. Mah, Q.C., and *Ron Goltz*, for the respondent the Workers' Compensation Board of Alberta.

Sandra Hermiston, for the respondent the Appeals Commission for Alberta Workers' Compensation.

John S. Tyhurst, for the respondent the Attorney General of Canada.

Laurel M. Courtenay and *Scott A. Nielsen*, for the intervener the Workers' Compensation Board of British Columbia.

Pierre Michel Lajeunesse and *Lucille Giard*, for the intervener Commission de la santé et de la sécurité du travail.

Roderick (Rory) H. Rogers, Q.C., and Madeleine F. Hearns, for the intervener Workers' Compensation Board of Nova Scotia.

The judgment of the Court was delivered by

KARAKATSANIS J. —

I. Introduction and Overview

[1] The appellant, an employee of Parks Canada, initiated a claim for workers' compensation. Under the federal *Government Employees Compensation Act*, R.S.C. 1985, c. G-5 (*GECA*), federal workers who suffer workplace injuries are entitled to compensation "at the same rate and under the same conditions" as provided under the provincial law where the employee is usually employed: s. 4(1) and (2). The compensation is determined by "the same board, officers or authority" as determine compensation under provincial law: s. 4(3). The appellant's claim was denied by the Appeals Commission for the Alberta Workers' Compensation Board (Commission), 2009 CanLII 66292, because it did not meet all the criteria set out in Alberta's Workers' Compensation Board of Directors' Policy 03-01, Part II, Application 6 (Policy) (online) authorized under the Alberta *Workers' Compensation Act*, R.S.A. 2000, c. W-15 (*WCA*). The Alberta Court of Appeal found that the provincial Policy applied to Mr. Martin's claim and restored the Commission's denial of compensation.

[2] The main issue in this appeal is whether the *GECA* requires the provincial boards to apply provincial law and policy to determine entitlement to workers' compensation. Provincial courts of appeal have reached competing conclusions on this question. Some have concluded that the *GECA* provides a complete code of

eligibility for federal workers' compensation.[1] Others, like the Alberta Court of Appeal in this case, have concluded that eligibility for compensation under the *GECA* is determined in accordance with provincial rules.[2]

[3] I would dismiss the appeal. The provincial boards and authorities are required under the *GECA* to apply their own provincial laws and policies, provided they do not conflict with the *GECA*. I conclude that the Commission's decision to reject the claim was reasonable.

II. Background Facts

[4] The appellant, Douglas Martin, began employment with Parks Canada as a park warden in 1973. In 2000, he commenced a health and safety complaint against Parks Canada, arguing that wardens should be armed when carrying out law enforcement duties. This complaint generated various internal complaint processes, court cases and appeals. The appellant felt that he suffered a loss of work, training and promotion opportunities as a result of his leadership role in the dispute.

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1 See, for example, *Rees v. Royal Canadian Mounted Police*, 2005 NLCA 15, 246 Nfld. & P.E.I.R. 79, at para. 31, leave to appeal refused, [2005] 2 S.C.R. x; *Stewart v. Workplace Health, Safety and Compensation Commission*, 2008 NBCA 45, 331 N.B.R. (2d) 278, at para. 10.

2 *Canada Post Corp. v. Smith* (1998), 40 O.R. (3d) 97, at pp. 109 and 111, leave to appeal refused, [1998] 3 S.C.R. v; *Thomson v. Workers' Compensation Appeal Tribunal*, 2003 NSCA 14, 212 N.S.R. (2d) 81, at para. 18; *Canadian Broadcasting Corp. v. Luo*, 2009 BCCA 318, 273 B.C.A.C. 203, at paras. 22 and 40.

[5] In June 2006, Parks Canada received a request under access to information legislation. It instructed the appellant to disclose information relating to data on his work computer so that it could comply with the request. Parks Canada was not satisfied that the appellant had responded adequately. On December 18 of that year, he received a letter notifying him that if he did not provide further response to the request by December 13 (five days prior to receiving the letter), disciplinary action would result.

[6] The appellant already had a written reprimand on his file and feared that the next disciplinary action would be dismissal. He alleged that the letter, following the stress of years of conflict over the health and safety issue, triggered a psychological condition. He took medical leave beginning December 23, 2006, consulted medical professionals for treatment, and initiated a claim for compensation for chronic onset stress the following month.

III. Proceedings Below

[7] The appellant's claim was denied by three levels of workers' compensation authorities — the Alberta Workers' Compensation Board (WCB), the Dispute Resolution and Decision Review Body, and the Commission — on the basis that it did not meet the criteria set out in the Policy related to chronic onset stress. In particular, the Commission held that his claim failed to meet the third and fourth provincial Policy criteria — namely, that the "work-related events are excessive or unusual in comparison to the normal pressures and tensions experienced by the

average worker in a similar occupation" and that "there is objective confirmation of the events" (A.A., at p. 56).

[8] On judicial review, the Alberta Court of Queen's Bench concluded that the provincial Policy did not apply, and therefore set aside the decision and returned the matter to the Commission. As a federal employee, the appellant's eligibility for compensation was to be determined solely under the *GECA*, which was designed to ensure that all federal government employees in Canada are subject to the same rules. The third and fourth eligibility criteria imposed by the Policy were improper extra hurdles which were inconsistent with the *GECA*.

[9] The Alberta Court of Appeal (2012 ABCA 248, 65 Alta. L.R. (5th) 220 (Fraser C.J. and Watson and McDonald JJ.A.)) restored the Commission's decision (para. 84), the majority reasoning that Parliament had intended to rely upon provincial eligibility criteria, and the Policy criteria did not conflict with the federal *GECA* (paras. 4-8, 30-33, 35-47 and 51).

IV. Analysis

A. *Issues*

[10] This appeal gives rise to three issues. First, was the Commission entitled to apply provincial policy in determining eligibility under the federal *GECA*? Second, if so, did the particular Policy in this case conflict with the definition of

"accident" in the *GECA*? Third, was the Commission's denial of the claim in this case reasonable?

B. *Standard of Review*

[11] The appropriate standard of review in this case is reasonableness. Section 4 of the *GECA* gives the provinces broad authority to determine the compensation claims of federal workers, in effect rendering the *GECA* a "home" or "constituent" statute for the provincial tribunals. The presumption of reasonableness where an administrative tribunal interprets a "home" or "constituent" statute is not displaced here as the question of law is not of central importance to the legal system and is squarely within the specialized functions of workers' compensation tribunals: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30. As discussed below, Parliament intended that provinces would generally adjudicate claims according to provincial law, resulting in the potential for different applications of the *GECA* from province to province.

[12] With respect to the adjudication of Mr. Martin's claim more specifically, the issue is one of mixed fact and law and this expert tribunal is entitled to deference.

C. *Relevant Statutory Provisions*

[13] The relevant provisions of the *GECA* and the *WCA* are as follows:

Government Employees Compensation Act, R.S.C. 1985, c. G-5

2. [Definitions] In this Act,

"accident" includes a wilful and an intentional act, not being the act of the employee, and a fortuitous event occasioned by a physical or natural cause.

. . .

4. [Persons eligible for compensation] (1) Subject to this Act, compensation shall be paid to

(*a*) an employee who

(i) is caused personal injury by an accident arising out of and in the course of his employment, or

(ii) is disabled by reason of an industrial disease due to the nature of the employment; and

(*b*) the dependants of an employee whose death results from such an accident or industrial disease.

(2) [Rate of compensation and conditions] The employee or the dependants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by persons other than Her Majesty, who

(*a*) are caused personal injuries in that province by accidents arising out of and in the course of their employment; or

(*b*) are disabled in that province by reason of industrial diseases due to the nature of their employment.

(3) [Determination of compensation] Compensation under subsection (1) shall be determined by

(*a*) the same board, officers or authority as is or are established by the law of the province for determining compensation for workmen and dependants of deceased workmen employed by persons other than Her Majesty; or

(*b*) such other board, officers or authority, or such court, as the Governor in Council may direct.

Workers' Compensation Act, R.S.A. 2000, c. W-15

1(1) [Interpretation] In this Act,

(*a*) "accident" means an accident that arises out of and occurs in the course of employment in an industry to which this Act applies and includes

(i) a wilful and intentional act, not being the act of the worker who suffers the accident,

(ii) a chance event occasioned by a physical or natural cause,

(iii) disablement, and

(iv) a disabling or potentially disabling condition caused by an occupational disease;

D. *Does the Provincial Policy Apply in Determining Eligibility Under the GECA?*

[14] The primary issue in this appeal addresses the nature of the relationship between the *GECA* and provincial workers' compensation law: if and when provincial workers' compensation legislation, such as the Alberta *WCA*, can be used to determine eligibility for compensation under the *GECA*.

(1) Submissions of the Parties

[15] The appellant argues that s. 4(1) of the *GECA* sets out a complete eligibility test. Parliament intended to subject all federal employees to the same eligibility standard, but to have the amount of compensation be determined by each province. Thus, a worker governed by the *GECA* who suffers injury as a result of a work-related accident is entitled to compensation, without reference to any provincial law or policy respecting eligibility. Section 4(1) and the definition of "accident" in the *GECA* would be redundant if provincial legislation governed to determine eligibility for compensation. The question is whether the stress at issue is an injury by "accident" within the meaning of the *GECA*.

[16] The respondent the WCB submits that its authority to determine compensation for federal employees under s. 4 of the *GECA* includes the power to make policies in respect of compensation, including eligibility. The *GECA* provides an efficient system of compensation for federal employees consistent with that of provincial workers; the interplay between the *GECA* and the *WCA* is a positive example of cooperative federalism. Section 4(2), which directs that federal employees are to receive compensation "at the same rate and under the same conditions" as provincial employees, refers to both entitlement and quantum of benefits.

[17] The respondent the Attorney General of Canada contends that the intention of the *GECA* is to incorporate provincial law into the assessment of both

eligibility and rate of compensation. The *GECA* was intended to create parity between workers within a province and to rely on provincial law and administration. Where Parliament intended to distinguish part of the *GECA* from the various provincial Acts, it has done so expressly. Therefore, except in those few situations where it conflicts with the *GECA*, provincial law determines issues of compensation.

(2) <u>Analysis</u>

[18] "[T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

[19] For the reasons that follow, I conclude that the Commission was required to apply provincial law and policy to determine the entitlement to and rate of compensation for an employee governed by the *GECA*. The *GECA* incorporates provincial workers' compensation regimes, except where they conflict with the *GECA*. It creates an efficient and consistent system so that federal and other workers within a province are generally compensated at the same rates and under the same conditions. Where Parliament intended to impose different conditions, it has done so expressly.

(a) *The Text and Scheme of the Provisions*

[20] Section 4(1) of the *GECA* is a general provision which provides that compensation is to be paid to employees who are caused personal injury due to a workplace accident, and to their dependents if death results: "Subject to this Act, compensation shall be paid to . . . an employee who . . . is caused personal injury by an accident arising out of and in the course of his employment . . . ". In my view, this does not suggest that the provision is a complete code for determining eligibility for compensation. Compensation is "[s]ubject to this Act". Neither the words "eligibility" nor "entitlement" appear in s. 4(1). Marginal notes are not part of the provision and are not determinative of the meaning of the section: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 14.

[21] Although the injury must be caused by an "accident", the broad and open-ended definition of "accident" in s. 2 of the *GECA* provides only two categories of events which will constitute accidents: it "includes" both "wilful" and "intentional" acts of others and "fortuitous event[s]". No standard or rule is provided in the definition of "accident" — or in s. 4(1) — by which to determine what categories of "act[s]" or "event[s]" may constitute "accident[s]", when such acts are "arising out of and in the course of . . . employment" or to address when an injury is "caused" by an accident.

[22] Read as a whole and in context, s. 4 supports the interpretation that the criteria for entitlement are not specified in the *GECA* and are to be determined according to provincial workers' compensation law and authorities.

[23] First, s. 4(2) provides that federal employees under the *GECA* are "entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed". This provides parallel *entitlements* to all workers *within* a given province. Since provinces have the jurisdiction to enact their own legislation respecting workers' compensation, s. 4(2) contemplates that different "rates" and "conditions" of compensation will apply to federal workers in different provinces, depending on the law enacted in their province of employment. Thus, the consistency promoted is for all workers within a province — and not for federal workers throughout the country.

[24] It would make little sense to defer to a provincial regime of compensation for the rates and conditions of compensation without also deferring on the question of eligibility, since those aspects of the regime are inevitably intertwined. "Conditions" for the receipt of compensation will determine whether or not an employee receives compensation. Thus, the "entitlement" under s. 4(2) to receive compensation "under the same conditions" as other employees in the province suggests that federal employees are entitled to receive compensation under the same circumstances. As I observe below, the legislative history clearly indicates that the reference to the "same conditions" was intended to indicate that the *eligibility conditions* for federal employees under the *GECA* were to be the same as under the provincial scheme.

[25] The parallel language used in ss. 4(1) and 4(2) further links eligibility for compensation of federal employees to the provincial scheme. Under s. 4(1),

compensation shall be paid to a federal employee who "is caused personal injury by an accident arising out of and in the course of his employment". Section 4(2) states that federal employees are entitled to compensation as provided for workers under provincial jurisdiction who are "caused personal injuries in that province by an accident arising out of and in the course of their employment". This mirroring of the language suggests that federal employees receive compensation in the same circumstances as fellow workers in the province where they work for injuries "caused . . . by an accident arising out of and in the course of . . . employment".

[26] Section 4(3) provides that "[c]ompensation under subsection (1) shall be determined by . . . the same board, officers or authority as is or are established by the law of the province for determining compensation for [workers under provincial jurisdiction]". As with s. 4(2), this provision contemplates that boards or authorities may determine compensation differently from province to province.

[27] Thus, the text of the *GECA* suggests that s. 4(1) does not set out a complete test for eligibility for compensation. Section 4(1) simply states that federal workers injured in accidents on the job are to be compensated subject to the *GECA*. The broad and open-ended definition of "accident" in s. 2 does not assist in determining the boundaries of entitlement. It is far more likely that Parliament intended to rely on provincial laws defining the scope of "accident" to provide some certainty. The authority granted in s. 4(2) and (3) is itself strongly indicative of such a role. According to s. 4(2), federal workers are entitled to the rates and conditions of

compensation determined according to provincial law. And in s. 4(3), the *GECA* clearly delegates to the provincial boards the actual *determination* of compensation under s. 4(1). Provincial institutions and laws thus provide the structure and boundaries necessary to determine whether and how much compensation is to be paid to federal employees.

(b) *Legislative Purpose*

[28] The history of the text of the *GECA* as well as Parliament's stated intentions clearly demonstrate that Parliament's purpose in enacting the *GECA* was to rely on provincial laws and provincial boards to determine federal workers' compensation claims, except where the *GECA* clearly conflicts with provincial legislation.

[29] The *GECA*'s predecessor statute was enacted in 1918: *An Act to provide Compensation where Employees of His Majesty are killed or suffer injuries while performing their duties*, S.C. 1918, c. 15. According to s. 1(1) of the initial Act, both "the liability for and the amount of such compensation" were to be determined under provincial law and by provincial authorities:

> **1.** (1) An employee in the service of His Majesty who is injured, and the dependents of any such employee who is killed, shall be entitled to the same compensation as the employee, or as the dependent of a deceased employee, of a person other than His Majesty would, under similar circumstances, be entitled to receive under the law of the province in which the accident occurred, and the liability for and the amount of such compensation shall be determined in the same manner and by the

> same Board, officers or authority, as that established by the law of the province for determining compensation in similar cases, or by such other Board, officers or authority or by such court as the Governor in Council shall from time to time direct.

[30] Indeed, the Minister responsible for the initial Act described it as ensuring that "[i]n case of injury, an employee of the Government railway will be in exactly the same position in regard to compensation as would the employee of a railway company" (Hon. J. D. Reid, *House of Commons Debates*, vol. 132, 1st Sess., 13th Parl., April 16, 1918, at p. 812 (emphasis added)).

[31] In 1947, the words "the liability for" were replaced by the phrase "the right to" compensation (S.C. 1947, c. 18, s. 3(1)). Both phrases plainly refer to a worker's entitlement to, or eligibility for, compensation. The definition of "accident" was also added at that time — without any particular discussion in Parliament.

[32] In 1955, the present phrase was adopted, stating that federal employees are to receive compensation "at the same rate and under the same conditions" as are provided under the law of the province where the employee is usually employed (S.C. 1955, c. 33, s. 2). During first reading of these amendments, the Minister responsible stated:

> The proposed amendments provide that the entitlement to and rates of compensation payable to an employee under the act shall be determined in accordance with and under the same circumstances as are provided under the law of the province where the employee is usually employed . . . . [Emphasis added.]

(Hon. Milton F. Gregg, *House of Commons Debates*, vol. II, 2nd Sess., 22nd Parl. February 28, 1955, at p. 1561)

[33] The phrase "under the same conditions" appears to have directly replaced the earlier references to "the liability for" and "the right to" compensation. And as the legislative debates made clear, these were to be determined by provincial law and adjudicative bodies.

[34] In providing that provincial law and authorities were to determine compensation for federal government workers, Parliament expressly recognized that "[c]laims arising from accidents or otherwise are handled differently according to the provinces" (Hon. Lionel Chevrier, *House of Commons Debates*, vol. II, 3rd Sess., 20th Parl., March 27, 1947, at p. 1824) and that "<u>[t]he right to</u> compensation and the amount of it in each case are decided by the provincial workmen's compensation board <u>under the statute of the province concerned</u>" (Hon. Milton F. Gregg, *House of Commons Debates*, vol. II, 6th Sess., 21st Parl., May 7, 1952, at p. 1974 (emphasis added)).

[35] In short, the legislative history of the *GECA* and statements of parliamentary purpose demonstrate that the intent has remained consistent since 1918: both eligibility for and the rate of compensation are to be determined according to provincial law.

(c) *Conflicts Between the GECA and Provincial Legislation*

[36] As can be seen from the legislative history, Parliament also intended to enact specific exceptions to its reliance on provincial law.

[37] For example, in 1947, Parliament amended the *GECA* to provide coverage for pulmonary tuberculosis contracted in a government hospital or sanatorium, which was not covered at the time under provincial legislation. During a debate in the House of Commons, the Minister responsible for the amendments referred several times to Parliament's *general* intention "to accept the decisions of the provincial boards of what is an accident and what is an industrial disease" in order to avoid setting up a separate federal authority to adjudicate claims (Hon. Lionel Chevrier, *House of Commons Debates*, vol. II, 3rd Sess., 20th Parl., March 31, 1947, at p. 1892). However he affirmed that the amendment "introduces a new principle" and that the new section "provides something which no other provincial act, save for perhaps one, does" (pp. 1894 and 1896).

[38] Potential conflicts between the *GECA* and provincial workers' compensation legislation were discussed in *Cape Breton Development Corp. v. Morrison Estate*, 2003 NSCA 103, 218 N.S.R. (2d) 53, leave to appeal refused, [2004] 1 S.C.R. vii.

[39] The issue in *Morrison* was whether a "benefit of the doubt" presumption in the Nova Scotia workers' compensation legislation applied to workers who fell

under the *GECA*. The Nova Scotia Court of Appeal held that the presumption with respect to causation in the provincial Act applied to federal workers as well. The court held that there was no conflict between the two statutes, as there was no language in the *GECA* to exclude federal workers from the benefit of such a presumption (para. 45).[3] The court adopted the Attorney General of Canada's description of the legislative landscape, concluding that:

> The provincial workers' compensation scheme governs claims submitted under *GECA* provided that:
>
> (a) the provision in issue is reasonably incidental to a "rate" or "condition" governing compensation under the law of the province, and
>
> (b) the provision is not otherwise in conflict with *GECA*. [para. 68]

I agree. Where a direct conflict between the provincial law and the *GECA* exists, the *GECA* will prevail, rendering that aspect of the provincial law or policy inapplicable to federal workers.[4] Otherwise, the provincial workers' compensation scheme prevails. In either case, provincial boards and authorities will be responsible for adjudicating the claim.

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[3] In a similar case, *McLellan v. Workers' Compensation Appeals Tribunal*, 2003 NSCA 106, 218 N.S.R. (2d) 176, a provincial presumption of causation benefitting miners seeking compensation was held to also apply to federal workers. Both provisions were "reasonably incidental" to the issue of compensation under the law of the province, and were not otherwise in conflict with the *GECA* (para. 30).

[4] For example, in the case of the pulmonary tuberculosis amendment, which was followed by a regulation implementing the change (*The Government Employees Compensation Regulations 1948 (Pulmonary Tuberculosis)*, SOR/48-573), a provincial WCB could not deny compensation to federal employees for injury due to pulmonary tuberculosis even if the provincial legislation explicitly excluded such coverage, as this would be in conflict with the *GECA*.

[40] Given the broad delegation of the determination of eligibility to the provincial level, conflicts between provincial law and the *GECA* with respect to eligibility will generally only arise in situations where the *GECA* regime has specifically included or excluded matters from compensation in a way that is in conflict with the relevant provincial law, as for example occurred in the case of pulmonary tuberculosis.

E. *The Interpretation of "Accident": Did the Provincial Policy Conflict with the GECA?*

[41] Given my conclusion that provincial law applies, except to the extent it is in conflict with the *GECA*, the second issue is whether the provincial Policy conflicted with the definition of "accident" in s. 2 of the *GECA*. Specifically, was it reasonable for the Commission to apply the Alberta Policy criteria to determine whether the chronic onset stress was caused by an accident arising out of and in the course of employment? Or did the Policy necessarily conflict with the *GECA*?

(1) <u>Submissions of the Parties</u>

[42] The appellant submits that the *GECA*'s definition of "accident" is broad and inclusive and cannot be limited by provincial law or policy. To interpret "accident" as requiring excessive or unusual workplace events is inconsistent with the broad definition of "accident" under the *GECA*. The Policy unreasonably and

unfairly imposes a stricter causative requirement on those suffering from psychological injuries than on those suffering from physical injuries.

[43] The respondent the WCB argues that the provincial Policy does not change or add extra requirements to the definition of "accident" in the *GECA*. Instead, it provides guidance in determining whether an accident, as defined in both the Alberta *WCA* and the *GECA*, has occurred and, if so, whether it arose out of and in the course of employment.

[44] The respondent the Attorney General of Canada contends that Parliament left considerable room for provincial law to determine the specific circumstances under which an injury is compensable and the factors to be considered in this decision.

(2) Analysis

(a) *The Relationship Between the GECA and the WCA*

[45] The *GECA* provided no definition for the term "accident" until 1947, even though the requirement that the employee's injury be caused by an "accident arising out of and in the course of his employment" had been present in the legislation since 1931 (S.C. 1931, c. 9, s. 2).

[46] The definition of "accident" in the Alberta legislation is substantially the same as the definition in the *GECA*. Both include accidents arising out of and in the course of employment (see s. 4(1) of the *GECA* and the definition of "accident" in s. 1(1) of the *WCA*). Both include "a wilful and intentional act" of someone other than the claimant and a "fortuitous" or "chance" "event occasioned by a physical or natural cause" (see the definitions of "accident" in s. 2 of the *GECA* and s. 1(1) of the *WCA*).

[47] The Alberta legislation, like all provincial workers' compensation legislation, contemplates the consistent adjudication of claims through the application of policies.[5] Section 13.2(6)(b) of the Alberta *WCA* states that the Appeals Commission "is bound by the board of directors' policy relating to the matter under appeal". In effect, the Alberta policies govern the interpretation and application of the *WCA*.

(b) *The Specific Policy in Issue*

[48] The WCB has adopted specific policies to guide decision making on the acceptance of certain medical conditions. The Policy identifies the circumstances

[5] B.C. *Workers Compensation Act*, R.S.B.C. 1996, c. 492, s. 99(2); Alberta *WCA*, ss. 8(3)(c) and (d) and 13.2(6); Saskatchewan *Workers' Compensation Act, 2013*, S.S. 2013, c. W-17.11, s. 23(2); Manitoba *Workers Compensation Act*, C.C.S.M. c. W200, s. 51.1(1)(a); Ontario *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, s. 126 and 161; Quebec *An Act respecting industrial accidents and occupational diseases*, CQLR, c. A-3.001, ss. 382 and 454; New Brunswick *Workplace Health, Safety and Compensation Commission Act*, S.N.B. 1994, c. W-14, s. 7(*f*); Nova Scotia *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, s. 183; P.E.I. *Workers Compensation Act*, R.S.P.E.I. 1988, c. W-7.1, s. 30(1); Newfoundland and Labrador *Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990, c. W-11, s. 5(1)(a); Northwest Territories *Workers' Compensation Act*, S.N.W.T. 2007, c. 21, s. 91(3); Yukon *Workers' Compensation Act*, S.Y. 2008, c. 12, ss. 3 "policy" and 18; Nunavut *Workers' Compensation Act*, S.Nu. 2007, c. 15, s. 31(2).

under which a psychiatric or psychological disability is compensable. No one has suggested that the Alberta Policy is *ultra vires* the *WCA*. The Policy defines the parameters of an "accident" as related to claims for chronic onset stress by identifying four criteria which must be met in order to establish eligibility for compensation:

> *11. When does WCB accept claims for chronic onset stress?*
>
> As with any other claim, WCB investigates the causation to determine whether the claim is acceptable. Claims for this type of injury are eligible for compensation only when *all* of the following criteria are met:
>
> - there is a confirmed psychological or psychiatric diagnosis . . .
> - the work-related events or stressors are the predominant cause of the injury; . . .
> - the work-related events are excessive or unusual in comparison to the normal pressures and tensions experienced by the average worker in a similar occupation, and
> - there is objective confirmation of the events.
>
> In addition to the duties reasonably expected by the nature of the worker's occupation, normal pressures and tensions include, for example, interpersonal relations and conflicts, health and safety concerns, union issues, and routine labour relations actions taken by the employer, including workload and deadlines, work evaluation, performance management (discipline), transfers, changes in job duties, lay-offs, demotions, terminations, and reorganizations, to which all workers may be subject from time to time. [pp. 5-6]
>
> . . .

[49] In my view, to interpret "accident" to require excessive or unusual workplace events is not inconsistent with the broad definition of "accident" in s. 2 of

the *GECA*, which "includes a wilful and an intentional act, not being the act of the employee, and a fortuitous event occasioned by a physical or natural cause". The definition of "accident" sets out a minimum content, but is neither exhaustive nor limiting. It is permissive and flexible, consistent with Parliament's intention to delegate the administration of workers' compensation to the provincial agencies. As the intervener the Workers' Compensation Board of British Columbia pointed out, neither the *GECA* nor the *WCA* definition of "accident" provides guidance as to when an accident or injury is, in fact, *caused by* the worker's employment. Provincial law supplements the federal Act with structure and specificity.

[50] In this case, the province required excessive or unusual events for psychological stress claims and objective confirmation of those events. The requirements simply reflect Alberta's interpretation of "accident" in the context of psychological stress claims. Under a no-fault compensation scheme, what constitutes an "accident" cannot be solely dependent on the worker's subjective view of events. An event triggering a physical injury will often be easier to identify than one giving rise to a mental injury. Alberta's enactment of a policy which defines a workplace "accident" causing mental injury is not unreasonable.

[51] Workers' compensation schemes in Canada follow the Meredith model, a "historic trade-off" under which workers lose their cause of action against their employers for workplace injuries, but gain coverage under a no-fault insurance scheme (*Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, at para. 29,

citing *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 25). Employers are forced to contribute to the scheme, but are freed from potentially crippling liability. These schemes provide guaranteed compensation for injuries arising from industrial diseases or accidents (*Marine Services*, at para. 30).

[52] As was pointed out in *Canada Post*, the disparity in entitlements between federal workers in different provinces which arises from the scheme of the *GECA* is not "inconsistent with the principles of federalism" (p. 105). The plan carried out through the *GECA* is cooperative federalism at work. Provincial policies may define eligibility for compensation differently, but Parliament intended this flexibility. The *GECA*'s open-ended definition of "accident" enables this flexibility; it does not curtail it.

[53] Finally, the appellant relied on the values in the *Canadian Charter of Rights and Freedoms* to argue that the definition of "accident" must be interpreted in a way that does not impose additional causality burdens on claimants for mental health injuries as compared to claimants for physical injuries. However, the constitutionality of the provisions was not challenged before this Court. For this Court to make a determination based on *Charter* values would in effect be to decide a *Charter* challenge to the Policy without a proper record.

[54] For these reasons, the Commission was entitled to conclude that there is no conflict between the definition of "accident" under the *GECA* and the Policy's

requirement that chronic stress arise as a result of "excessive or unusual" events where "there is objective confirmation".

F. *Was the Denial of the Claim in this Case Reasonable?*

[55] The third and final issue on appeal, then, is whether the Commission's application of the Policy to the appellant's claim was reasonable. There is no dispute that the appellant met the first two Policy criteria: there was a confirmed psychological or psychiatric diagnosis, and the work-related events or stressors were the predominant cause of the injury.

[56] The parties' dispute is with respect to the last two criteria of the Policy, at p. 5:

> - the work-related events are excessive or unusual in comparison to the normal pressures and tensions experienced by the average worker in a similar occupation, and
> - there is objective confirmation of the events.

[57] With respect to the third criterion, that the events must be excessive or unusual, the appellant argues that the Commission wrongly found the letter to be the "predominant cause" of the appellant's condition (A.F., at para. 85, quoting the Commission's decision, at para. 28). By not taking into account the culmination of a series of events, the Commission failed to fully account for his situation.

[58] However, the Commission explicitly acknowledged in its analysis "that the stressful factors arising from the work situation included, for example, health and safety concerns, interpersonal relations and conflicts in the workplace, compliance deadlines, performance management and the employer's direction that the worker comply with a request for disclosure under the *Access to Information Act*" (para. 29). The Commission noted that such factors fall under the Policy's description of normal pressures and tensions and therefore do not qualify as excessive or unusual.

[59] Given the record, and the way in which the claim was presented, it was open to the Commission to find that the "predominant cause" of Martin's psychological injury was his reaction to a letter from his employer requesting compliance with an access to information request, and that such a request was not unusual in terms of normal pressures and tensions in a similar occupation (paras. 28 and 30).

[60] I do not agree with the appellant that the Commission unreasonably interpreted the list of "normal pressures and tensions" in the Alberta Policy as completely excluding compensation for injuries arising from labour relations issues, or health and safety concerns and interpersonal relations and conflicts. A fair reading of the reasons makes clear that the Commission found that, on the facts of this case, the events were not excessive or unusual.

[61] The Commission's conclusion respecting the third criterion was "within a range of possible, acceptable outcomes which are defensible in respect of the facts

and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47).

[62] Since the third criterion was not met, the Commission's decision to deny compensation in this case was reasonable. There is no need to consider the Commission's analysis of the fourth criterion.

V. Conclusion

[63] In enacting the *GECA*, Parliament intended that provincial boards and authorities would adjudicate the workers' compensation claims of federal government employees — including both entitlement to and rates of compensation — according to provincial law, except where a conflict arises between the provincial law and the *GECA*. The Alberta Policy's interpretation of "accident" in the context of psychological stress claims does not conflict with the *GECA* and was applicable to the appellant's claim. The Commission's decision to deny compensation in this case was reasonable. The appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitor for the respondent the Workers' Compensation Board of Alberta: Workers' Compensation Board of Alberta, Edmonton.

Solicitor for the respondent the Appeals Commission for Alberta Workers' Compensation: Appeals Commission for Alberta Workers' Compensation, Edmonton.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Workers' Compensation Board of British Columbia: Workers' Compensation Board of British Columbia, Richmond.

Solicitors for the intervener Commission de la santé et de la sécurité du travail: Vigneault Thibodeau Bergeron, Québec.

Solicitors for the intervener the Workers' Compensation Board of Nova Scotia: Stewart McKelvey, Halifax.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20210415

Docket: A-204-20

Citation: 2021 FCA 72

CORAM: **NOËL C.J.**
STRATAS J.A.
LASKIN J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellants

and

THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE CANADIAN COUNCIL OF CHURCHES, ABC, DE [BY HER LITIGATION GUARDIAN ABC], AND FG [BY HER LITIGATION GUARDIAN ABC], MOHAMMAD MAJD MAHER HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI AND REDA YASSIN AL NAHASS and NEDIRA JEMAL MUSTEFA

Respondents

Heard by online video conference hosted by the Registry on February 23 and 24, 2021.

Judgment delivered at Ottawa, Ontario, on April 15, 2021.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NOËL C.J.
LASKIN J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The appellants ("Canada") appeal from the judgment of the Federal Court (*per* McDonald J.): 2020 FC 770, 448 D.L.R. (4th) 132. The respondents to the appeal (the "Claimants") cross-appeal. Broadly speaking, the appeal and the cross-appeal concern the constitutional validity of

certain legislative provisions that prevent certain refugee claimants from seeking refugee protection in Canada. To understand the nature of the appeal and cross-appeal, a brief description of the background is needed.

[2] As a general matter, refugee claimants arriving from a country designated as a safe country under the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the "Regulations") are ineligible to claim refugee protection in Canada: *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), para. 101(1)(*e*). Since 2004, the United States has been designated: Regulations, s. 159.3. This designation followed an agreement between the United States and Canada, commonly called the Safe Third Country Agreement.

[3] Since that time, many refugee claimants arriving from the United States have been ruled ineligible for refugee protection in Canada. Among these were the individual Claimants. They and certain advocacy organizations for refugees brought three judicial reviews in the Federal Court.

[4] In their applications for judicial review, the Claimants alleged that the designation of the United States under section 159.3 of the Regulations was outside of the authority granted by the Act (*i.e.*, was *ultra vires*). The Federal Court rejected that allegation.

[5] The Claimants also alleged that the designation of the United States as a safe third country under section 159.3 of the Regulations and the resulting ineligibility of refugee claimants in Canada under paragraph 101(1)(*e*) of the Act infringed the rights guaranteed by sections 7 and

15 of the *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 and were not justified as a reasonable limit on rights under section 1.

[6] The Federal Court agreed that these two provisions infringed section 7 of the Charter and were not justified under section 1. It declared them of no force or effect under section 52 of the *Constitution Act, 1982*. Given this conclusion, the Federal Court found it unnecessary to deal with the section 15 issues..

[7] The Federal Court stayed its judgment for six months. This Court granted a further stay until final determination of this appeal: 2020 FCA 181.

[8] In its appeal, Canada focuses on the Federal Court's finding of unjustifiable infringement of section 7 of the Charter.

[9] In their cross-appeal, the Claimants focus on the Federal Court's decision not to deal with the issues concerning section 15 of the Charter. They also challenge the Federal Court's rejection of their *ultra vires* argument.

[10] For the reasons that follow, I would allow the appeal, dismiss the cross-appeal, set aside the judgment of the Federal Court and dismiss the applications for judicial review.

A. Preliminary issues

(1) Is the cross-appeal improper?

[11] Canada submits that the Claimants' cross-appeal is improper and should be summarily dismissed.

[12] Canada's submission is well founded. A cross-appeal lies when a party "seeks a different disposition of the [judgment] appealed from": Rule 341 of the *Federal Courts Rules*, S.O.R./98-106. "Different disposition" means a remedy that will have real-life, practical consequences for the party cross-appealing. A cross-appeal does not lie simply because a party is dissatisfied with the reasons for judgment: *Ratiopharm Inc. v. Pfizer Canada Inc.*, 2007 FCA 261, 367 N.R. 103 at paras. 6 and 12.

[13] In the Federal Court, two sets of Claimants sought a specific declaration that section 15 of the Charter was infringed. All of the Claimants sought a specific declaration that section 159.3 of the Regulations was *ultra vires*. The Federal Court did not grant these specific declarations.

[14] But the Federal Court's failure to grant these declarations does not have any real-life, practical consequences for the Claimants: they wanted the two provisions struck down and they were struck because they infringed section 7. The Claimants take issue with the Federal Court's reasons, not its judgment. Therefore, I would dismiss the cross-appeal.

(2) Are the section 15 and *vires* issues properly before this Court?

[15] Canada also submits that the section 15 and *vires* issues are not properly before this Court.

[16] This Court can hear and determine appeals under the Act when the Federal Court has certified a proper question for its consideration or where one of the narrow common law exceptions applies: s. 74(*d*). The Federal Court included section 15 in the certified question even though it did not deal with section 15. Because of this, Canada submits that the Federal Court should not have included section 15 in the certified question.

[17] We need not consider this submission. Canada accepts that, aside from the inclusion of section 15, this Court has a proper certified question before it concerning section 7 of the Charter. Once there is a proper certified question before the Court, all issues that might affect the outcome of the appeal, including, here, the section 15 and *vires* issues, are before the Court: *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at para. 50 and authorities cited therein. The Claimants can advance any argument to sustain the judgment below: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36 at 621 S.C.R.

[18] As a result, all issues that were before the Federal Court are now before this Court.

B. The Safe Third Country Agreement, the legislative scheme and an administrative policy

(1) Description

[19] In 2002, Canada and the United States entered into an agreement, commonly called the Safe Third Country Agreement, to share responsibility for refugees: *Agreement between the Government of Canada and the Government of the United States of America For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, United States and Canada, 5 December 2002 (entered into force on December 29, 2004).

[20] Under the Safe Third Country Agreement, refugee claimants must request refugee protection in the first country, Canada or the United States, that they arrive in unless they qualify for an exception. Exceptions include claimants who have family in Canada and unaccompanied minors. The Safe Third Country Agreement also does not apply to those who enter Canada irregularly or to most individuals who arrive by sea or by air.

[21] Thus, those who arrive in the United States must claim refugee status in the United States under United States law. They cannot leave the United States and claim refugee status in Canada at a land port of entry. If they do so, Canada can refuse to consider their refugee claim and, if they have no other legal basis for remaining in Canada, return them to the United States.

[22] Like all other international instruments, the Safe Third Country Agreement, by itself, does not have force of law in Canada. It must be implemented by Canadian legislation. That has happened.

[23] The legislative scheme is an interrelated one with many moving parts. It is supplemented by an Order in Council. And beneath it is an administrative policy that tells us how one aspect of this legislative scheme—continual reviews of the designation of a foreign country under subsection 102(3) of the Act—is supposed to work. In describing this legislative scheme, the Court draws in part upon its earlier analysis in *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 F.C.R. 136, leave to appeal to SCC refused, 32820 (5 February 2009).

[24] The legislative scheme reflects the philosophy that "where a refugee claimant could have sought protection in another safe country, it is reasonable and appropriate to require the refugee claimant to return and make use of that opportunity": Regulatory Impact Statement, (2004) C. Gaz II, Vol. 138, No. 22, 1622-1627 at 1622; S.O.R./2004-217, s. 2. By implementing this philosophy, Canada can share with other countries "the responsibility for providing protection to those in need, improve the efficacy of the refugee determination system and restore public confidence in that system" (at 1622).

[25] The legislative scheme begins with subsection 99(3) of the Act. It provides that those who arrive at a port of entry in Canada and intend to claim refugee status must make that claim to an immigration officer. Upon receiving the claim, the officer must determine whether it is eligible to be referred to the Refugee Protection Division for adjudication. One circumstance of

ineligibility is where "the claimant came directly or indirectly to Canada from a country designated by the regulations": para. 101(1)(*e*) of the Act.

[26] Subsection 102(1) of the Act authorizes the making of regulations designating a country. A country can be designated having regard to four factors.

[27] The first factor is that the country has entered into a safe third country agreement or, in the words of paragraph 102(2)(*d*) of the Act, "an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection". In this case, the Safe Third Country Agreement is such an agreement.

[28] Subsection 102(2) of the Act sets out the remaining three factors: "whether the country is a party to the Refugee Convention and to the Convention Against Torture", the "policies and practices" of the country concerning "claims under the Refugee Convention and...obligations under the Convention Against Torture", and the "human rights record" of the country.

[29] In 2004, the Governor in Council designated the United States under section 159.3 of the Regulations: S.O.R./2004-217, s. 2. At that time, it concluded that the United States met all four factors for designation under subsection 102(2): *Canadian Council for Refugees*.

[30] The power to designate a country based on the subsection 102(2) factors includes the power to revoke designation of a country based on those same factors: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 31(4). Revocation of designation can be achieved by repealing the regulatory

provision designating the foreign country (here 159.3 of the Regulations). Revocation of designation might happen if the foreign country enacts new legislation, issues new executive orders, renders new judicial decisions or adopts administrative practices that bring it out of compliance with the subsection 102(2) factors.

[31] Recognizing the possibility of revocation based on non-compliance with the subsection 102(2) factors, Parliament created a mechanism to monitor the designated country's compliance on an ongoing basis. Subsection 102(3) of the Act provides the mechanism: "continuing review" of the foreign country's compliance with the four factors.

[32] Subsection 102(3) does not stand alone. It leaves certain questions unanswered. What does "continuing review" mean? What sort of "review"? Who should do it? What should be looked at in a review?

[33] In 2004, the Governor in Council made an Order in Council that answers some of these questions. In 2015, that Order in Council was replaced by a new one which is still in force: *Directives for Ensuring a Continuing Review of Factors Set Out in Subsection 102(2) of the Immigration and Refugee Protection Act with Respect to Countries Designated Under Paragraph 102(1)(A) of That Act (2015)*, P.C. 2015-0809 <online: https://orders-in-council.canada.ca/attachment.php?attach=31132&lang=en>. And an administrative policy also helps to answer them: Immigration, Refugees and Citizenship Canada, *Monitoring Framework for the U.S. Designation As a Safe Third Country*, June 2015 (Baril Affidavit, sworn October 11, 2019, Exhibit E, Appeal Book, Vol. 37, page 15662-15667).

[34] The 2015 Order in Council requires "a continuing review of factors set out in subsection 102(2)" to ensure the designation of the United States as a safe third country remains appropriate. The Minister of Citizenship and Immigration is to "undertake a review, on a continual basis, of the factors set out in subsection 102(2) of the *Immigration and Refugee Protection Act* with respect to the United States" by "monitoring those factors on a regular basis". The "Minister must report to the Governor in Council on that review when the circumstances warrant".

[35] Under the 2015 Order in Council, if the Minister's review of the subsection 102(2) factors favours continuing the designation, the Minister need not do anything. But if the Minister's review detects problems that warrant the Governor in Council's attention, the Minister must make a report to the Governor in Council. Upon receiving the report, the Governor in Council considers whether the designation of the foreign country should be revoked.

[36] Why was the Governor in Council given the responsibility to decide on matters of designation and revocation? Answering this question helps to shed light on the nature and content of the Governor in Council's decision: *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, [2012] 2 F.C.R. 312 at para. 76.

[37] The Governor in Council is the "Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada": *Interpretation Act*, R.S.C. 1985, c. I-21, subsection 35(1), and see also the *Constitution Act, 1867*, (UK), 30 & 31 Vict., c. 3, s. 91, reprinted in R.S.C. 1985, Appendix

II, No. 5, sections 11 and 13. All the Ministers of the Crown, not just the Minister, are active members of the Queen's Privy Council for Canada. They meet in a body known as Cabinet. Cabinet—sitting at the apex of the executive of the Canadian government—is "to a unique degree the grand co-ordinating body for the divergent provincial, sectional, religious, racial and other interests throughout the nation" and, by convention, it attempts to represent different geographic, linguistic, religious, and ethnic groups: Norman Ward, *Dawson's The Government of Canada*, 6th ed., (Toronto: University of Toronto Press, 1987) at pages 203-204; Richard French, "The Privy Council Office: Support for Cabinet Decision Making" in Richard Schultz, Orest M. Kruhlak and John C. Terry, eds., *The Canadian Political Process*, 3rd ed. (Toronto: Holt Rinehart and Winston of Canada, 1979) at pages 363-394. All the levers of government are present at the Cabinet table.

[38] In response to a report from the Minister raising concerns, the Governor in Council can consider whether to maintain the foreign country's designation or revoke it. But given its status, nature and powers, the Governor in Council can do much more. It can authorize diplomatic, state-to-state discussions with the government of the foreign country to try to fix anything that casts into doubt the country's compliance with the subsection 102(2) factors. From those discussions, it may learn of developments that could impact on the designation but it may also learn that the foreign country will address these developments through new initiatives. It can also amend the Regulations and tailor the exceptions under the scheme to address any new developments: para. 102(1)(*c*) of the Act and Article 6 of the Safe Third Country Agreement. It may have other policy considerations to consider. It may ask for further investigations to be made. This is not necessarily an exhaustive list.

[39] To assist in the conducting of subsection 102(3) reviews, an administrative policy has been developed. It is entitled, "Monitoring Framework for the U.S. Designation as a Safe Third Country".

[40] The Monitoring Framework requires subsection 102(3) reviews to focus on systemic concerns in the United States, not isolated incidents. The reviews are "to track developments in the U.S." that "would considerably weaken the level of human rights and refugee protection that the U.S. provides" and, thus, cast doubt "on its ability to continue to meet the criteria for designation as a safe third country". It requires subsection 102(3) reviews to be conducted continually so that Immigration, Refugees and Citizenship Canada can "identify, in a timely manner, changes in the U.S." that might affect "its status as a safe third country". This furthers "responsible action and decision-making" on whether the designation of the United States remains appropriate.

[41] The Monitoring Framework requires subsection 102(3) reviews to examine two sets of indicators:

- *Indicators concerning significant changes in the United States refugee protection system*. These include how the United States applies the non-refoulement principle, how it applies exclusion clauses in the Refugee Convention (*e.g.*, clauses 1E and 1F), its consistency and quality of adjudication, whether refugee claimants have effective access to counsel, the United States' practices of detention and the operation of its judicial system.

- *Indicators to monitor the human rights record of the United States*. These include the observance in the United States of the rights contained in "long-standing core U.N. human rights legal instruments": life, liberty and security of the person, access of refugee claimants to an independent judiciary, civic and political freedoms, the rights of non-citizens, and freedom from discrimination.

These help to ensure that subsection 102(3) reviews are detailed and thorough.

[42] Both indicators are to be examined using quantitative and qualitative information from a wide variety of governmental and non-governmental sources, such as documents from U.N. sources, publications of international human rights organizations and supra-national and regional organizations, international media, U.S. government publications and reports from reputable non-government organizations such as the Claimants, the Canadian Council for Refugees, Amnesty International and the Canadian Council of Churches.

[43] Other portions of the Act are potentially relevant and, thus, form part of this legislative scheme. Under the Act, Canadian immigration officers, upon finding a claimant is ineligible, have a number of powers and discretions. These include:

- Issuing a temporary residence permit under subsection 24(1) of the Act;

- Deferring removal upon request if the officer finds that exceptional circumstances exist based on evidence of risk of death, extreme sanction, or inhumane treatment:

Revell v. Canada (Citizenship and Immigration), 2019 FCA 262, [2020] 2 F.C.R. 355 at paras. 50-52; *Canada (Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286, [2012] 2 F.C.R. 133;

- Transferring the matter to Immigration, Refugees and Citizenship Canada when an officer determines there are exceptional circumstances. Based on humanitarian and compassionate considerations or public policy considerations, Immigration, Refugees and Citizenship Canada can decide whether to grant access to the Refugee Protection Division by waiving either the ineligibility finding under paragraph 101(1)(*e*) of the Act or the pre-removal risk assessment bar under paragraph 112(2)(*b*) of the Act: Act, ss. 25, 25.1 and 25.2.

[44] As well, refugee claimants have access to the Federal Court if they believe the circumstances of their removal warrant the Court's intervention: *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, [2020] 1 F.C.R. 699 at para. 87; *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 at paras. 158-159.

[45] This Court's case law shows that these powers and discretions can work to alleviate harsh effects caused by the Act: see *Atawnah v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144 at paras. 13-23; *Tapambwa* at paras. 87-88; *Revell* at paras. 50-52; *Brown* at paras. 150-159.

(2) Assessment and conclusion

[46] Paragraph 101(1)(*e*) of the Act and section 159.3 of the Regulations are part of an interrelated legislative scheme. The two sections do not sit alone and in isolation. It is artificial to view and analyze them in the abstract, all the more so after a foreign country has been designated. After designation, subsection 102(3) reviews are to take place continually to ensure that designation remains appropriate.

[47] Put another way, if someone were to ask why a foreign country continued to be designated, say, in 2017 when the applications for judicial review in this case were brought, the answers are to be found not in the original designation in 2004 but in one or more subsection 102(3) reviews conducted up to that time, the failure to conduct reviews, the failure to conduct them properly or the failure to refer matters to the Governor in Council for assessment and decision, the findings and recommendations in those reviews, and the Governor in Council's reactions or non-reactions to those findings and recommendations. For the purposes of these reasons, all these activities shall be described as "subsection 102(3) reviews and related administrative conduct". At a higher level, one also could query whether subsection 102(3), the 2015 Order in Council, the Monitoring Framework and the reviews have been designed properly and have been working as they should.

C. The Claimants' Charter challenge is not properly constituted

(1) The true nature of the Claimants' Charter challenge

[48] Before us is an appeal from applications for judicial review in the Federal Court. We must begin by identifying the "real essence" and "essential character" of the applications. We do this by "reading [them] holistically and practically without fastening onto matters of form": *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50.

[49] All of the applications challenge the decision of an officer at an entry point who found the individual Claimants' claims for refugee protection to be ineligible for referral to the Refugee Protection Division under paragraph 101(1)(*e*) of the Act because of the designation of the United States under section 159.3 of the Regulations. All allege that the officer had no power to do that because those two provisions were invalid.

[50] Invalidity is alleged to stem from two problems, *ultra vires* and the Charter. The *ultra vires* issue will be canvassed later in these reasons.

[51] The Claimants say the two provisions cause effects that are contrary to section 7, section 15 or both. The Claimants also say the two provisions are not justified under section 1 and must be struck down under section 52 of the *Constitution Act, 1982*.

[52] The Claimants do not say that other provisions, statutory instruments or policies are invalid because they cause effects contrary to the Charter. In particular, the Claimants do not seek to invalidate subsection 102(3), the 2015 Order in Council or the Monitoring Framework. Nor do they say that these matters are part of the cause of any unconstitutional effects caused by the two provisions.

[53] As well, in their applications, the Claimants do not challenge any subsection 102(3) reviews and related administrative conduct. For example, they do not challenge or seek remedies concerning administrative conduct in relation to subsection 102(3) reviews, the outcome of reviews that left the designation in place, reports to the Governor in Council or the failure to report to the Governor in Council, or any decisions at any time by the Governor in Council to keep the designation in place. None of these things are said to be part of the cause of any unconstitutional effects. In their memorandum of fact and law, the Claimants do make submissions alleging inadequacies in the subsection 102(3) reviews, but only in support of their submission that the designation of the United States as a safe country is *ultra vires* the Act.

[54] Thus, the real essence and essential character of the Claimants' applications is a challenge to paragraph 101(1)(*e*) of the Act and section 159.3 of the Regulations, and only those two provisions. Alone and in isolation they are said to cause unconstitutional effects. Based on this, as we shall see, the evidentiary record that developed in the Federal Court concentrated on general effects of the designation of the United States, often described in terms of individual incidents rather than the subsection 102(3) reviews and related administrative conduct and their effect.

[55] The Claimants' applications do not fit with the nature of the legislative scheme. To reiterate, paragraph 101(1)(*e*) of the Act and section 159.3 of the Regulations do not sit alone and in isolation. They are part of an interrelated legislative scheme. And after designation, the real cause of any continued designation or decision to revoke it is the subsection 102(3) reviews and related administrative conduct.

(2) The nature of the Charter and the basic requirements for a challenge under it

[56] The Charter sets out rights and freedoms and guarantees them subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. But nowhere does the Charter invite courts to depart from their role as courts. Nor does it invite judges—career lawyers who happen to hold a judicial commission—to follow whatever procedures they wish. Rather, the Charter is a document of law, surrounded, suffused and sustained by law. In fact, tens of thousands of cases have been decided under it, a veritable mountain of guidance.

[57] From this mountain, certain immutable principles bind us all. One of the most basic is that Charter claimants must show that some state action—for example, legislation or administrative conduct by state officials—has caused an infringement of rights or freedoms. Inherent in this are two requirements: the Charter claimants must identify the state action responsible for the infringement, *i.e.*, demonstrate a causal link between the state action and the infringement, and place enough evidence before the Court to prove causation and infringement. See, *e.g.*, *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 at

447 and 490 S.C.R.; *Symes v. Canada*, [1993] 4 S.C.R. 695, 110 D.L.R. (4th) 470 at 764-765 S.C.R.; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 60; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at paras. 73-78; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 at paras. 126, 131-134; *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398 at paras. 251-254 and cases cited therein. Common to these requirements is causation. Causation is key.

[58] From this, two practical rules have emerged in the jurisprudence:

(a) Legislative provisions in an interrelated legislative scheme cannot be taken in isolation and selectively challenged: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134. The provisions, taken in isolation, may not have caused the Charter infringement. Other related provisions may be responsible or may prevent or cure any possible defects. This sort of artificial and narrow challenge often results in the creation of an unduly artificial and narrow evidentiary record.

(b) Where administrative action or administrative inaction under legislation is the cause of a rights infringement, it, not the legislation, must be challenged: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120. Challenging the legislation and ignoring the administrative action or administrative inaction will not satisfy the requirement of causation between the state action and the rights infringement. This can also lead to the development of an unduly artificial and narrow evidentiary record.

[59] In considering a Charter challenge, another basic principle must be kept front of mind: courts are courts and have to act like courts. Thus, courts can deal only with the challenge the Charter challengers have advanced and courts can work only with the evidence the parties have offered concerning that challenge. Courts cannot go beyond the challenge and address a different challenge. Nor can they help themselves to evidence as if they are a roving commission of inquiry. Instead, Courts dealing with a Charter challenge are "firmly grounded in the discipline of the common law methodology": Brian Morgan, "Proof of Facts in Charter Litigation," in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987), 159 at 162, cited with approval by the Supreme Court in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385 at 363 S.C.R. and *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, 73 D.L.R. (4th) 686 at 1099-1101 S.C.R.

(3) Application of these principles to the Claimants' Charter challenge

[60] The Claimants' Charter challenge offends the two practical rules. The fundamental requirement of causation that underlies both rules has not been met. This has also rendered the evidentiary record on key issues too thin to permit responsible adjudication. As a result, the Claimants' Charter challenge must be dismissed.

(a) Applying the two practical rules

(i) Legislative sections cannot be taken in artificial isolation and selectively challenged

[61] Assuming for the moment that there is a Charter infringement in this case, what caused it? As the analysis of the legislative scheme in section B of these reasons shows, subsection 102(3) reviews play a pivotal role in ensuring that continued designation remains appropriate. In this case, the cause of any infringement is not the designation of the United States 17 years ago but the subsection 102(3) reviews and related administrative conduct that has caused the designation to continue. It was incumbent on the Claimants to challenge that.

[62] But they did not do that. Instead, they plucked two provisions out of this complex, interrelated legislative scheme and have singled them out for attack. This was wrong. By attacking those two provisions and only those two—as if the rest of the legislative scheme and administrative conduct under that scheme does not exist—the Claimants have created a strawman and have asked us to decide on its constitutionality. This we cannot do. Courts deciding constitutional cases with big public impact do not deal with strawmen.

[63] This is fatal to the Claimants' challenge: *PHS Community Services*, above.

[64] In *PHS Community Services*, the Supreme Court considered the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. That Act is structurally similar to the Act in this case. Like this case, the relevant provisions of the *Controlled Drugs and Substances Act* consisted of a general

provision whose effects are mitigated by a provision elsewhere in the legislative scheme. Specifically, the *Controlled Drugs and Substances Act* prohibited the possession of certain drugs and substances (subsection 4(1)) but allowed the Minister of Health to grant exemptions from the prohibition (section 56).

[65] The Charter claimant in *PHS Community Services*, the Insite safe injection facility, challenged the general provision, subsection 4(1), arguing that it violated section 7 of the Charter and was not saved under section 1. Just like the Claimants here, Insite argued that the general provision was grossly disproportionate and overbroad.

[66] The Supreme Court unanimously dismissed Insite's Charter challenge. The challenge was directed against the general provision, subsection 4(1), "in isolation" rather than "in the context of other provisions… notably s. 56" (at para. 109). In words apposite to the Claimants' challenge in the case before us, the Supreme Court observed that if the general provision operated in isolation, with "no provision for exemptions", the "assertions that it is arbitrary, overbroad and disproportionate in its effects might gain some traction" (at para. 109). But the general prohibition did not operate that way. It worked hand in hand with the mitigating provision, section 56.

[67] The Supreme Court concluded that the "constitutional validity of s. 4(1) of the Act cannot be determined without considering the provisions in the Act designed to relieve against unconstitutional or unjust applications of that prohibition" (at para. 109). Subsection 4(1) was interrelated to and could not be separated from section 56. In the Supreme Court's view, section

56 acted "as a safety valve that prevents [the general provision] from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects" (at para. 113).

[68] Thus, the Charter challenge had to be brought against all relevant parts of the legislative scheme, not just the general provision in isolation. As this was not done, the challenge against the general provision was dismissed.

[69] But the Supreme Court went further. It held that the entire legislative scheme, consisting of the general provision and the safety valve, was constitutional (at para. 114). Any problem with constitutionality was "not in the statute but in the Minister's exercise of the power the statute gives him to grant appropriate remedies" against any effect causing a Charter violation (at para. 114). Here, the Supreme Court suggests that the challenge in *PHS Community Services* properly lay against the Minister's discretionary decision refusing an exemption from the general prohibition.

[70] Just as in *PHS Community Services*, paragraph 101(1)(*e*) of the Act and section 159.3 of the Regulations cannot be challenged in isolation. A safety valve in the legislative scheme in issue here is the review procedure under subsection 102(3). In this case, if there are effects contrary to the Charter, they stem not from paragraph 101(1)(*e*) of the Act and section 159.3 of the Regulations but from the subsection 102(3) reviews and related administrative conduct. This Court has previously dismissed challenges to the Act that artificially isolate provisions: *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R.

655 at para. 81; *Sogi v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 212, [2005] 1 F.C.R. 171 at para. 23.

[71] Fundamentally then, *PHS Community Services* holds that a Charter challenge must be directed to the state action—legislation or administrative conduct—that causes the Charter infringement. In this regard, it stands alongside and is bolstered by the Supreme Court authority on the requirement of causation cited at paragraph 57 of these reasons.

[72] In oral argument, the Claimants submit that *PHS Community Services* actually supports their position. After all, in *PHS Community Services*, the Supreme Court, using the Charter, ordered the Minister to grant Insite its exemption from the general prohibition. Counsel urges this Court to apply *PHS Community Services*, grant Charter relief here, and end the designation of the United States as a safe third country.

[73] However, *PHS Community Services* and this case are not identical. In *PHS Community Services*, the challengers sought a declaration of the constitutional invalidity of the general prohibition in the *Controlled Drugs and Substances Act* just like the Claimants here sought a declaration of the constitutional invalidity of two designation sections. But in *PHS Community Services*, the challengers went further than that. They challenged administrative conduct—the Minister's failure to grant exemptions—that caused individual rights breaches and sought individual remedies under section 24, including a declaration that the failure of the Minister to grant exemptions to individuals violated section 7 rights (at para. 116). Here, the Claimants have not done this.

[74] In paragraph 58 of these reasons, I mentioned that failing to challenge the matter that is the real cause of the infringement often leads to the development of an unduly artificial and narrow evidentiary record, one that does not speak to the real cause of the Charter infringement. This has happened here. The subsection 102(3) reviews and related administrative conduct are the real causes of the infringement, if there is one. But the evidence before us in this case on subsection 102(3) reviews and related administrative conduct is limited because they were not the focus of the Claimants' challenge. Much more evidence concerning subsection 102(3) reviews and related administrative conduct would have appeared in this record had they been the focus of the Claimants' challenge. We cannot be confident that this record, hobbled by the way the Claimants have cast their challenge, is sufficient for us to adjudicate the Charter issues responsibly.

[75] By way of illustration, the most recent reports from subsection 102(3) reviews were issued just before and after the Charter challenges in this case, in December 2016, March 2017 and February 2018, likely covering events right around the time of the challenges: Reasons of the Federal Court at para. 77. Yet, the Federal Court tells us that not even "the content of these reports was...in evidence": Reasons of the Federal Court at para. 78. All that the Federal Court could surmise (at para. 78) was that "reporting continued after the 2015 [Order in Council]". The reviews underlying these reports—to say nothing of the material administrative officials might have considered when preparing these reviews—could contain evidence of the sort described at paragraphs 34-42 and 47 of these reasons. In this case, much of this valuable evidence is missing or is in bits and pieces, highly redacted in many places due to assertions of privilege by Canada. But the Claimants advised us at the hearing that they did not object to or challenge these, in

effect acquiescing to Canada's non-disclosure. As a result, right where any Charter assessment must focus—the subsection 102(3) reviews and related administrative conduct, including any reports—lies a great big hole.

[76] The legal question for this Court "is whether the appeal record provides sufficient facts to permit the Court to adjudicate properly the issues raised": *R. v. Mills*, [1999] 3 S.C.R. 668, 180 D.L.R. (4th) 1 at para. 37. The answer is no. The evidentiary basis is too incomplete to allow for an informed Charter adjudication on what really matters in this case.

[77] The Claimants submit that the evidentiary record is voluminous and, thus, was adequate. Voluminous it was, particularly concerning the experiences of some refugee claimants in the United States and the experiences of some refugee claimants in Canada who were returned to the United States. But the value of evidence is not measured by the pound.

[78] As shall be seen in the discussion of the Federal Court's treatment of the section 7 issues, some of this evidence, although voluminous, is somewhat piecemeal and individualized and, thus, is problematic for drawing system-wide inferences concerning the situation in the United States. Immigration, Refugees and Citizenship Canada noted similar problems with a report, prepared by two of the Claimants, that urged the Minister to revoke the designation of the United States: Memorandum to the Minister entitled "Amnesty International and Canadian Counsel for Refugees Report Contesting the U.S. Designation as a Safe Third Country", dated July 7, 2017, Appeal Book, Vol. 39 at 16740 and 16741. Also some of the evidence consists of or is based on media reports whose reliability and admissibility is open to question. The evidentiary record

suffers from other problems too. But the biggest problem of all is that very little of it concerned the subsection 102(3) reviews and related administrative conduct, a storehouse of some of the best available evidence. As will be discussed shortly, if their Charter challenge were properly constituted, the Claimants could have pursued this evidence, asserted and maintained objections to non-disclosure and litigated the objections. And, as will also be discussed shortly, measures could have been taken to ensure that a judicial review would be available, effective, and fair.

[79] At one point in the hearing, the Claimants seemed to suggest that the requirement of a sufficient evidentiary record before the Court is just a technicality. A foundational case from the Supreme Court rejects this. The sufficiency of evidence is "not...a mere technicality" but is "a flaw that is fatal" because it "is essential to a proper consideration of Charter issues". Deciding Charter cases in "a factual vacuum" would "trivialize" the Charter and cause "ill-considered opinions" in cases "of fundamental importance to Canadian society" that "profoundly affect the lives of Canadians and all residents of Canada". No one can "expect a court to deal with [a Charter issue where there is]...a factual void". And "the unsupported hypotheses of enthusiastic counsel" cannot fill that void. See *MacKay* at 361-362 and 366 S.C.R.

[80] This especially matters where, as here, the allegation of unconstitutionality stems from the alleged effects of the impugned provision. In *Danson* at 1101 S.C.R., the Supreme Court put it this way:

> In general, any Charter challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred.

[81] Time and time again, the Supreme Court has underscored the importance of a court having a full evidentiary record before deciding Charter cases. See *A.G. (Que.) v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321 at 90-91 S.C.R.; *MacKay* at 361-362 S.C.R.; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1 at 762, at 767-768 S.C.R.; *Danson* at 1101 S.C.R.; *Eaton v. Brant County Board of Education,* [1997] 1 S.C.R. 241, 142 D.L.R. (4th) 385 at paras. 2-3 and 55; *R. v. Goltz*, [1991] 3 S.C.R. 485, 131 N.R. 1, at 515-516 S.C.R.; and at least 16 other, more recent Supreme Court authorities on point.

[82] This is just a subset of an older, broader rule, expressed in non-Charter constitutional cases that constitutional issues should not be decided unless a full and adequate evidentiary record is before the Court: *Northern Telecom v. Communications Workers*, [1980] 1 S.C.R. 115, 98 D.L.R. (3d) 1 at 139 S.C.R.

[83] Had the subsection 102(3) reviews and related administrative conduct been targeted in a Charter challenge or judicial review, the reports of the reviews, the reviews themselves and the information relied upon by officials involved in the reviews and, if relevant, by the Governor in Council would form the record placed before the Court, subject to privilege and other valid objection: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297; and see discussion at paras. 106-120 below on tools the Court has to manage privilege and objection. Much of the record would have

been systemic evidence related to the United States' treatment of refugees, including evidence gathered on a state-to-state basis, based on the many detailed sources required to be examined in the Monitoring Framework—sources broader and more numerous than those that the non-governmental organizations who are Claimants in this case could access. As well, the subsection 102(3) reviews would have contained evaluations by administrators responsible for studying the matter—potentially important for the issues of rights breach and justification. Finally, assuming a challenge targets the most recent subsection 102(3) reviews and related administrative conduct, the underlying material would be relatively fresh. Freshness matters: the policies and practices of the United States and the conditions refugees encounter there can rapidly change.

(ii) Where administrative action or inaction under legislation is responsible for unconstitutional effects, the administrative action or inaction must be challenged, not the legislation

[84] A Charter remedy will be given only for state action that causes a Charter infringement. Where the state action is legislation and the effect of the legislation is to infringe Charter rights in an unjustifiable way, the legislation is liable to be struck. But if, in reality, administrative action or inaction under the legislation is alone responsible for the unjustified Charter infringement, the Charter challenge must focus on the administrative action or inaction, not the legislation: *PHS Community Services*; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416 at 1078-1079 S.C.R.; *Eaton*, above at paras. 2-3 and 55; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 at paras. 20-23; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at para. 53; *New Brunswick (Minister of Health and Community Services) v. G.(J.)*,

[1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124 at para. 97; *Little Sisters*, above at paras 134-135; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295 at paras. 83-84; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 at para. 67; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773 at para. 174.

[85] *Little Sisters*, above is perhaps the foremost Supreme Court authority supporting the proposition that where administrative action or inaction is responsible for unconstitutional effects, the administrative action or inaction should be challenged.

[86] Little Sisters Book and Art Emporium imported erotic publications into Canada. Canada Customs regularly intercepted and prohibited the importations on the ground of obscenity. It launched a Charter challenge against the provisions of Customs legislation that authorized the interceptions.

[87] The majority of the Supreme Court asked itself whether the "source of the problem" was "the…legislation itself" or "the unconstitutional conduct of Customs officials exercising powers under constitutional legislation" (at para. 108).

[88] The majority of the Supreme Court held that the problem did not stem from the Customs legislation itself. In purpose and effect, it was not contrary to the Charter. It did not contemplate or authorize maladministration by officials with Canada Customs. Instead, the administrative decisions taken by Canada Customs under the legislation were the real source of any

constitutional infringement. In the words of the majority of the Supreme Court, the challengers' complaints were about "the statutory scheme as *operated* by officials rather than the statutory scheme itself" (at para. 77, emphasis in original). Occasional maladministration and misapplication by officials, by itself, affords "no reason to declare the legislation unconstitutional" (at para. 77). The proper recourse for Little Sisters was to challenge non-importation decisions by Canada Customs by way of judicial review.

[89] The case at bar is similar to *Little Sisters*. The alleged constitutional defect in this case stems from how administrators and officials are operating the legislative scheme, not the legislative scheme itself. If they are operating the legislative scheme properly, regular reviews under subsection 102(3) will be conducted against the four criteria in subsection 102(2) of the Act and the reviews, conducted in accordance with the Monitoring Framework, will be thorough. For good measure, officials at points of entry will have powers and discretions available to them to mitigate or eliminate any harsh effects.

[90] Thus, based on the record before us, the legislative scheme as a whole, assuming it is operated properly, is designed to protect fundamental human rights, including Charter rights. Based on the record before us, to the extent that detrimental effects are being suffered by persons being returned to the United States, the legislative scheme as a whole is not to blame. Rather, if anything, subsection 102(3) reviews and related administrative conduct may be to blame. But because the Claimants chose not to attack any administrative conduct, we have neither the ability nor the evidence before us to assess it.

[91] Before leaving this topic, one exchange between the Claimants and this Court deserves mention. The Court asked the Claimants questions regarding the nature of their Charter challenge and whether it had been properly constituted, *i.e.*, whether the Claimants had challenged the state action responsible for the Charter infringements they allege. In response, shortly after the mid-morning break on the second day of hearing, the Claimants submitted that all they had to do to succeed in their Charter challenge was to prove the presence of any Charter infringements and point to any sort of legislative action that had taken place in the years leading up to the infringements, nothing more. This is not supported by the law. It reads out the requirement at paragraph 57 of these reasons that a Charter challenger prove causation, the two practical rules identified at paragraph 58 of these reasons and discussed at paragraphs 61-73 and 84-91 of these reasons, the need for adequate evidence proving causation identified at paragraphs 74-83 of these reasons, and the tens of Supreme Court cases cited in this section of these reasons supporting all of these points.

(b) The Claimants' proper recourse

[92] The Claimants and Canada both submitted during the hearing that applications for judicial review targeting the subsection 102(3) reviews and related administrative conduct are not possible. In their view, there must be a formal decision, a formal order or a tangible record of a decision-point such as a report that has legal effect before there can be judicial review. They submit that there was no such thing here.

[93] I disagree. Applications for judicial review targeting the subsection 102(3) reviews and related administrative conduct are possible despite what the parties might believe.

[94] Applications for judicial review are possible where a matter—usually administrative conduct or inaction—affects legal rights, imposes legal obligations or causes real prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488 at paras 21-25; *Democracy Watch v. Conflict of Interest and Ethics Commission*, 2009 FCA 15, 387 N.R. 365. As a result, there are examples of judicial reviews for administrative conduct or inaction falling short of formal decisions or orders: see, *e.g.*, *Saulnier v. Quebec Police Commission* (1975), [1976] 1 S.C.R. 572, 57 D.L.R. (3d) 545 at 578 S.C.R. (a recommendation to the Minister of Justice to demote an officer is reviewable); *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694, 125 D.L.R. (4th) 559 at 561-565 D.L.R. (F.C.A.) (the process for tendering and awarding a contract is reviewable); *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440, 151 D.L.R. (4th) 1 (notices from the commissioner of an inquiry that outline possible findings of misconduct are reviewable); *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, [2009] 2 F.C.R. 417 (issuance of a royal commission report with no legal consequences that made reputation-affecting findings concerning an individual is reviewable).

[95] This Court explained the legal basis for this as follows:

> Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone

> directly affected by "the matter in respect of which relief is sought." A "matter" that can be subject of judicial review includes not only a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.
>
> As far as "decisions" or "orders" are concerned, the only requirement is that any application for judicial review of them must be made within 30 days after they were first communicated: subsection 18.1(2) of the *Federal Courts Act*.

(*Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605 at paras. 24-25.)

[96] Based on these authorities, the individual Claimants could have brought judicial reviews against the immigration officers' decisions that they were ineligible for refugee protection in Canada on the basis that they were or are actually eligible. In support of that, they could have sought *mandamus* requiring the Governor in Council to revoke the designation of the United States and a declaration that the Governor in Council should have revoked the designation of the United States at an earlier time. To the extent it is necessary, administrative law relief could also have been obtained concerning subsection 102(3) reviews and related administrative matters as long as those matters affect legal rights, impose legal obligations or cause real prejudicial effects in accordance with the *Irving* test. To the extent that any administrative decisions have been made along the way and need to be quashed, *certiorari* could have been sought. Both administrative law grounds and the Charter might have been offered in support of any of this administrative law relief. If the non-governmental organizations that are Claimants qualify for public interest standing, they could have sought any of this relief on those grounds.

[97] To the extent that any declaratory relief were sought, the Court would have determined its true essence and essential character. If it were akin to *mandamus* or *certiorari*, the Court would have required the prerequisites for those remedies to be met, including any standard of review, before granting any relief: *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R. (4th) 737; *Schmidt v. Canada (Attorney General)*, 2018 FCA 55, [2019] 2 F.C.R. 376 at paras. 17-22.

[98] In response to the Court's questioning, the Claimants submitted that judicial reviews under this legislative scheme would be ineffective. The Claimants pointed to Canada's ability to assert privileges over key documents or redact them and raised the spectre of Canada being able to immunize subsection 102(3) reviews from judicial review.

[99] Canada's position at the hearing did not lessen the Claimants' concerns about immunization. Canada maintained that it has an absolute and unqualified right to assert any of the various privileges at its disposal, such as Crown and public interest privilege under sections 38 and 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, regardless of the consequences, even if immunization of decision-making results.

[100] Both sides' positions are overstated.

[101] In this area, two principles collide. It is true that Canada can assert its privileges if supported by the facts and the law. But courts oppose the immunization of public decision-making from review. The collision of these two principles has led courts to devise ways to

reconcile the protection of necessary interests in confidentiality with the need for effective, meaningful and fair judicial review.

[102] For a long time now, Canadian courts have opposed attempts by public authorities to immunize administrators completely from judicial review, whether that be done by full privative clauses or the withholding of evidence or explanations essential for a meaningful review. The complete barring of review by a court by whatever means, whether by appeal or by judicial review, even on the issue whether an administrator has exceeded its legislative authority, is an unwarranted interference with the core, constitutional powers of the judiciary and the constitutional principle of the rule of law: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 27-28; *Habtenkiel v. Canada (Citizenship and Immigration)*, 2014 FCA 180, [2015] 3 F.C.R. 327 at para. 38; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 24. Put positively, *Crevier* stands for the proposition that there must always be at least some prospect or degree of review: *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658 at 601 S.C.R. (dissenting but not disputed by the majority on this point), citing, with approval, J. H. Grey, "Sections 96 to 100: A Defense" (1985), 1 Admin. L.J. 3 at 11. This principle is limited to the complete ousting of any review of an administrative decision, not legislative limitations on the availability or scope of review: see, *e.g.*, *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, 102 D.L.R. (4th) 402 at 333 S.C.R.; *Capital Regional District v. Concerned Citizens of British Columbia et al.*, [1982] 2 S.C.R. 842, 141 D.L.R. (3d) 385; *Vavilov* at paras. 45-52.

[103] For this reason, full privative clauses that purport to immunize administrative decision-making entirely from review are read down to permit review, albeit usually on a deferential basis: see, *e.g.*, *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449.

[104] In judicial review, the reviewing courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at para. 70. Put another way, all holders of public power must be accountable for their exercises of power, a principle that rests at the heart of our democratic governance and the rule of law: *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 at paras. 313-315 (dissenting but not disputed by the majority on this point); *Canada (Judicial Council) v. Girouard*, 2019 FCA 148, [2019] 3 F.C.R. 503 at para. 103; *Douglas v Canada (Attorney General)*, 2014 FC 299, [2015] 2 F.C.R. 911 at para. 119.

[105] The rationale against the complete immunization of administrative conduct from review is as fundamental as it can get:

> "L'etat, c'est moi" and "trust us, we got it right" have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them—the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on—must obey the law: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385; *United States v. Nixon*, 418 U.S. 683 (1974); *Marbury v. Madison,* 5 U.S. 137 (1803); *Magna Carta* (1215), art. 39. From this, just as night follows day, two corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being

> reviewed. See the discussion in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 77-79, *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 at paras. 313-315 (dissenting but not disputed by the majority), and the numerous authorities cited therein.
>
> Tyranny, despotism and abuse can come in many forms, sizes, and motivations: major and minor, large and small, sometimes clothed in good intentions, sometimes not. Over centuries of experience, we have learned that all are nevertheless the same: all are pernicious. Thus, we insist that all who exercise public power—no matter how lofty, no matter how important—must be subject to meaningful and fully independent review and accountability.

(*Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 at paras. 23-24; see also *Girouard v. Canada (Attorney General)*, 2018 FC 865, [2019] 1 F.C.R. 404 at paras. 6-7, aff'd 2019 FCA 148, [2019] 3 F.C.R. 503.)

[106] Courts are alert to attempts by public authorities and administrators to immunize their decision-making by withholding documents and information necessary for judicial review or by failing to give explanations and rationales for decision-making: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 51; *Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at para. 24; *Slansky* at para. 276 (dissenting but not disputed by the majority); see also Paul A. Warchuk, "The Role of Administrative Reasons in Judicial Review: Adequacy and Reasonableness" (2016), 29 Can. J. Admin. L. & Prac. 87 at 113; and see the requirement for reasoned explanations behind administrative decision-making in *Vavilov* at paras. 83-87 and 91-104.

[107] To ensure that judicial reviews are available, effective and fair, both sides have many tools to compel the production of evidence or the provision of information such as production of the administrative record under Rule 317, subpoenas under Rule 41, and oral and documentary

discoveries when the judicial review can be treated like an action under subsection 18.4(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7: see the general discussion in *Tsleil-Waututh Nation* at 86-105; on subsection 18.4(2), see *Canada (Human Rights Commission) v. Saddle Lake Cree Nation*, 2018 FCA 228 at paras. 23-26 and *Meggeson v. Canada (Attorney General)*, 2012 FCA 175, 349 D.L.R. (4th) 416 at paras. 31-34. The Federal Courts have additional tools under the plenary powers they possess as courts: see *Dugré v. Canada (Attorney General)*, 2021 FCA 8 at para. 20 and cases cited therein.

[108] The primary tool available to parties is to request that the administrative decision-maker produce its record under Rule 317. In dealing with a request, administrative decision-makers can object to disclosing documents under Rule 318 based, for example, on privileges. After receiving submissions, the Court can rule on the objections. See, generally, *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 at paras. 5-18; and see *Bernard v. Public Service Alliance of Canada*, 2017 FCA 35 on the procedure for litigating objections.

[109] When dealing with privileges, the Court will scrutinize them carefully. Some privileges, such as public interest privilege, have demanding requirements that must be met: see, *e.g.*, *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24, [2018] 3 F.C.R. 633. When a claim of privilege over a document is before a Court under Rule 318, the Court is not always limited to the all-or-nothing choice of making an order requiring the document to be produced or keeping the document secret. Often the Court can craft an order that protects confidentiality interests while permitting sufficient access to confidential material to facilitate effective and meaningful judicial review: *Lukács* at paras. 12-18; see also *Canada Evidence Act*,

s. 37(5) and ss. 39.1(7) and (8). When the record assembled under Rules 317 and 318 is settled, it can be filed with the Court hearing the judicial review: on this, see *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268, [2016] 3 F.C.R. 19 at paras. 7-24.

[110] There are cases where the Court cannot craft an order permitting some disclosure and so an assertion of privilege over an important document is entirely upheld. But the judicial review is not stopped in its tracks. The Court has some mechanisms to deal with this.

[111] Assertions of privileges over a challenger's constant and firm objection can lead to adverse inferences being drawn against the party asserting the privilege—and sometimes the adverse inference can be pivotal in the outcome of the judicial review: see, *e.g.*, *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 at paras. 165-166; and see discussion of this in *Tsleil-Waututh Nation* at para. 54.

[112] The assertion of privileges over a challenger's constant and firm objection can also lead to serious gaps in the evidentiary record that either leave the administrator unable to demonstrate the reasonableness of its decision to the reviewing court or undermine the requirement that there be a reasoned explanation for an administrator's decision. Either can lead to the quashing of the administrative decision: *Vavilov*, above; *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 at paras. 313-324.

[113] Despite the assertion of privileges, challengers and the Court do not necessarily have to be deprived of what they need for an effective, meaningful and fair judicial review.

[114] Public authorities and administrative decision-makers can sometimes prepare and disclose a summary of how they went about their task, what they took into account and why they acted the way they did, providing enough information to allow for an effective and meaningful judicial review. In law, the provision of such a summary in these circumstances does not waive privilege. For example, in *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, 444 D.L.R. (4th) 298, a certificate under section 39 of the *Canada Evidence Act*—the most drastic privilege on the books—was issued to render secret the Governor in Council's deliberations and the sensitive documents and information it relied upon. But the Governor in Council provided a summary of its decision-making in the preambles to its Order in Council approving an infrastructure project. This was sufficient in the circumstances to make the judicial review effective, meaningful and fair.

[115] Of course, the summary must be adequate and accurate. Some evidence should be offered regarding who prepared the summary and how it was prepared. Some of the mechanisms, discussed immediately below, may facilitate the making of submissions concerning the adequacy and accuracy of the summary.

[116] The Federal Courts have mechanisms available to them that can reconcile the need for confidentiality while allowing for effective, meaningful and fair judicial review. And some statutory privileges are subject to exceptions and Courts can fashion flexible disclosure orders to

preserve confidentiality as much as possible: see for example *Canada Evidence Act*, s. 37(5) and ss. 39.1(7) and (8).

[117] Depending on the type of privilege and the circumstances, a reviewing court may be able to review the privileged documents and the summary to ensure adequacy and accuracy.

[118] For example, on motion by either side to the judicial review, the Court, using its powers under the *Federal Courts Rules*, its plenary powers, or both, can appoint the equivalent of an *amicus* who can receive unredacted or largely unredacted copies of privileged material and make submissions in the absence of the applicants on the challengers' behalf in a closed hearing. This is analogous to the use of a special advocate acting for the challengers in a national security judicial review: *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326.

[119] Sometimes measures short of that suffice. *Ex parte* hearings may be necessary and useful in some circumstances. In some cases, counsel for the applicants on judicial review can be permitted to receive confidential information on their undertaking to keep it confidential or a more restrictive undertaking not even to divulge it to their clients.

[120] The measures to which a court can resort are limited only by its creativity and the obligation to afford procedural fairness to the highest extent possible. Many variations of the measures discussed above can be imagined: see, *e.g.*, the creative order made for access to highly confidential Cabinet materials in the Charter challenge in *Health Services and Support-Facilities*

Subsector Bargaining Association v. British Columbia, 2002 BCSC 1509, 8 B.C.L.R. (4th) 281, particularly Schedule 1 thereto; and see also this Court's approval of these mechanisms in *Vancouver Airport Authority* and *Lukács*.

[121] Judicial reviews can be prosecuted and decided quickly, especially if they are expedited: *Brown* at para. 159; *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108 at para. 22. Examples of speediness abound. The Federal Court often hears and decides urgent judicial reviews quickly: *Brown* at paras. 157-159. This Court can act quickly even in complex matters. For example, recently this Court issued 79 directions, orders, reasons and judgments over a handful of weeks to get a large judicial review ready for hearing: *Coldwater First Nation*. Where delay is unavoidable, interlocutory relief, including a stay, pending determination of a judicial review is possible: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

[122] For years, the Federal Courts have entertained judicial reviews in the national security context. Sometimes they have to proceed quickly. They deal with some of the most sensitive and confidential information held by the Government of Canada. Nevertheless, by using many of the mechanisms described above and mechanisms analogous to these, the Federal Courts have reconciled the protection of necessary interests in confidentiality with the need for effective, meaningful and fair judicial review. With all the tools at the Federal Courts' disposal in the *Federal Courts Rules* and their plenary powers—and with the good faith and professionalism of all involved—that reconciliation can also happen here. The precise form it takes in specific cases

will be a matter for the parties to negotiate and argue and the Federal Court to consider and decide.

(c) Procedural fairness concerns in this case

[123] None of the parties to this appeal spent much time in their memoranda of fact and law characterizing the real essence and essential character of the applications or the implications of that. Nor did they spend much time analyzing the legislative scheme. As a result, the parties spent little time on the most relevant part of the legislative scheme in the post-designation context: the subsection 102(3) reviews and related administrative conduct.

[124] During our preparations for the hearing of the appeal, we noticed that relatively few submissions were made concerning subsection 102(3) reviews. And upon reviewing the evidentiary record before us, we found relatively little evidence concerning the conducting of subsection 102(3) reviews. What we did find was often heavily redacted.

[125] Uppermost in our minds as we were preparing was procedural fairness: the need to ensure the parties were aware of our concerns and had an opportunity to address them. We must decide cases on all the law that binds us, not just the law that the parties happen to put to us. But in doing this, we must be procedurally fair to the parties. See *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689. We took steps to ensure procedural fairness.

[126] We issued a direction inviting the parties to make additional submissions, particularly on the issue of the subsection 102(3) reviews:

> In addition to the parties' submissions in the memoranda of fact and law and the oral submissions they intend to make at the hearing of this appeal, the Court would appreciate submissions on an additional issue.
>
> At paras. 77-78 of its reasons, the Federal Court refers to reports of reviews conducted in December 2016, March 2017 and February 2018. Were these reviews conducted under subsection 102(3) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27? Some other assessments, which may or may not be reviews under subsection 102(3), appear in the record with passages redacted: see, *e.g.*, pp. 15993 and 16722.
>
> At the hearing of this appeal, the Court would appreciate oral submissions on the nature of the evidentiary record concerning subsection 102(3) reviews and the following three questions.
>
> Are all the subsection 102(3) reviews since the decision of this Court in 2008 before the Court in non-redacted form?
>
> If not, which reviews have not been included and what were the circumstances leading to the non-inclusion of reviews or the making of redactions in documents concerning the reviews?
>
> Finally, what effects do the answers to these questions have on this Court's adjudication of this appeal?
>
> The parties are invited to make submissions at the hearing of this appeal on these questions or on any issues related to these questions.

[127] At the appeal hearing, the parties offered detailed submissions on the issues described in the direction and related issues. They showed an understanding of the relevance of these issues and their implications for the outcome of the appeal.

[128] Further, during the hearing, the Court actively questioned the parties on these issues, often explaining the relevance and implications of its questions. Our questions explored:

- the real essence and essential character of the Claimants' applications;
- the role and significance of subsection 102(3) reviews and related administrative conduct;
- whether the Claimants should have challenged the entire legislative scheme, including subsection 102(3), and the related administrative conduct;
- whether the effects on refugee claimants described by the Claimants stemmed from the two provisions alone, the entire legislative scheme including subsection 102(3), or administrative action or inaction concerning subsection 102(3) reviews and the failure of the Governor in Council to revoke the designation of the United States as a safe third country;
- whether the gaps in the evidentiary record concerning subsection 102(3) reviews and related administrative conduct and the failure to challenge the entire legislative scheme or any administrative actions under it were fatal to this appeal;
- whether applications for judicial review were available for subsection 102(3) reviews and related administrative conduct.

[129] During this questioning, the Court put to the parties the leading Supreme Court authorities concerning these matters, including *PHS Community Services*, *Little Sisters* and

MacKay. The parties, represented by experienced constitutional litigators, were familiar with these authorities and gave us helpful submissions on them.

[130] The parties understood these issues, understood their significance for this appeal and gave complete responses to the Court. They did not ask for an opportunity to make further written submissions to the Court. None were needed, as the Court was satisfied with the completeness and the quality of the parties' responses.

(d) The Federal Court's decision

[131] The Federal Court dealt with the Charter challenge in the way it was put and defended. In so doing, its attention was diverted away from important features of the legislative scheme—in particular, the subsection 102(3) reviews and related administrative conduct and the centrality of these two things. As well, the principles of Charter litigation, discussed above, were not argued before it. These things led the Federal Court into reversible error. As a result, this Court can intervene.

D. The issues arising under section 7 of the Charter

[132] The analysis in section C of these reasons is sufficient to dismiss the Claimants' Charter challenge. However, for the guidance of those advancing section 7 claims in this area in the future, this Court will now highlight certain issues arising from the reasons of the Federal Court.

(1) The finding that those returned to the United States were automatically detained

[133] The Federal Court found that returnees are "immediately and automatically imprisoned by U.S. authorities" (at para. 103).

[134] The Claimants submit that appellate courts must defer to the factual findings of first-instance courts and the test for interference is the very high standard of palpable and overriding error. On this, they are correct: see, *e.g.*, *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46. However, where fact-finding has been done contrary to accepted legal principle or where a legal error "infected or tainted" a factual conclusion, the Court may interfere: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 35.

[135] The Federal Court took the evidence of ten individuals who said that they were detained upon returning to the United States (at paras. 95-98), evidence that United States officials required one returnee to surrender her cellphone (at para. 97) and evidence about the conditions and quality of one person's detention (at para. 96) and concluded that all who return to the United States are "immediately and automatically imprisoned" (at para. 103).

[136] The Federal Court also relied (at para. 98) on the evidence of lawyers who represent or advise returnees. Their testimony, taken at its highest, suggests that many, not all, detainees are detained.

[137] As a matter of law, inferences must be logical and must not go beyond the limits of the evidence before the Court: *Mahjoub*, above at para. 62; *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723, citing the widely accepted test in *R. v. Munoz* (2006), 86 O.R. (3d) 134, 38 C.R. (6th) 376 (S.C.J.) at paras. 23-31. Where a court draws inferences outside the range of inferences it could reasonably make, interference is warranted: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 at para. 57.

[138] Logically, evidence about the conditions and quality of one person's detention and the confiscation of another person's cellphone says nothing about whether detention is immediate or automatic across the United States system. The evidence of the particular treatment of ten individuals—all selected by the Claimants—cannot itself provide a basis for making system-wide inferences. And evidence from lawyers selected by the Claimants that "most are detained" cannot support an inference that all coming in from the border with Canada are immediately and automatically detained.

[139] Only the opinion of experts testifying on system-wide phenomena, the content of United States law and its effects might suffice. In the Federal Court, the Claimants tendered the evidence of several experts on United States law and immigration practice to try to do just that. However, in this case, the experts' testimony did not support the Federal Court's conclusion. The experts testified that detention is discretionary, not mandatory, for most returnees: Hughes December 3, 2018 Cross-examination, Appeal Book, Vol. 27, tab 119, pp. 11292-11293; Witmer Cross-examination, Appeal Book, Vol. 33, tab 137, pp. 13763-13765; Anker Cross-examination, Appeal Book, Vol. 25, tab 109, p. 10127; Yale-Loeher Affidavit, Appeal Book, Vol. 47, tab 185,

pp. 20142-20144. The United States law cited by them confirms this point. And many experts had little knowledge about the application of United States refugee detention practices to returnees: Hughes December 3, 2018 Cross-examination, Appeal Book, Vol. 27, tab 119, pp. 11254-11255; Robinson Cross-examination, Appeal Book, Vol. 33, tab 141, pp. 13907-13910; Obser Cross-examination, Appeal Book, Vol. 32, tab 133, pp. 13526, 13538; Warden-Hertz Cross-examination, Appeal Book, Vol. 33, tab 139, pp. 13830-13831; and Benson Cross-examination, Appeal Book, Vol. 28, tab 122, pp. 11586-11587.

[140] The highest possible finding on this record is that returnees to the United States are exposed to a risk of discretionary detention. Refugee claimants in Canada are exposed to that sort of risk: Act, s. 55. This similarity suggests that sending refugee claimants to the United States is not against the principles of fundamental justice: *Canada (Attorney General) v. Barnaby*, 2015 SCC 31, [2015] 2 S.C.R. 563 at paras. 3-5.

[141] The evidence shows that returnees who are detained in the United States can seek release and release is often granted, either on bond or without: Witmer Cross-examination, Appeal Book, Vol. 33, tab 137, pp. 13762-13763, 13766; Irizarry Cross-examination, Appeal Book, Vol. 33, tab 143, pp. 14130, 14137-14142; Robinson Cross-examination, Appeal Book, Vol. 33, tab 141, p. 13918; Warden-Hertz Cross Examination, Appeal Book Vol. 33, tab 139, pp. 13863-13864, 13853-13855; Hughes Cross-examination, Appeal Book, Vol. 27, tab 119, pp. 11303-11304; Yale-Loehr October 12, 2018 Affidavit, Appeal Book, Vol. 47, tab 185, pp. 20146-20147.

[142] There is also evidence that some returnees have access to counsel while in detention. One of the individual Claimants testified that her detention conditions were unacceptable as she was cold and was held in solitary confinement for a week while awaiting a tuberculosis test. She suspected that her religious dietary needs were not accommodated. However, there is no evidence that these practices are widespread or regular.

(2) The finding that Canadian immigration officers' discretion to alleviate harsh effects is "illusory"

[143] In the Federal Court, Canada submitted that the two provisions, paragraph 101(1)(*e*) of the Act and section 159.3 of the Regulations, do not have the effect of infringing the Charter because certain "safety valves" exist that can stop any unconstitutional effects that might arise in extreme cases. The "safety valves" it cites are described at paragraph 43, above.

[144] The Federal Court rejected this submission on the ground that these safety valves were not "generally available" and, therefore, were "illusory": F.C. reasons at para. 130. As a matter of law, this is incorrect. It cannot be said that the safety valves are "not generally available".

[145] The evidentiary record in this case bears this out. Some of the applicants in this case used these "safety valves" to avoid removal. The ABC and the Homsi/Al-Nahass families applied immediately for judicial review of the officer's ineligibility decision and applied for a stay of removal. Counsel advises that the Homsi/Al-Nahass family has, so far, been successful in obtaining permanent resident status under section 25. In Ms. Mustefa's case, an immigration officer told her about the ability to review her ineligibility decision.

(3) The findings that detention conditions are cruel and unusual and cause psychological suffering

[146] Here again, broad, system-wide inferences concerning the United States from the limited nature of the individual incidents described in the record cannot be made.

[147] As well, "cruel and unusual" has a known meaning in Canadian law. It is enshrined in section 12 of the Charter and has a high threshold. Also high is the threshold for finding that psychological suffering engages section 7 of the Charter: *Kreishan v. Canada (Citizenship and Immigration),* 2019 FCA 223, 438 D.L.R. (4th) 148. Neither threshold appears to have been applied.

[148] In *Kreishan*, this Court also noted (at para. 100) that psychological suffering is inherent in the plight of refugees fleeing their home country out of fear of persecution. Thus, one must ask whether sending refugee claimants back to the United States actually increased psychological suffering above this inherent level (at para. 93).

[149] It is unclear whether all of the expert evidence on this point was critically assessed. Much relied upon media reports: Appeal Book at 7250, 7412, 7456, 7460, 7895, 7900, 8414, 8419, 9531, 9831, 10017, 12861, 13278, 13281, 13285, 13290, 13299, 13321, 13325, 13331, 13337, 13341, 13344, 13382, 13472, 13480, 13484, 14410, 14415, 14510, 14572, and many others (full citations not included for brevity). For its part, Canada also added many media reports to the record: see Appeal Book, Vol. 43, tab 182 and the exhibits therein.

[150] On this practice, a note of caution needs to be sounded. Media reports often have to be relied upon in immigration matters in the absence of better evidence regarding country conditions. But here the media reports are being used to prove conditions in the United States in support of a Charter claim with serious ramifications where other, better types of evidence are readily available. In the context of this case, media reports are out of court descriptions of incidents by persons who often did not witness the incidents, reporting on what others observed or experienced. Thus, they are hearsay upon hearsay and sometimes even hearsay beyond that, often mixed with inadmissible lay opinion: Lederman, Bryant and Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada,* 5th ed. (Toronto: LexisNexis Canada Inc., 2018) at 249. All the dangers of admitting this sort of evidence—inaccuracy, partiality and lack of opportunity for it to be tested and assessed—are present: Sopinka at 250-256. Charter cases with wide implications should not depend on what one finds in a newspaper.

(4) The principles of fundamental justice

[151] A Court must properly identify and define the principles of fundamental justice relevant to the case before it: *R. v. White*, [1999] 2 S.C.R. 417, 174 D.L.R. (4th) 111 at para. 38. And the principles must be applied with due regard to the context of the case: see *Charkaoui v. Canada (Citizenship and Immigration),* 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 20. This is particularly important in cases that involve removal to a foreign country: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 at para. 68.

[152] The Claimants submit that the relevant principles of fundamental justice are that the effects of laws should not be overbroad or grossly disproportionate to their purposes: *Bedford*, above. The Federal Court accepted that submission.

[153] But the effects, said to be overbroad and grossly disproportionate, are carried out in the United States, by United States officials, under United States law. For that to count under Canadian law, the actions of United States officials had to have sufficient causal connection to Canadian actions such that the effects in the United States were an "entirely foreseeable consequence" of Canadian state action: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at para. 54. All that the Federal Court said here was that (at para. 94) there were "related harms". That falls short of the necessary threshold.

[154] The plain text of section 32 of the Charter provides that the Charter applies only to the "Parliament and government of Canada" and to the "legislature and government of each province", *i.e.*, Canadian state action: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174. Nor does the Charter allow Courts to weigh in on the policy of other States and decide if it passes constitutional muster: *Canada v. Schmidt,* [1987] 1 S.C.R. 500, 39 D.L.R. (4th) 18 at 522-524 S.C.R.; *Kindler v. Canada (Minister of Justice),* [1991] 2 S.C.R. 779, 84 D.L.R. (4th) 438 at 845-846 S.C.R.

[155] The Supreme Court has repeatedly emphasized that Canadian courts cannot apply Canadian constitutional standards to foreign legal systems and administrations as if they were Canadian:

- A court may not apply section 11(*h*) of the Charter to foreign trials: *Schmidt* at 523 S.C.R. This is true even when the government of Canada has extradited that individual to be tried in the foreign system.

- Section 8 of the Charter does not apply to a Canadian letter of request addressed to a foreign government for production of an individual's documents: *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, 158 D.L.R. (4th) 577 at para. 31.

- Section 10(*b*) of the Charter does not apply to questioning by foreign state authorities concerning a person's immigration status and the circumstances of an offence committed by that person's boyfriend: *R. v. Harrer*, [1995] 3 S.C.R. 562; 128 D.L.R. (4th) 98. In this case (at para. 12), United States immigration officials and law enforcement officers could "in no way be considered as acting on behalf of" Canadian officials or governments.

- The Charter does not apply to the conduct of foreign police cooperating with Canadian police on an informal basis: *R. v. Terry*, [1996] 2 S.C.R. 207, 135 D.L.R. (4th) 214 at para. 19.

- Section 12 of the Charter does not apply to punishment someone might receive in a foreign state: *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858, 84 D.L.R. (4th) 498; *Kindler* at 847 S.C.R.

- The Supreme Court has upheld extradition orders to face charges under foreign law with minimum sentences that would be unconstitutional in Canada: *United States of America v. Jamieson*, [1996] 1 S.C.R. 465, 197 N.R. 1, *United States v. Whitley*, [1996] 1 S.C.R. 467, 132 D.L.R. (4th) 575; *United States v. Ross*, [1996] 1 S.C.R. 469, 132 D.L.R. (4th) 383.

[156] These holdings of the Supreme Court are also supported by the fundamental principles of state sovereignty and international comity, which themselves likely inform the content of the principles of fundamental justice: *R. v. Cook*, [1998] 2 S.C.R. 597, 164 D.L.R. (4th) 1 at paras. 26, 39 and 44; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at paras. 33-56; *Terry*.

[157] The Federal Court was correct to note that Canada may not "avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand": Reasons of the Federal Court at para. 100, citing *Suresh*. But this does not allow Canadian courts to assess the substance of United States law and practice through the domestic doctrines of overbreadth and gross disproportionality.

[158] The relevant Canadian state action in this case is the removal of individuals to the United States where they will face treatment under the United States legal system and administration. In such circumstances, Canadian courts will respond to the removal of individuals to foreign legal systems and administrations only where they will suffer effects that are so deplorable they "shock the conscience" of Canadians: *Kindler* at 847-849; *Burns* at paras. 66-69; *Suresh* at paras.

27, 49 and 56; *Barnaby* at para. 2; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127 at para. 44.

[159] Whether something shocks the conscience of Canadians is determined by considering Canadian legal norms, the practices of other democratic countries, and relevant international law: *Burns* at paras. 76-84. "Shocks the conscience" is a high threshold. It covers extreme things such as torture, stoning, mutilation or the death penalty: *Burns* at paras 8 and 69; *Suresh* at paras. 77-78. The threshold is so high that before 2001 the Supreme Court ruled that even the death penalty did not shock the conscience: *Kindler*; *Ng*.

[160] The meaning of "shocks the conscience" can also be understood by appreciating what it does not include. Removal to face criminal charges where "the system for the administration of justice in that country" is "substantially different from ours with different checks and balances" does not shock the conscience: *Schmidt* at 522-523 S.C.R. And removal to face foreign legal proceedings that are not substantially different from what could occur in Canada does not shock the conscience: *Barnaby*.

[161] In this case, there was no evidence that could support a finding that the treatment of returnees to the United States at the Canada-United States border "shocks the conscience". There is evidence of individual cases of substandard treatment but nothing that rises to the very high level required by the "shocks the conscience" standard.

(5) The interpretation and application of overbreadth and gross disproportionality

[162] Paragraph 101(1)(*e*) of the Act and section 159.3 of the Regulations are not contrary to the doctrines of overbreadth or gross disproportionality. When these doctrines are applied properly—*i.e.*, applied only to Canadian state action and effects caused by that state action—there is a rational connection between the law's objectives and its effects and the effects are not so severe that they are not justified by the objective.

[163] A law is unconstitutionally overbroad if the means it employs prohibits or regulates conduct that has no relation whatsoever to the law's purpose: *Bedford* at para. 101; *R. v. Heywood,* [1994] 3 S.C.R. 761, 120 D.L.R. (4th) 348. To be unconstitutionally overbroad, there must be no rational connection between the purpose of the law and some of its impacts: *Bedford* at paras. 112, 117 and 119. This is a high standard to meet: *Bedford* at para. 119.

[164] The objective of the law in this case is the sharing of responsibility for the consideration of refugee claims with countries that are signatory to and comply with the relevant articles of the Conventions and have an acceptable human rights record: *Canadian Council for Refugees* at para. 75.

[165] In this case, Canada's objective is achieved by making, with some exceptions, claimants arriving in Canada at a regular land border with the United States ineligible to claim refugee protection in Canada. As a result, claimants will very often, but not always, be returned to the United States where they face a risk of detention. The question is whether ineligibility to make a

refugee claim and the associated risk of detention for certain individuals arriving from the United States captures some conduct that bears no rational connection to the government's objectives.

[166] The rational connection is evident. Parliament sought to share responsibility for the consideration of refugee claims with the United States, a country that (at least in the eyes of the Canadian government) has signed and complies with the relevant Conventions and has an acceptable human rights record. It chose to do so by denying refugee claimants arriving from the United States access to the Refugee Protection Division. As the law denies individuals access based on the fact they have arrived from the United States, it bears a rational connection to the objective. The fact that some returned to the United States may be detained while making their claim there does not erode this connection.

[167] A law is grossly disproportionate if the means chosen to fix a problem have such a deleterious impact on an individual that they cannot be justified by the importance of fixing the problem. An example is a law that imposes life imprisonment for littering on the streets. The Supreme Court has said, keeping the streets clean is not important enough to justify imposing life imprisonment: *Bedford* at para. 120. As this doctrine requires courts to interfere with the weighing process of Parliament, it has been limited to only extreme cases: *Bedford* at para. 120.

[168] In this case, the means chosen, ineligibility to the Refugee Protection Division for refugee claimants arriving from the United States, is not disproportionate with the objective of sharing responsibility for the consideration of refugee claims with countries that are signatory to

and comply with the relevant articles of the Conventions and have an acceptable human rights record.

E. The issues arising under section 15 of the Charter

[169] For the benefit of future cases, a few words on the Claimants' challenge under section 15 of the Charter are warranted.

[170] The Federal Court found it unnecessary to deal with section 15. As a result, it made no factual findings relevant to the section 15 challenge.

[171] The Claimants submit that the Federal Court judge was obligated to deal with the section 15 challenge. I disagree. A Court has a discretion whether or not to deal with issues unnecessary to the outcome of the case: see, *e.g.*, *Steel v. Canada (Attorney General)*, 2011 FCA 153, [2013] 1 F.C.R. 143 at paras. 65-66 and 68; *Defence Construction Canada v. Ucanu Manufacturing Corp.*, 2017 FCA 133, [2018] 2 F.C.R. 269 at paras. 47-52.

[172] This applies to issues arising under section 15. Section 15 does not enjoy "superior status in a 'hierarchy' of rights": *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238 at para. 26. The Supreme Court has repeatedly rejected the notion that the Charter contains a hierarchy of rights or that one right should be regarded as inherently superior to another: *Reference re Same-Sex Marriage* at para. 50; *Dagenais v. Canadian*

Broadcasting Corp., [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 at 877 S.C.R.; *Mills* at para. 61; *R. v. Crawford*, [1995] 1 S.C.R. 858, 96 C.C.C. (3d) 481 at paras. 34-35.

[173] Had it been necessary for this Court to decide the section 15 issues, it would have had to assess whether it should determine the issues itself or send them back to the Federal Court to determine. Where, as here, no factual findings have been made on the section 15 issues, it is generally best for us to send the matter back to the Federal Court because of its expertise in fact-finding: *Sandhu Singh Hamdard Trust v. Navsun Holdings Ltd.*, 2019 FCA 295 at para. 60; *Canada v. Piot*, 2019 FCA 53 at para. 114; *Pfizer Canada Inc.*, above at paras. 153-159. This is especially so here: the Federal Court expressed concern (at paras. 36-45) about some of the evidence tendered in support of the section 15 claim that might affect its weight.

[174] In commenting on section 15 of the Charter, I do not minimize its importance when assessing conduct under this legislative scheme. Nor do I minimize the importance of any other Charter rights or freedoms, the *Refugee Convention* and the *Convention Against Torture* under this legislative scheme. Far from it. "Anxious scrutiny" in this area is called for: *R. v. Secretary of State for the Home Department*, [2002] UKHL 36, [2003] 1 A.C. 920 at 941 A.C.

F. *Ultra vires*

[175] Regulations, as subordinate legislation, must be authorized by and be within the limits of a statute. When they are not, they are said to be *ultra vires* or beyond the power of those who made them.

[176] The Claimants submit that section 159.3 of the Regulations is *ultra vires*. They maintain that the Regulations were not authorized by the Act at the time of enactment. They also maintain that, over time, the Regulations were no longer authorized by the Act because the factors under subsection 102(2) of the Act no longer supported the designation of the United States as a safe country.

[177] This submission has no merit. This Court's decision in 2008 in *Canadian Council for Refugees* rejected it. No later cases from the Supreme Court have cast doubt on its conclusion. Thus, this Court is bound by it.

[178] In *Canadian Council for Refugees*, this Court held that the issue is "to identify the conditions precedent to the [Governor in Council's] exercise of its delegated authority [to designate the United States] and determine whether these conditions were satisfied at the time of promulgation" (at para. 64). This Court held that:

- the conditions precedent were the four factors in subsection 102(2) of the Act (at paras. 66, 75, 78);

- the delegated authority was set out in paragraph 101(1)(*e*) of the Act (at para. 72); and

- the time of promulgation, "the last relevant date for the assessment of the *vires* issue", was December 29, 2004; the assessment cannot be made "on the

> basis of facts, events or developments that are subsequent to the date of the promulgation" (at para. 89).

Based on these considerations, this Court concluded that the Governor in Council had the power to designate the United States a safe third country under section 159.3 of the Regulations.

[179] The Claimants submit that the designation of the United States became *ultra vires* because it was no longer supported by the subsection 102(2) factors. This overlooks that the assessment of *ultra vires* is done at the time of the designation: *Canadian Council of Refugees* at para. 89. It also overlooks the law on the books expressed in this legislative regime. The subsection 102(3) reviews and related administrative conduct is the mechanism by which the continuing compliance of the designation against the subsection 102(2) factors is assessed. The Claimants' submission on the *vires* issue falls to be considered as part of a judicial review brought against the subsection 102(3) reviews and related administrative conduct.

G. Proposed disposition

[180] For the foregoing reasons, I would allow the appeal, set aside the judgment dated July 22, 2020 of the Federal Court in files IMM-775-17. IMM-2229-17 and IMM-2977-17, and, giving

the judgment the Federal Court ought to have given, I would dismiss the applications for judicial review. I would dismiss the cross-appeal. As this is a matter arising under the Act and there are no special circumstances supporting an award of costs, I would make no award of costs.

"David Stratas"
J.A.

"I agree
Marc Noël Chief Justice"

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-204-20

APPEAL FROM A JUDGMENT DATED JULY 22, 2020 OF THE HONOURABLE JUSTICE MCDONALD, NOS. IMM-2977-17, IMM-2229-17 AND IMM-775-17

STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION *et al.* v. THE CANADIAN COUNCIL FOR REFUGEES *et al.*
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	FEBRUARY 23 AND 24, 2021
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	NOËL C.J. LASKIN J.A.
DATED:	APRIL 15, 2021

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Ontario

Français

Broader Public Sector Accountability Act, 2010

S.O. 2010, CHAPTER 25

Consolidation Period: From April 1, 2021 to the e-Laws currency date.

Last amendment: 2019, c. 7, Sched. 5, s. 7.

Legislative History: [+]

CONTENTS [-]

PART I
INTERPRETATION

Interpretation

1 (1) In this Act,

"agency of the Government of Ontario" means a public body designated in regulations made under the *Public Service of Ontario Act, 2006*; ("organisme du gouvernement de l'Ontario")

"broader public sector organization" means,

(a) a designated broader public sector organization, and

(b) a publicly funded organization; ("organisme du secteur parapublic")

"consultant" means a person or entity that under an agreement, other than an employment agreement, provides expert or strategic advice and related services for consideration and decision-making; ("expert-conseil")

"designated broader public sector organization" means,

(a) every hospital,

(b) every school board,

(c) every university in Ontario and every college of applied arts and technology and post-secondary institution in Ontario whether or not affiliated with a university, the enrolments of which are counted for purposes of calculating annual operating grants and entitlements,

(d) every agency designated as a children's aid society under subsection 34 (1) of Part III of the *Child, Youth and Family Services Act, 2017*,

(e) REPEALED: 2016, c. 30, s. 31 (2).

(f) every corporation controlled by one or more designated broader public sector organizations that exists solely or primarily for the purpose of purchasing goods or services for the designated broader public sector organization or organizations,

(g) every publicly funded organization that received public funds of 10 million dollars or more in the previous fiscal year of the Government of Ontario, and

(h) every organization that is prescribed for the purposes of this definition; ("organisme désigné du secteur parapublic")

"hospital" means,

(a) a public hospital,

(b) a private hospital that received public funds in the previous fiscal year of the Government of Ontario, and

Note: On a day to be named by proclamation of the Lieutenant Governor, clause (b) of the definition of "hospital" in subsection 1 (1) of the Act is repealed and the following substituted: (See: 2017, c. 25, Sched. 9, s. 86 (1))

(b) a community health facility within the meaning of the *Oversight of Health Facilities and Devices Act, 2017* that was formerly licensed under the *Private Hospitals Act* and that received public funds in the previous fiscal year of the Government of Ontario, and

(c) the University of Ottawa Heart Institute/Institut de cardiologie de l'Université d'Ottawa; ("hôpital")

"lobbyist" means an individual who acts as a consultant lobbyist within the meaning of section 4 of the *Lobbyists Registration Act, 1998*, and does not include an in-house lobbyist within the meaning of section 5 or 6 of that Act; ("lobbyiste")

"lobbyist services" means services undertaken by a lobbyist that constitute lobbying within the meaning of the *Lobbyists Registration Act, 1998*; ("services de lobbyiste")

"local health integration network" means a local health integration network within the meaning of the *Local Health System Integration Act, 2006*; ("réseau local d'intégration des services de santé")

Note: On a day to be named by proclamation of the Lieutenant Governor, the definition of "local health integration network" in subsection 1 (1) of the Act is repealed. (See: 2019, c. 5, Sched. 3, s. 2 (1))

"long-term care home" means a long-term care home within the meaning of the *Long-Term Care Homes Act, 2007*; ("foyer de soins de longue durée")

"Ontario Health" means the corporation continued by section 3 of the *Connecting Care Act, 2019*; ("Santé Ontario")

"private hospital" means a private hospital within the meaning of the *Private Hospitals Act*; ("hôpital privé")

Note: On a day to be named by proclamation of the Lieutenant Governor, the definition of "private hospital" in subsection 1 (1) of the Act is repealed. (See: 2017, c. 25, Sched. 9, s. 86 (2))

"public funds" means the public money of the province of Ontario that is provided by the Government of Ontario or an agency of the Government of Ontario, directly to any authority, board, commission, committee, corporation, council, foundation or organization through a grant or transfer payment or other funding arrangement, and, in the case of a school board, includes money received by the school board from taxes levied under the *Education Act* for school purposes, but public funds does not include,

(a) money that is paid for the provision of goods or services to the Government of Ontario or an agency of the Government of Ontario,

(b) money that is paid by the Government of Ontario or an agency of the Government of Ontario under a fee for service arrangement, or

(c) money that is provided by the Government of Ontario or an agency of the Government of Ontario, by way of a loan or loan guarantee; ("fonds publics")

"publicly funded organization" means every authority, board, commission, committee, corporation, council, foundation or organization that received public funds in the previous fiscal year of the Government of Ontario, but does not include,

(a) the Office of the Lieutenant Governor,

(b) the Office of the Assembly or the office of an officer of the Assembly,

(c) a ministry of the Government of Ontario,

(d) an agency of the Government of Ontario,

(e) a municipality,

(f) subject to the regulations, a local board as defined in section 1 of the *Municipal Act, 2001* and section 3 of the *City of Toronto Act, 2006*,

(g) a board of health under the *Health Protection and Promotion Act*,

(h) subject to the regulations, an organization that undertakes its activities for the purpose of profit to its shareholders,

(i) a long-term care home, or

(j) any organization excluded under the regulations; ("organisme financé par des fonds publics")

"public hospital" means a hospital within the meaning of the *Public Hospitals Act*; ("hôpital public")

"school board" means a board as defined in the *Education Act*. ("conseil scolaire") 2010, c. 25, s. 1 (1); 2016, c. 30, s. 31; 2017, c. 14, Sched. 4, s. 2; 2018, c. 17, Sched. 45, s. 3; 2019, c. 5, Sched. 3, s. 2 (2).

Interpretation re Crown agent

(2) Nothing in this Act makes an organization a Crown agent where that organization would not otherwise be a Crown agent. 2010, c. 25, s. 1 (2).

Solicitor-client privilege preserved

(3) Nothing in this Act shall operate so as to require the disclosure of information that is subject to solicitor-client privilege, litigation privilege or settlement privilege. 2010, c. 25, s. 1 (3).

Section Amendments with date in force (d/m/y) [+]

Rules re directives, etc.

2 (1) A directive under this Act may exempt particular organizations or sectors or classes of organizations from any or all of the requirements of the directive. 2010, c. 25, s. 2 (1).

Same

(2) A directive under this Act may be general or particular in its application, and may provide for different classes or categories. 2010, c. 25, s. 2 (2).

Public availability

(3) Every directive and guideline under this Act,

(a) shall be made available to the public on request; and

(b) shall be publicly posted on at least one Government of Ontario website. 2010, c. 25, s. 2 (3).

Status

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply with respect to directives or guidelines. 2010, c. 25, s. 2 (4).

Regulations

3 (1) The Lieutenant Governor in Council may make regulations,

(a) prescribing organizations that are designated broader public sector organizations for the purposes of the definition of that term;

(b) providing that a local board, or an organization that undertakes its activities for the purpose of profit to its shareholders, is a publicly funded organization, despite the definition of that term;

(c) excluding organizations from the definition of "publicly funded organization" in subsection 1 (1);

(d) defining or further specifying the meaning of any word or expression used in this Act but not defined in this Act. 2010, c. 25, s. 3 (1).

Exception re: Hydro One Inc.

(1.1) Despite clauses (1) (a) and (b), Hydro One Inc. and its subsidiaries cannot be prescribed to be designated broader public sector organizations or publicly funded organizations for the purposes of this Act. 2015, c. 20, Sched. 4, s. 1.

Regulations, directives, etc.

(2) The Lieutenant Governor in Council may, by regulation, exercise the power to make a directive, guideline or minister's regulation under this Act and, where the Lieutenant Governor in Council has done so, everything in this Act that applies with respect to that directive, guideline or regulation is deemed to apply with respect to the regulation made by the Lieutenant Governor in Council, with any necessary modification. 2010, c. 25, s. 3 (2).

Section Amendments with date in force (d/m/y) [+]

PART II
LOBBYISTS AND CONSULTANTS

LOBBYISTS

No publicly funded lobbyists

4 (1) No organization to which this section applies shall engage a lobbyist to provide lobbyist services where the compensation for the services is paid,

(a) in the case of an organization referred to in clause (2) (b), from public funds; or

(b) in the case of an organization referred to in clause (2) (a), (c), (d), (f) or (g),

(i) from public funds, or

(ii) from revenues generated by the organization. 2010, c. 25, s. 4 (1); 2014, c. 7, Sched. 2, s. 1 (1).

Application

(2) This section applies to,

(a) every agency of the Government of Ontario;

(b) every designated broader public sector organization;

(c) REPEALED: 2015, c. 20, Sched. 4, s. 2 (1)).

(d) Ontario Power Generation Inc. and each of its subsidiaries;

(e) REPEALED: 2014, c. 7, Sched. 2, s. 1 (2).

(f) Independent Electricity System Operator; and

(g) every organization that is provided for in regulations made under subsection (6). 2010, c. 25, s. 4 (2); 2014, c. 7, Sched. 2, s. 1 (2); 2015, c. 20, Sched. 4, s. 2 (1)).

Transitional

(3) Where, immediately before this section applied to an organization, there was an agreement in place that provided for the payment of money by the organization for lobbyist services, and the compensation for the lobbyist services is to be paid from public funds or other revenues that may not be used for the purpose under this section, the agreement is deemed to contain the following provisions:

1. The lobbyist services are terminated on the earlier of the date that is 30 days after this section applies to the organization and the date that they would have otherwise been terminated under the agreement, despite any notice provisions required under the agreement.

2. The lobbyist may only charge, and shall only be paid for, lobbyist services provided to the organization under the agreement up to the date provided for in paragraph 1.
3. Unless inconsistent with paragraphs 1 and 2, all other terms and conditions related to the lobbyist services terminated in accordance with paragraph 1 that would otherwise survive the term of the agreement shall continue to apply to those services. 2010, c. 25, s. 4 (3).

No circumvention of prohibition on engaging lobbyists

(4) No organization to which this section applies shall provide public funds, or other revenues that may not be used for the purpose, to any person or entity for the purpose of that person or entity engaging a lobbyist to provide lobbyist services to the organization. 2010, c. 25, s. 4 (4).

Saving, association fees

(5) Subsection (4) does not operate in respect of membership fees paid by an organization to which this section applies, to be a member of an association that is established to represent the interests of a group or class of similar organizations. 2010, c. 25, s. 4 (5).

Regulations

(6) The Minister responsible for this Part may make regulations,

(a) providing for additional organizations that this section applies to;

(b) exempting organizations from the prohibition under this section. 2010, c. 25, s. 4 (6).

Exception re: Hydro One Inc.

(7) Despite clause (6) (a), a regulation cannot provide for the application of this section to Hydro One Inc. and its subsidiaries. 2015, c. 20, Sched. 4, s. 2 (2).

Section Amendments with date in force (d/m/y) [+]

Reporting re Use of Consultants

Reporting by Ontario Health, LHINS

5 (1) Ontario Health and every local health integration network shall prepare reports approved by the board of Ontario Health or the local health integration network, as the case may be, concerning the use of consultants by Ontario Health or the local health integration network. 2019, c. 5, Sched. 3, s. 2 (3).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 5 (1) of the Act is repealed and the following substituted: (See: 2019, c. 5, Sched. 3, s. 2 (4))

Reporting by Ontario Health

(1) Ontario Health shall prepare reports approved by its board concerning its use of consultants. 2019, c. 5, Sched. 3, s. 2 (4).

Directives

(2) The Minister of Health and Long-Term Care may issue directives to Ontario Health and to local health integration networks respecting the reports, including directives with respect to,

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 5 (2) of the Act is amended by striking out "and to local health integration networks" in the portion before clause (a). (See: 2019, c. 5, Sched. 3, s. 2 (6))

(a) the information that shall be included in reports made under subsection (1);

(b) to whom the reports shall be submitted; and

(c) the form, manner and timing of the reports. 2010, c. 25, s. 5 (2); 2019, c. 5, Sched. 3, s. 2 (5).

Compliance

(3) Ontario Health and every local health integration network shall comply with the directives. 2010, c. 25, s. 5 (3); 2019, c. 5, Sched. 3, s. 2 (7).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 5 (3) of the Act is amended by striking out "and every local health integration network". (See: 2019, c. 5, Sched. 3, s. 2 (8))

Section Amendments with date in force (d/m/y) [+]

Reporting by hospitals

6 (1) Every hospital shall prepare reports concerning the use of consultants by the hospital that are approved by,

(a) in the case of a public hospital and the University of Ottawa Heart Institute/Institut de cardiologie de l'Université d'Ottawa, the hospital's board; and

(b) in the case of a private hospital, the hospital's superintendent. 2010, c. 25, s. 6 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 6 (1) of the Act is repealed and the following substituted: (See: 2017, c. 25, Sched. 9, s. 86 (3))

Reporting by hospitals

(1) Every hospital shall prepare reports concerning the use of consultants by the hospital that are approved by the hospital's board. 2017, c. 25, Sched. 9, s. 86 (3).

Directives

(2) The Minister of Health and Long-Term Care may issue directives to hospitals respecting the reports, including directives with respect to,

(a) the information that shall be included in reports made under subsection (1);

(b) whom the reports shall be submitted; and

(c) the form, manner and timing of the reports. 2010, c. 25, s. 6 (2); 2019, c. 5, Sched. 3, s. 2 (9).

Compliance

(3) Every hospital shall comply with the directives. 2010, c. 25, s. 6 (3).

Section Amendments with date in force (d/m/y) [+]

Regulations

7 (1) The Lieutenant Governor in Council may make regulations requiring designated broader public sector organizations to report on the use of consultants, including regulations respecting the content, form, manner and timing of the reports. 2010, c. 25, s. 7 (1).

Compliance

(2) Every designated broader public sector organization to which the regulations apply shall comply with regulations. 2010, c. 25, s. 7 (2).

PART II.1 (S. 7.1-7.20) REPEALED: 2019, C. 7, SCHED. 5, S. 7 (1).

7.1

Section Amendments with date in force (d/m/y) [+]

7.2

Section Amendments with date in force (d/m/y) [+]

7.3, 7.4

Section Amendments with date in force (d/m/y) [+]

7.5

Section Amendments with date in force (d/m/y) [+]

7.6-7.12

Section Amendments with date in force (d/m/y) [+]

7.13

Section Amendments with date in force (d/m/y) [+]

7.14-18

Section Amendments with date in force (d/m/y) [+]

7.19

Section Amendments with date in force (d/m/y) [+]

7.20

Section Amendments with date in force (d/m/y) [+]

PART III
PUBLIC REPORTING OF EXPENSE CLAIM INFORMATION

Public posting of expenses

8 (1) Ontario Health, every local health integration network and every hospital shall, in compliance with directives made under subsection (2), post on its public website information about expense claims that is required to be posted under the directives. 2019, c. 5, Sched. 3, s. 2 (10).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 8 (1) of the Act is amended by striking out "every local health integration network". (See: 2019, c. 5, Sched. 3, s. 2 (11))

Directives

(2) The Minister of Health and Long-Term Care may issue directives respecting the information about expense claims that is to be posted on a public website for the purposes of subsection (1). 2010, c. 25, s. 8 (2).

Same

(3) Without limiting the generality of subsection (2), the directives shall provide for,

(a) designation of the individuals, including board members and senior managers, whose expense claim information must be posted;

(b) the information in expense claims that is required to be posted, and the form and manner in which the information is to be posted;

(c) the timing and frequency of when expense claim information must be posted; and

(d) the duration of time for which expense claim information must be posted. 2010, c. 25, s. 8 (3).

Section Amendments with date in force (d/m/y) [+]

Public posting of expenses by broader public sector organizations

9 (1) The Lieutenant Governor in Council may make regulations establishing rules for public posting of expenses by broader public sector organizations. 2010, c. 25, s. 9 (1).

Compliance

(2) Every organization to which the regulations apply shall comply with the regulations. 2010, c. 25, s. 9 (2).

PART IV
EXPENSE CLAIMS: ALLOWABLE EXPENSES

Directives for designated broader public sector organizations

10 (1) The Management Board of Cabinet may issue directives requiring designated broader public sector organizations to establish expense rules. 2010, c. 25, s. 10 (1).

Allowable expense

(2) An expense is an allowable expense, and may be reimbursed by a designated broader public sector organization if the expense meets the requirements set out in the rules made under the directives. 2010, c. 25, s. 10 (2).

Not allowable expense

(3) An expense is not an allowable expense, and shall not be reimbursed by a designated broader public sector organization, if the expense does not meet the requirements set out in the rules made under the directives. 2010, c. 25, s. 10 (3).

Examples

(4) Without limiting the generality of subsection (1), the directives may require designated broader public sector organizations to establish rules that,

(a) impose restrictions on who may make expense claims, on the types of expenses or the amounts that may be claimed or the circumstances in which the expense claims may be made;

(b) require specified information or documents to be supplied or kept in support of an expense claim;

(c) require the establishment of procedural requirements for making expense claims; and

(d) meet any standards set out in the directives. 2010, c. 25, s. 10 (4).

Compliance

(5) Every designated broader public sector organization to which the directives apply shall comply with the directives. 2010, c. 25, s. 10 (5).

Guidelines for publicly funded organizations

11 The Management Board of Cabinet may make guidelines with respect to allowable expenses for publicly funded organizations. 2010, c. 25, s. 11.

PART IV.1
PERQUISITES

Directives about perquisites, designated broader public sector organizations

11.1 (1) The Management Board of Cabinet may issue directives requiring designated broader public sector organizations to establish rules about perquisites. 2011, c. 9, Sched. 4, s. 1.

Allowable perquisite

(2) A perquisite is an allowable perquisite, and may be provided by a designated broader public sector organization, if the perquisite meets the requirements set out in the rules made under the directives. 2011, c. 9, Sched. 4, s. 1.

Not allowable perquisite

(3) A perquisite is not an allowable perquisite, and shall not be provided by a designated broader public sector organization, if the perquisite does not meet the requirements set out in the rules made under the directives. 2011, c. 9, Sched. 4, s. 1.

Examples

(4) Without limiting the generality of subsection (1), the directives may require designated broader public sector organizations to establish rules that,

(a) impose restrictions on who may receive perquisites, on the types of perquisites or the amounts that may be expended or on the circumstances in which the perquisites may be provided or used;

(b) require specified information or documents to be supplied or kept in support of a perquisite;

(c) require the establishment of procedural requirements for providing or using perquisites; and

(d) meet any standards set out in the directives. 2011, c. 9, Sched. 4, s. 1.

Compliance

(5) Every designated broader public sector organization to which the directives apply shall comply with the directives. 2011, c. 9, Sched. 4, s. 1.

Section Amendments with date in force (d/m/y) [+]

Guidelines about perquisites, publicly funded organizations

11.2 The Management Board of Cabinet may make guidelines with respect to allowable perquisites for publicly funded organizations. 2011, c. 9, Sched. 4, s. 1.

Section Amendments with date in force (d/m/y) [+]

PART V
PROCUREMENT STANDARDS

Directives

12 (1) The Management Board of Cabinet may issue directives governing the procurement of goods and services by designated broader public sector organizations. 2010, c. 25, s. 12 (1).

Same

(2) Without limiting the generality of subsection (1), the directives may incorporate by reference a Government of Ontario policy or directive, in whole or in part, as amended from time to time. 2010, c. 25, s. 12 (2).

Compliance

(3) Every designated broader public sector organization to which the directives apply shall comply with the directives. 2010, c. 25, s. 12 (3).

Guidelines for publicly funded organizations

13 The Management Board of Cabinet may make guidelines with respect to the procurement of goods and services by publicly funded organizations. 2010, c. 25, s. 13.

PART V.1
BUSINESS PLANS

Directives for designated broader public sector organizations

13.1 (1) The Management Board of Cabinet may issue directives requiring designated broader public sector organizations to prepare and publish business plans and any other business or financial documents that the directives may specify. 2014, c.13, Sched. 3, s. 1.

Same

(2) Without limiting the generality of subsection (1), the directives may,

(a) incorporate by reference a Government of Ontario policy or directive, in whole or in part, as amended from time to time;

(b) specify the form, content and timing of the business plans and other documents; and

(c) specify one or more methods of publishing the business plans and other documents. 2014, c.13, Sched. 3, s. 1.

Compliance

(3) Every designated broader public sector organization to which the directives apply shall comply with the directives. 2014, c.13, Sched. 3, s. 1.

Section Amendments with date in force (d/m/y) [+]

Guidelines for publicly funded organizations

13.2 The Management Board of Cabinet may make guidelines with respect to the preparation and publication by publicly funded organizations of business plans and any other business or financial documents that the guidelines may specify. 2014, c.13, Sched. 3, s. 1.

Section Amendments with date in force (d/m/y) [+]

PART VI
COMPLIANCE REPORTS

Ontario Health, LHINs

14 (1) Ontario Health and every local health integration network shall prepare attestations, made by its chief executive officer and approved by its board, attesting to,

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 14 (1) of the Act is amended by striking out "and every local health integration network" in the portion before clause (a). (See: 2019, c. 5, Sched. 3, s. 2 (13))

(a) the completion and accuracy of reports required on the use of consultants;

(b) compliance with the prohibition on engaging lobbyist services using public funds;

(c) compliance with the expense claim directives issued by the Management Board of Cabinet;

(c.1) compliance with the perquisites directives issued by the Management Board of Cabinet;

(d) compliance with procurement directives issued by the Management Board of Cabinet; and

(e) compliance with directives issued by the Management Board of Cabinet on the preparation and publication of business plans and other business or financial documents. 2010, c. 25, s. 14 (1); 2011, c. 9, Sched. 4, s. 2; 2014, c. 13, Sched. 3, s. 2; 2019, c. 5, Sched. 3, s. 2 (12).

Directives

(2) The Minister of Health and Long-Term Care may issue directives respecting the attestations, including directives with respect to,

(a) the information that shall be included in the attestations and any other information in relation to the attestations;

(b) to whom the attestations shall be submitted; and

(c) the form, manner and timing of the attestations. 2010, c. 25, s. 14 (2).

Compliance

(3) Ontario Health and every local health integration network shall comply with the directives. 2010, c. 25, s. 14 (3); 2019, c. 5, Sched. 3, s. 2 (14).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 14 (3) of the Act is amended by striking out "and every local health integration network". (See: 2019, c. 5, Sched. 3, s. 2 (15))

Posting
(4) Ontario Health and every local health integration network shall publicly post the attestations on their website. 2010, c. 25, s. 14 (4); 2019, c. 5, Sched. 3, s. 2 (14).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 14 (4) of the Act is amended by striking out "and every local health integration network". (See: 2019, c. 5, Sched. 3, s. 2 (15))

Section Amendments with date in force (d/m/y) [+]

Hospitals
15 (1) Every hospital shall prepare attestations attesting to,

(a) the completion and accuracy of reports required on the use of consultants;

(b) compliance with the prohibition on engaging lobbyist services using public funds;

(c) compliance with the expense claim directives issued by the Management Board of Cabinet;

(c.1) compliance with the perquisites directives issued by the Management Board of Cabinet;

(d) compliance with procurement directives issued by the Management Board of Cabinet; and

(e) compliance with directives issued by the Management Board of Cabinet on the preparation and publication of business plans and other business or financial documents. 2010, c. 25, s. 15 (1); 2011, c. 9, Sched. 4, s. 3; 2014, c. 13, Sched. 3, s. 3.

Who shall make attestations
(2) An attestation must be approved by the hospital's board, if it has one, and shall be made by,

(a) in the case of a public hospital, the administrator;

(b) in the case of a private hospital, the superintendent; and

(c) in the case of the University of Ottawa Heart Institute/Institut de cardiologie de l'Université d'Ottawa, its chief executive officer. 2010, c. 25, s. 15 (2).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 15 (2) of the Act is repealed and the following substituted: (See: 2017, c. 25, Sched. 9, s. 86 (4))

Who shall make attestations

(2) An attestation must be approved by the hospital's board and shall be made by,

(a) in the case of a public hospital, the administrator; and

(b) in the case of a community health facility or the University of Ottawa Heart Institute/Institut de cardiologie de l'Université d'Ottawa, the chief executive officer. 2017, c. 25, Sched. 9, s. 86 (4).

Directives
(3) The Minister of Health and Long-Term Care may issue directives respecting the attestation, including directives with respect to,

(a) the information that shall be included in the attestations and any other information in relation to the attestations;

(b) to whom the attestations shall be submitted; and

(c) the form, manner and timing of the attestations. 2010, c. 25, s. 15 (3).

Compliance
(4) Every hospital shall comply with the directives. 2010, c. 25, s. 15 (4).

Posting

(5) Every hospital shall publicly post the attestations on their website. 2010, c. 25, s. 15 (5).

Section Amendments with date in force (d/m/y) [+]

Other organizations

16 (1) The Lieutenant Governor in Council may make regulations requiring broader public sector organizations to file attestations about compliance with the requirements under this Act, and governing the content, form, manner and timing of those attestations. 2010, c. 25, s. 16 (1).

Compliance

(2) Every organization to which the regulations apply shall comply with the regulations. 2010, c. 25, s. 16 (2).

PART VII
ENFORCEMENT PROVISIONS

Ontario Health, LHINs

17 Every obligation of Ontario Health and of a local health integration network under this Act is deemed to be an obligation they are required to comply with under the terms of an accountability agreement required under the *Local Health System Integration Act, 2006* or under the *Connecting Care Act, 2019*. 2019, c. 5, Sched. 3, s. 2 (16).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 17 of the Act is repealed and the following substituted: (See: 2019, c. 5, Sched. 3, s. 2 (17))

Ontario Health

17 Every obligation of Ontario Health under this Act is deemed to be an obligation it is required to comply with under the terms of the accountability agreement required under the *Connecting Care Act, 2019*. 2019, c. 5, Sched. 3, s. 2 (17).

Section Amendments with date in force (d/m/y) [+]

Hospitals

18 Every obligation of a hospital under this Act is deemed to be an obligation it is required to comply with under the terms of the service accountability agreement entered into between the hospital and Ontario Health under the *Connecting Care Act, 2019*. 2010, c. 25, s. 18; 2019, c. 5, Sched. 3, s. 2 (18, 19).

Section Amendments with date in force (d/m/y) [+]

Other organizations

19 Every obligation of a broader public sector organization under this Act is deemed to be an obligation it is required to comply with under the terms of every agreement or other funding arrangement between the organization and the Government of Ontario or between the organization and an agency of the Government of Ontario. 2010, c. 25, s. 19.

Employment agreements

20 (1) Every employment or other agreement between a hospital, a local health integration network or Ontario Health and a person employed by the hospital, the network or Ontario Health in a senior management position is deemed to contain a term providing that the obligations of the hospital, the network or Ontario Health under this Act are also the obligations of the person employed by the hospital, the network or Ontario Health. 2019, c. 5, Sched. 3, s. 2 (20).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 20 (1) of the Act is repealed and the following substituted: (See: 2019, c. 5, Sched. 3, s. 2 (21))

Employment agreements

(1) Every employment or other agreement between a hospital or Ontario Health and a person employed by the hospital or Ontario Health in a senior management position is deemed to contain a term providing that the obligations of the hospital or Ontario Health under this Act are also the obligations of the person employed by the hospital or Ontario Health. 2019, c. 5, Sched. 3, s. 2 (21).

Reduction in compensation

(2) Despite any employment or other agreement, the board of a hospital, a local health integration network or Ontario Health may, in addition to any other remedy under the agreement or at common law, reduce the compensation of a person employed in a senior management position where the board determines that the person has failed to meet a requirement under this Act. 2019, c. 5, Sched. 3, s. 2 (22).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 20 (2) of the Act is amended by striking out "a local health integration network". (See: 2019, c. 5, Sched. 3, s. 2 (23))

Same, private hospitals

(3) Despite any employment or other agreement, the superintendent of a private hospital may, in addition to any other remedy under the agreement or at common law, reduce the compensation of a person employed in a senior management position where the superintendent determines that the person has failed to meet a requirement under this Act. 2019, c. 5, Sched. 3, s. 2 (22).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 20 (3) of the Act is repealed. (See: 2019, c. 5, Sched. 3, s. 2 (24))

Section Amendments with date in force (d/m/y) [+]

Terms of agreements

21 (1) Any provision in an agreement that conflicts with a requirement under Part II, III, IV, IV.1, V.1,VI or this Part is not valid or enforceable by any party to the agreement, whether the agreement was entered into before or after the coming into force of that Part. 2010, c. 25, s. 21 (1); 2011, c. 9, Sched. 4, s. 4; 2014, c. 13, Sched. 3, s. 4.

Otherwise valid agreements

(2) Nothing in this section affects the validity of any provision in an agreement that does not conflict with a Part of this Act mentioned in subsection (1), or with any right of payment for anything done or provided at a time when the provision was not in conflict with the Part. 2010, c. 25, s. 21 (2).

Transitional

(3) An agreement entered into before Part V applies to a designated broader public sector organization is not invalid on the basis that the procurement process used by the organization does not comply with any directive issued under that Part. 2010, c. 25, s. 21 (3).

Same

(4) A directive issued under Part V does not apply to a procurement process where a designated broader public sector organization has issued a request for proposal before the directive applied to the organization. 2010, c. 25, s. 21 (4).

Section Amendments with date in force (d/m/y) [+]

Limitations on remedies

22 (1) No cause of action arises against the Crown, or any of the Crown's ministers, agents, appointees and employees, or an organization subject to this Act, as a direct or indirect result of,

(a) the enactment or repeal of any provision of this Act;

(b) the making or revocation of any provision of the regulations, directives or guidelines made under this Act; or

(c) anything done or not done in accordance with this Act or the regulations or the directives or guidelines. 2010, c. 25, s. 22 (1).

Same

(2) Without limiting the generality of subsection (1), that subsection applies to an action or other proceeding claiming any remedy or relief, including specific performance, injunction, declaratory relief, any form of compensation or damages, including loss of revenue and loss of profit, or any other remedy or relief. 2010, c. 25, s. 22 (2).

Proceedings barred

(3) No proceeding, including but not limited to any proceeding in contract, restitution, tort, trust, fiduciary obligation or otherwise, that is directly or indirectly based on or related to anything referred to in clause (1) (a), (b) or (c) may be brought or maintained against the Crown or any of the Crown's ministers, agents, appointees and employees or an organization subject to this Act. 2010, c. 25, s. 22 (3).

No judicial review

(4) Despite any other Act or law, no person may bring an application for judicial review of a directive issued under Part V or a procurement process undertaken under a directive. 2010, c. 25, s. 22 (4).

Rights preserved

(5) Subsections (1), (2), (3) and (4) do not prevent the Attorney General from bringing an application or commencing proceedings to require an organization subject to this Act to comply with this Act and its regulations and directives. 2010, c. 25, s. 22 (5).

Same

(6) Subsections (1), (2), (3) and (4) do not prevent the enforcement of an agreement or funding arrangement referred to in sections 17, 18 and 19. 2010, c. 25, s. 22 (6).

No compensation

23 (1) Despite any other Act or law, no person is entitled to any compensation for any loss or damages, including loss of revenues or loss of profit, arising from the enactment or application of this Act or anything done in accordance with this Act, the regulations or directives, including,

(a) the termination of an agreement in accordance with subsection 4 (3);

(b) the termination of an agreement in accordance with section 19;

(c) a reduction in compensation in accordance with subsection 20 (2);

(d) the invalidity or unenforceability of an agreement by reason of section 21; or

(e) the inoperability of a compensation plan by reason of subsection 7.17 (1), as it read immediately before it was repealed. 2010, c. 25, s. 23 (1); 2012, c. 8, Sched. 4, s. 2; 2019, c. 7, Sched. 5, s. 7 (2).

Saving

(2) Subject to subsection (3), subsection (1) does not bar any action against a designated broader public sector organization for failure to meet a common law duty owed during a procurement process undertaken by the designated broader public sector organization. 2010, c. 25, s. 23 (2).

Same

(3) A duty referred to in subsection (2) does not include an obligation of a designated broader public sector organization arising from a directive issued under this Act. 2010, c. 25, s. 23 (3).

Section Amendments with date in force (d/m/y) [+]

PART VIII (OMITTED)

24 OMITTED (AMENDS, REPEALS OR REVOKES OTHER LEGISLATION). 2010, c. 25, s. 24.

PART IX (OMITTED)

25-28 OMITTED (AMENDS, REPEALS OR REVOKES OTHER LEGISLATION). 2010, c. 25, ss. 25-28.

PART X (OMITTED)

29 OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT). 2010, c. 25, s. 29.

30 OMITTED (ENACTS SHORT TITLE OF THIS ACT). 2010, c. 25, s. 30.

Français

28227

Supreme Court of Canada

Cour suprême du Canada

02 119 141

Bell ExpressVu Limited Partnership

- v. -

Richard Rex, Richard Rex, c.o.b. as 'Can-Am Satellites', Richard Rex, c.o.b. as 'Can Am Satellites' and c.o.b. as 'CANAM Satellites' and c.o.b. as 'Can Am Satellite' and c.o.b. as 'Can Am Sat' and c.o.b. as 'Can-Am Satellites Digital Media Group' and c.o.b. as 'Can-Am Digital Media Group' and c.o.b. as 'Digital Media Group', Anne Marie Halley a.k.a. Anne Marie Rex, Michael Rex a.k.a. Mike Rex, Rodney Kibler a.k.a. Rod Kibler, Lee-Anne Patterson, Michelle Lee, Jay Raymond, Jason Anthony, John Doe 1 to 20, Jane Doe 1 to 20 and any other person or persons found on the premises or identified as working at the premises at 22409 McIntosh Avenue, Maple Ridge, British Columbia, who operate or work for businesses carrying on business under the name and style of 'Can-Am Satellites', 'Can Am Satellites', 'CanAm Satellites', 'Can Am Satellite', 'Can Am Sat', 'Can-Am Satellites Digital Media Group', 'Can-Am Digital Media Group', 'Digital Media Group', or one or more of them

- and -

The Attorney General of Canada, the Canadian Motion Picture Distributors Association, DIRECTV, Inc., the Canadian Alliance for Freedom of Information and Ideas, and the Congres Iberoamericain du Canada (B.C.) (28227)

CORAM:
The Honourable Mme Justice L'Heureux-Dubé
The Honourable Mr. Justice Iacobucci
The Honourable Mr. Justice Major
The Honourable Mr. Justice Bastarache
The Honourable Mr. Justice Binnie
The Honourable Madam Justice Arbour
The Honourable Mr. Justice LeBel

Bell ExpressVu Limited Partnership

- c. -

Richard Rex, Richard Rex, faisant affaire sous les dénominations sociales 'Can-Am Satellites', 'Can Am Satellites', 'CanAm Satellites', 'Can Am Satellite', 'Can Am Sat', 'Can-Am Satellites Digital Media Group', 'Can-Am Digital Media Group' et 'Digital Media Group', Anne Marie Halley, alias Anne Marie Rex, Michael Rex, alias Mike Rex, Rodney Kibler, alias Rod Kibler, Lee-Anne Patterson, Michelle Lee, Jay Raymond, Jason Anthony, M. Untel 1 à 20, Mme Unetelle 1 à 20 et toute autre personne qui a été vue travaillant dans les locaux situés au 22409, avenue McIntosh, Maple Ridge, Colombie-Britannique, ou identifiée comme étant une telle personne, qui exploite des entreprises -- ou l'une ou plusieurs de celles-ci -- faisant affaire sous les dénominations sociales 'Can-Am Satellites', 'Can Am Satellites', 'CanAm Satellites', 'Can Am Satellite', 'Can Am Sat', 'Can-Am Satellites Digital Media Group', 'Can-Am Digital Media Group', 'Digital Media Group', ou qui travaille pour ces entreprises ou pour l'une ou plusieurs de celles-ci

- et -

Le procureur général du Canada, l'Association canadienne des distributeurs de films, DIRECTV, Inc., la Canadian Alliance for Freedom of Information and Ideas et le Congres Iberoamericain du Canada (C.-B.) (28227)

CORAM:
L'honorable juge L'Heureux-Dubé
L'honorable juge Iacobucci
L'honorable juge Major
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge Arbour
L'honorable juge LeBel

Appeal heard:
December 4, 2001

Judgment rendered:
April 26, 2002

Reasons for judgment by:
The Honourable Mr. Justice Iacobucci

Concurred in by:

The Honourable Mme Justice L'Heureux-Dubé
The Honourable Mr. Justice Major
The Honourable Mr. Justice Bastarache
The Honourable Mr. Justice Binnie
The Honourable Madam Justice Arbour
The Honourable Mr. Justice LeBel

Counsel at hearing:

For the appellant:
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Jessica Duncan
K. William McKenzie

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Alan D. Gold

For the respondent Michelle Lee:
Maureen McGuire

For the intervener the Attorney General of Canada:
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Graham R. Garton, Q.C.

For the intervener the Canadian Motion Picture Distributors Association:
Roger T. Hughes, Q.C.

Appel entendu:
Le 4 décembre 2001

Jugement rendu:
Le 26 avril 2002

Motifs de jugement:
L'honorable juge Iacobucci

Souscrivent à l'avis de l'honorable juge Iacobucci:
L'honorable juge L'Heureux-Dubé
L'honorable juge Major
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge Arbour
L'honorable juge LeBel

Avocats à l'audience:

Pour l'appelante:
Eugene Meehan
Jessica Duncan
K. William McKenzie

Pour les intimés Richard Rex et autres:
Alan D. Gold

Pour l'intimée Michelle Lee:
Maureen McGuire

Pour l'intervenant le Procureur général du Canada:
Christopher Rupar
Graham R. Garton, c.r.

Pour l'intervenante l'Association canadienne des distributeurs de films:
Roger T. Hughes, c.r.

For the intervener DIRECTV Inc.:
Christopher D. Bredt
Davit D. Akman
Jeffrey D. Vallis

For the intervener the Canadian Alliance for Freedom of Information and Ideas:
Ian W.M. Angus

For the intervener the Congres Iberoamericain du Canada:
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Pour l'intervenante DIRECTV Inc.:
Christopher D. Bredt
Davit D. Akman
Jeffrey D. Vallis

Pour l'intervenante Canadian Alliance for Freedom of Information and Ideas:
Ian W.M. Angus

Pour l'intervenant Congres Iberoamericain du Canada:
Alan Riddell

Citations	Références
B.C.C.A.: (2000), 191 D.L.R. (4th) 662, 9 W.W.R. 205, 142 B.C.A.C. 230, 233 W.A.C. 230, 79 B.C.L.R. (3d) 250, [2000] B.C.J. No. 1803 (QL), 2000 BCCA 493.	C.A. (C.-B.) : (2000), 191 D.L.R. (4th) 662, 9 W.W.R. 205, 142 B.C.A.C. 230, 233 W.A.C. 230, 79 B.C.L.R. (3d) 250, [2000] B.C.J. No. 1803 (QL), 2000 BCCA 493.
B.C.S.C.: [1999] B.C.J. No. 3092 (QL).	C.S. (C.-B.) : [1999] B.C.J. No. 3092 (QL).

CITATION

Before publication in the S.C.R., this judgment should be cited using the neutral citation: *Bell ExpressVu v. Rex*, 2002 SCC 42. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation: *Bell ExpressVu v. Rex*, [2002] x S.C.R. xxx, 2002 SCC 42.

RÉFÉRENCE

Avant la publication de ce jugement dans le R.C.S., il faut utiliser sa référence neutre : *Bell ExpressVu c. Rex*, 2002 CSC 42. Après sa publication dans le R.C.S., la référence neutre sera utilisée comme référence parallèle : *Bell ExpressVu c. Rex*, [2002] x R.C.S. xxx, 2002 CSC 42.

Bell ExpressVu Limited Partnership *Appellant*

v.

Richard Rex, Richard Rex, c.o.b. as 'Can-Am Satellites', Richard Rex, c.o.b. as 'Can Am Satellites' and c.o.b. as 'CanAm Satellites' and c.o.b. as 'Can Am Satellite' and c.o.b. as 'Can Am Sat' and c.o.b. as 'Can-Am Satellites Digital Media Group' and c.o.b. as 'Can-Am Digital Media Group' and c.o.b. as 'Digital Media Group', Anne Marie Halley a.k.a. Anne Marie Rex, Michael Rex a.k.a. Mike Rex, Rodney Kibler a.k.a. Rod Kibler, Lee-Anne Patterson, Michelle Lee, Jay Raymond, Jason Anthony, John Doe 1 to 20, Jane Doe 1 to 20 and any other person or persons found on the premises or identified as working at the premises at 22409 McIntosh Avenue, Maple Ridge, British Columbia, who operate or work for businesses carrying on business under the name and style of 'Can-Am Satellites', 'Can Am Satellites', 'CanAm Satellites', 'Can Am Satellite', 'Can Am Sat', 'Can-Am Satellites Digital Media Group', 'Can-Am Digital Media Group', 'Digital Media Group', or one or more of them. *Respondents*

and

The Attorney General of Canada, the Canadian Motion Picture Distributors Association, DIRECTV, Inc., the Canadian Alliance for Freedom of Information and Ideas, and the Congres Iberoamericain du Canada *Interveners*

Indexed as: Bell ExpressVu Limited Partnership *v.* Rex

Neutral citation: 2002 SCC 42.

File No.: 28227.

2001: December 4; 2002: April 26.

Present: L'Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for british columbia

Communications law -- Radiocommunications -- Direct-to-home distribution of television programming -- Decoding in Canada of encrypted signals originating from foreign satellite distributor -- Whether s. 9(1)(c) of Radiocommunication Act prohibits decoding of all encrypted satellite signals, with a limited exception, or whether it bars only unauthorized decoding of signals that emanate from licensed Canadian distributors -- Radiocommunication Act, R.S.C. 1985, c. R-2, s. 9(1)(c).

Statutes -- Interpretation -- Principles -- Contextual approach -- Grammatical and ordinary sense -- "Charter values" to be used as an interpretive principle only in circumstances of genuine ambiguity.

Appeals -- Constitutional questions -- Factual record necessary for constitutional questions to be answered.

The appellant engages in the distribution of direct-to-home (DTH) television programming and encrypts its signals to control reception. The respondents sell decoding systems to Canadian customers that enable them to receive and watch U.S. DTH progamming. They also provide U.S. mailing addresses to their customers who do not have one, since the U.S. broadcasters will not knowingly authorize their signals to be decoded by persons outside the United States. The appellant, as a licensed distribution undertaking, brought an action in the British Columbia Supreme Court, pursuant to ss. 9(1)(*c*) and 18(1) of the *Radiocommunication Act*, requesting in part an injunction prohibiting the respondents from assisting resident Canadians in subscribing to and decoding U.S. DTH programming. Section 9(1)(*c*) enjoins the decoding of encrypted signals without the authorisation of the "lawful distributor of the signal or feed". The chambers judge declined to grant the injunctive relief. A majority of the Court of Appeal held that there is no contravention of s. 9(1)(*c*) where a person decodes unregulated signals such as those broadcast by the U.S. DTH companies, and dismissed the appellant's appeal.

Held: The appeal should be allowed. Section 9(1)(*c*) of the Act prohibits the decoding of all encrypted satellite signals, with a limited exception.

It is necessary in every case for the court charged with interpreting a provision to undertake the preferred contextual and purposive interpretive approach before determining that the words are ambiguous. This requires reading the words of the Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids, including other principles of interpretation such as the strict construction of penal statutes and the "*Charter* values" presumption.

When the entire context of s. 9(1)(*c*) is considered, and its words are read in their grammatical and ordinary sense in harmony with the legislative framework in which the provision is found, there is no ambiguity and accordingly no need to resort to any of the subsidiary principles of statutory interpretation. Because the *Radiocommunication Act* does not prohibit the broadcasting of subscription programming signals (apart from s. 9(1)(*e*), which forbids their unauthorised retransmission within Canada) and only concerns decrypting that occurs in Canada or other locations contemplated in s. 3(3), this does not give rise to any extra-territorial exercise of authority. Parliament intended to create an absolute bar on Canadian residents' decoding encrypted programming signals. The only exception to this prohibition occurs where authorization is acquired from a distributor holding the necessary legal rights in Canada to transmit the signal and provide the required authorization. The U.S. DTH distributors in the present case are not "lawful distributors" under the Act. This interpretation of s. 9(1)(*c*) as an absolute prohibition with a limited exception accords well with the objectives set out in the *Broadcasting Act* and complements the scheme of the *Copyright Act*.

The constitutional questions stated in this appeal are not answered because there is no *Charter* record permitting this Court to address the stated questions. A party cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial. "*Charter* values" cannot inform the interpretation given to s. 9(1)(*c*) of the *Radiocommunication Act*, for these values are to be used as an interpretive principle only in circumstances of genuine ambiguity. A blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction, and wrongly upset the dialogic balance among the branches of governance. Where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result.

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Not followed: *R. v. Love* (1997), 117 Man. R. (2d) 123; *R. v. Ereiser* (1997), 156 Sask. R. 71; *R. v. LeBlanc*, [1997] N.S.J. No. 476 (QL); *R. v. Thériault*, [2000] R.J.Q. 2736, aff'd (*sub nom. R. v. D'Argy*), Sup. Ct. (Drummondville), No. 405-36-000044-003, June 13, 2001; *R. v. Gregory Électronique Inc.*, [2000] Q.J. No. 4923 (QL), aff'd [2001] Q.J. No. 4925 (QL); *R. v. S.D.S. Satellite Inc.*, C.Q. (Laval), No. 540-73-000055-980, October 31, 2000; *R. v. Branton* (2001), 53 O.R. (3d) 737; **referred to:** *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *R. v. Open Sky Inc.*, [1994] M.J. No. 734 (QL), aff'd (*sub nom. R. v. O'Connor*) (1995), 106 Man. R. (2d) 37, leave ref'd (1996), 110 Man. R. (2d) 153; *R. v. King*, [1996] N.B.J. No. 449 (QL), rev'd (*sub nom. King v. Canada (Attorney General)*) (1997), 187 N.B.R. (2d) 185; *R. v. Knibb* (1997), 198 A.R. 161, aff'd (*sub nom. R. v. Quality Electronics (Taber) Ltd.)*, [1998] A.J. No. 628 (QL); *ExpressVu Inc. v. NII Norsat International Inc.*, [1998] 1 F.C. 245, aff'd (1997), 222 N.R. 213; *WIC Premium Television Ltd. v. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628; *Canada (Procureure générale) v. Pearlman*, [2001] R.J.Q. 2026; *Ryan v. 361779 Alberta Ltd.* (1997), 208 A.R. 396; *R. v. Scullion*, [2001] R.J.Q. 2018; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56; *Stoddard v. Watson*, [1993] 2 S.C.R. 1069; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015; *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108; *R. v. Goulis* (1981), 33 O.R. (2d) 55; *R. v.*

Hasselwander, [1993] 2 S.C.R. 398; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53; *Westminster Bank Ltd. v. Zang*, [1966] A.C. 182; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743; *Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Perka v. The Queen*, [1984] 2 S.C.R. 232; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *R. v. Gayle* (2001), 54 O.R. (3d) 36, leave to appeal to S.C.C. refused, January 24, 2002; *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *Baron v. Canada*, [1993] 1 S.C.R. 416; *R. v. Mills*, [1999] 3 S.C.R. 668; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Golden*, 2001 SCC 83; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. Lucas*, [1998] 1 S.C.R. 439; *Symes v. Canada*, [1993] 4 S.C.R. 695; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

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APPEAL from a judgment of the British Columbia Court of Appeal (2000), 191 D.L.R. (4th) 662, 9 W.W.R. 205, 142 B.C.A.C. 230, 233 W.A.C. 230, 79 B.C.L.R. (3d) 250, [2000] B.C.J. No. 1803 (QL), 2000 BCCA 493, dismissing an appeal from a decision from the British Columbia Supreme Court, [1999] B.C.J. No. 3092 (QL), refusing to grant an injunction. Appeal allowed.

K. William McKenzie, *Eugene Meehan, Q.C.*, and *Jessica Duncan*, for the appellant.

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Robert T. Hughes, Q.C., for the intervener the Canadian Motion Picture Distributors Association.

Christopher D. Bredt, *Jeffrey D. Vallis*, and *Davit D. Akman*, for the intervener DIRECTV, Inc.

Ian W. M. Angus, for the intervener the Canadian Alliance for Freedom of Information and Ideas.

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SUPREME COURT OF CANADA

BELL EXPRESSVU LIMITED PARTNERSHIP

v.

RICHARD REX, RICHARD REX, c.o.b. as 'CAN-AM SATELLITES', RICHARD REX, c.o.b. as 'CAN AM SATELLITES' and c.o.b. as 'CANAM SATELLITES' and c.o.b. as 'CAN AM SATELLITE' and c.o.b. as 'CAN AM SAT' and c.o.b. as 'CAN-AM SATELLITES DIGITAL MEDIA GROUP' and c.o.b. as 'CAN-AM DIGITAL MEDIA GROUP' and c.o.b. as 'DIGITAL MEDIA GROUP', ANNE MARIE HALLEY a.k.a. ANNE MARIE REX, MICHAEL REX a.k.a. MIKE REX, RODNEY KIBLER a.k.a. ROD KIBLER, LEE-ANNE PATTERSON, MICHELLE LEE, JAY RAYMOND, JASON ANTHONY, JOHN DOE 1 to 20, JANE DOE 1 to 20 and ANY OTHER PERSON OR PERSONS FOUND ON THE PREMISES OR IDENTIFIED AS WORKING AT THE PREMISES AT 22409 McINTOSH AVENUE, MAPLE RIDGE, BRITISH COLUMBIA, WHO OPERATE OR WORK FOR BUSINESSES CARRYING ON BUSINESS UNDER THE NAME AND STYLE OF 'CAN-AM SATELLITES', 'CAN AM SATELLITES', 'CANAM SATELLITES', 'CAN AM SATELLITE', 'CAN AM SAT', 'CAN-AM SATELLITES DIGITAL MEDIA GROUP', 'CAN-AM DIGITAL MEDIA GROUP', 'DIGITAL MEDIA GROUP', OR ONE OR MORE OF THEM.

and

THE ATTORNEY GENERAL OF CANADA, THE CANADIAN MOTION PICTURE DISTRIBUTORS ASSOCIATION, DIRECTV, INC., THE CANADIAN ALLIANCE FOR FREEDOM OF INFORMATION AND IDEAS, AND THE CONGRES IBEROAMERICAIN DU CANADA

CORAM: L'Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie, Arbour, and LeBel JJ.

IACOBUCCI J. --

I. Introduction

1 This appeal involves an issue that has divided courts in our country. It concerns the proper interpretation of s. 9(1)(*c*) of the *Radiocommunication Act*, R.S.C. 1985, c. R-2, as am. by S.C. 1991, c. 11, s. 83. In practical terms, the issue is whether s. 9(1)(*c*) prohibits the decoding of all encrypted satellite signals, with a limited exception, or whether it bars only the unauthorised decoding of signals that emanate from licensed Canadian distributors.

2 The respondents facilitate what is generally referred to as "grey marketing" of foreign broadcast signals. Although there is much debate -- indeed rhetoric -- about the term, it is not necessary to enter that discussion in these reasons. Rather, the central issue is the much narrower one surrounding the above statutory provision: does s. 9(1)(*c*) operate on these facts to prohibit the decryption of encrypted signals emanating from U.S. broadcasters? For the reasons that follow, my conclusion is that it does have this effect. Consequently, I would allow the appeal.

II. Background

3 The appellant is a limited partnership engaged in the distribution of direct-to-home ("DTH") television programming. It is one of two current providers licensed by the Canadian Radio-television and Telecommunications Commission ("CRTC") as a DTH distribution undertaking under the *Broadcasting Act*, S.C. 1991, c. 11. There are two similar DTH satellite television distributors in the United States, neither of

which possesses a CRTC licence. The door has effectively been shut on foreign entry into the regulated Canadian broadcast market since April 1996, when the Governor in Council directed the CRTC not to issue, amend or renew broadcasting licences for non-Canadian applicants (SOR/ 96-192). The U.S. companies are, however, licensed by their country's Federal Communications Commission to broadcast their signals within that country. The intervener DIRECTV is the larger of these two U.S. companies.

4 DTH broadcasting makes use of satellite technology to transmit television programming signals to viewers. All DTH broadcasters own or have access to one or more satellites located in geosynchronous orbit, in a fixed position relative to the globe. The satellites are usually separated by a few degrees of Earth longitude, occupying "slots" assigned by international convention to their various countries of affiliation. The DTH broadcasters send their signals from land-based uplink stations to the satellites, which then diffuse the signals over a broad aspect of the Earth's surface, covering an area referred to as a "footprint". The broadcasting range of the satellites is oblivious to international boundaries and often extends over the territory of multiple countries. Any person who is somewhere within the footprint and equipped with the proper reception devices (typically, a small satellite reception dish antenna, amplifier, and receiver) can receive the signal.

5 The appellant makes use of satellites owned and operated by Telesat Canada, a Canadian company. Moreover, like every other DTH broadcaster in Canada and the U.S., the appellant encrypts its signals to control reception. To decode or unscramble the appellant's signals so as to permit intelligible viewing, customers must

possess an additional decoding system that is specific to the appellant: the decoding systems used by other DTH broadcasters are not cross-compatible and cannot be used to decode the appellant's signals. The operational component of the decoding system is a computerized "smart card" that bears a unique code and is remotely accessible by the appellant. Through this device, once a customer has chosen and subscribed to a programming package, and rendered the appropriate fee, the appellant can communicate to the decoder that the customer is authorized to decode its signals. The decoder is then activated and the customer receives unscrambled programming.

6 The respondent, Richard Rex, carries on business as Can-Am Satellites. The other respondents are employees of, or independent contractors working for, Can-Am Satellites. The respondents are engaged in the business of selling U.S. DTH decoding systems to Canadian customers who wish to subscribe to the services offered by the U.S. DTH broadcasters, which make use of satellites owned and operated by U.S. companies and parked in orbital slots assigned to the U.S. The footprints pertaining to the U.S. DTH broadcasters are large enough for their signals to be receivable in much of Canada, but because these broadcasters will not knowingly authorize their signals to be decoded by persons outside of the U.S., the respondents also provide U.S. mailing addresses for their customers who do not already have one. The respondents then contact the U.S. DTH broadcasters on behalf of their customers, providing the customer's name, U.S. mailing address, and credit card number. Apparently, this suffices to satisfy the U.S. DTH broadcasters that the subscriber is resident in the U.S., and they then activate the customer's smart card.

7 In the past, the respondents were providing similar services for U.S. residents, so that they could obtain authorization to decode the Canadian appellant's programming signals. The respondents were authorized sales agents for the appellant at the time, but because this constituted a breach of the terms of the agency agreement, the appellant unilaterally terminated the relationship.

8 The present appeal arises from an action brought by the appellant in the Supreme Court of British Columbia. The appellant, as a licensed distribution undertaking, commenced the action pursuant to ss. 9(1)(*c*) and 18(1) of the *Radiocommunication Act*. As part of the relief it sought, the appellant requested an injunction prohibiting the respondents from assisting resident Canadians in subscribing to and decoding U.S. DTH programming. The chambers judge hearing the matter declined to grant the injunctive relief, and directed that the trial of the matter proceed on an expedited basis. On appeal of the chambers judge's ruling, Huddart J.A. dissenting, the Court of Appeal for British Columbia dismissed the appellant's appeal.

9 The appellant applied for leave to appeal to this Court, which was granted on April 19, 2001, with costs to the applicant in any event of the cause ([2001] 1 S.C.R. vi). The Chief Justice granted the respondents' subsequent motion to state constitutional questions on September 4, 2001.

III. Relevant Statutory Provisions

10 The *Radiocommunication Act* is one of the legislative pillars of Canada's broadcasting framework. It and another of the pillars, the *Broadcasting Act*, provide

context that is of central importance to this appeal. I set out the most pertinent provisions below. I will cite other provisions throughout the course of my reasons as they become relevant.

11 *Radiocommunication Act*, R.S.C. 1985, c. R-2

> **2.** In this Act,
>
> "broadcasting" means any radiocommunication in which the transmissions are intended for direct reception by the general public;
>
> ...
>
> "encrypted" means treated electronically or otherwise for the purpose of preventing intelligible reception;
>
> "lawful distributor" in relation to an encrypted subscription programming signal or encrypted network feed, means a person who has the lawful right in Canada to transmit it and authorize its decoding;
>
> ...
>
> "radiocommunication" or "radio" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3 000 GHz propagated in space without artificial guide;
>
> ...
>
> "subscription programming signal" means radiocommunication that is intended for reception either directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge;
>
> ...
>
> **9.** (1) No person shall
>
> ...
>
> (*c*) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;

...

10. (1) Every person who

...

> (*b*) without lawful excuse, manufactures, imports, distributes, leases, offers for sale, sells, installs, modifies, operates or possesses any equipment or device, or any component thereof, under circumstances that give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9,

...

is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

...

(2.1) Every person who contravenes paragraph 9(1)(*c*) or (*d*) is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

...

(2.5) No person shall be convicted of an offence under paragraph 9(1)(*c*), (*d*) or (*e*) if the person exercised all due diligence to prevent the commission of the offence.

...

18. (1) Any person who

> (*a*) holds an interest in the content of a subscription programming signal or network feed, by virtue of copyright ownership or a licence granted by a copyright owner,

...

(*c*) holds a licence to carry on a broadcasting undertaking issued by the Canadian Radio-television and Telecommunications Commission under the *Broadcasting Act*,

...

may, where the person has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(*c*), (*d*) or (*e*) or 10(1)(*b*), in any court of competent jurisdiction, sue for and recover damages from the person who engaged in the conduct, or obtain such other remedy, by way of injunction, accounting or otherwise, as the court considers appropriate.

...

(6) Nothing in this section affects any right or remedy that an aggrieved person may have under the *Copyright Act.*

Broadcasting Act, S.C. 1991, c. 11

2. (1) In this Act,

"broadcasting" means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;

"broadcasting undertaking" includes a distribution undertaking, a programming undertaking and a network;

"distribution undertaking" means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking;

(2) For the purposes of this Act, "other means of telecommunication" means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system.

(3) This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings.

3. (1) It is hereby declared as the broadcasting policy for Canada that (*a*) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;

(*b*) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

...

(*d*) the Canadian broadcasting system should

(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

(ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and

(iv) be readily adaptable to scientific and technological change;

...

(*t*) distribution undertakings

(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

(ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,

(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and

(iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.

(2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

Copyright Act, R.S.C. 1985, c. C-42

21. (1) Subject to subsection (2), a broadcaster has a copyright in the communication signal that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

(*a*) to fix it,

(*b*) to reproduce any fixation of it that was made without the broadcaster's consent,

(*c*) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast, and

(*d*) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee,

and to authorize any act described in paragraph (*a*), (*b*) or (*d*).

31. ...

(2) It is not an infringement of copyright to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

> (*a*) the communication is a retransmission of a local or distant signal;
>
> (*b*) the retransmission is lawful under the *Broadcasting Act*;
>
> (*c*) the signal is retransmitted simultaneously and in its entirety, except as otherwise required or permitted by or under the laws of Canada; and
>
> (*d*) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act.

IV. Judgments Below

Supreme Court of British Columbia, [1999] B.C.J. No. 3092 (QL)

12 In a judgment delivered orally in chambers, Brenner J. (now C.J.B.C.S.C.) noted that there is conflicting jurisprudence on the interpretation of s. 9(1)(*c*). It was the chambers judge's opinion, however, that the provision is unambiguous, and that it poses no contradiction to the remainder of the *Radiocommunication Act*. He interpreted s. 9(1)(*c*) as applying only to the theft of signals from "lawful distributors" in Canada, and not applying to the "paid subscription by Canadians to signals from distributors outside Canada" (para. 20). He reasoned (at paras. 18-19):

> The offence in that section that was created by the language Parliament chose to use was the offence of stealing encrypted signals from distributors in Canada. In my view, if Parliament had intended in that section to make it an offence in Canada to decode foreign encrypted transmissions originating outside Canada as contended by the [appellant], it would have said so. In s. 9(1)(*c*) Parliament could have used language prohibiting the unauthorized decoding of all or any subscription programming in Canada. This, it chose not to do.
>
> The interpretation of s. 9(1)(*c*) asserted by the [appellant] makes no distinction between those who subscribe and pay for services from non-resident distributors and those who steal the signals of lawful distributors in Canada. That interpretation would create a theft offence applicable to

> persons in Canada who are nonetheless paying for the services they receive. If Parliament had intended s. 9(1)(*c*) to apply to such conduct, it would have said so in clear language. In my view the *quasi* criminal provisions in the *Radiocommunication Act* should not be interpreted in this manner in the absence of such clear parliamentary language.

13 Brenner J. therefore refused to grant the injunctive relief sought by the appellant. He directed that the trial of the matter proceed on an expedited basis.

Court of Appeal for British Columbia (2000), 79 B.C.L.R. (3d) 250, 2000 BCCA 493

14 The majority of the Court of Appeal, in a judgment written by Finch J.A. (now C.J.B.C.), identified two divergent strands of case law regarding the proper interpretation of s. 9(1)(*c*). The majority also noted that judgments representing each side had found the provision to be unambiguous; in its assessment, though, "[l]egislation which can reasonably be said to bear two unambiguous but contradictory, interpretations must, at the very least, be said to be ambiguous" (para. 35). For this reason, and the fact that s. 9(1)(*c*) bears penal consequences, the majority held that the "narrower interpretation adopted by the chambers judge ... must ... prevail" (para. 35). Conflicting authorities aside, however, the majority was prepared to reach the same result through application of the principles of statutory construction.

15 Section 9(1)(*c*) enjoins the decoding of encrypted signals without the authorization of the "lawful distributor of <u>the</u> signal or feed" (emphasis added). The majority interpreted the legislator's choice of the definite article "the", underlined in the above phrase, to mean that the prohibition applies only "to signals broadcast by lawful distributors who are licensed to authorize decoding of that signal" (para. 36). In other words, "[i]f there is no lawful distributor for an encrypted subscription

program signal in Canada, there can be no one licensed to authorize its decoding". Consequently, according to the majority, there is no contravention of s. 9(1)(*c*) where a person decodes unregulated signals such as those broadcast by the U.S. DTH companies.

16 The majority characterized s. 9(1)(*c*) as being clearly directed at regulation of the recipient rather than the distributor, but stated that Parliament had not chosen language that would prohibit the decoding of encrypted signals regardless of origin. Rather, in the majority's view, Parliament elected to regulate merely in respect of signals transmitted by parties who are authorized by Canadian law to do so. Dismissing the appellant's argument regarding the words "or elsewhere" in the definition of "subscription program signal", the majority held that "the fact that a subscription programming signal originating outside Canada was intended for reception outside Canada, does not avoid the requirement in s. 9(1)(*c*) that the decoding of such signals is only unlawful if it is done without the authorization of a lawful distributor" (para. 40).

17 Basing its reasons on these considerations, the majority held that it was unnecessary to address "the wider policy issues" or the issues arising from the *Charter* (para. 44). Finding no error in the chambers judge's interpretation, the majority dismissed the appeal.

18 Dissenting, Huddart J.A. considered the text of s. 9(1)(*c*) in light of the definitions set out in s. 2, and concluded that Parliamentary intent was evident: the provision "simply render[s] unlawful the decoding in Canada of all encrypted

programming signals ... regardless of their source or intended destination", except where authorization is given by a person having the lawful right in Canada to transmit and authorize the decoding of the signals (para. 48). She stressed that the line of cases relied upon by the chambers judge "[a]t most ... provides support for a less inclusive interpretation of s. 9(1)(*c*) than its wording suggests on its face because it has penal consequences" (para. 54), and proceeded to set out a number of reasons for which these cases should not be followed.

19 For one, "the task of interpreting a statutory provision does not begin with its being typed as penal. The task of interpretation is a search for the intention of Parliament" (para. 55). As well, the more restrictive reading of s. 9(1)(*c*) "ignores the broader policy objective" of the governing regulatory scheme, this being "the maintenance of a distinctive Canadian broadcasting industry in a large country with a small population within the transmission footprint of arguably the most culturally assertive country in the world with a population ten times larger" (para. 49). Huddart J.A. also referred to the existence of copyright interests, and stated that "[i]t can reasonably be inferred that U.S. distributors have commercial or legal reasons apart from Canadian laws for not seeking a Canadian market. ... Yet only Canada can control the reception of foreign signals in Canada" (para. 50).

20 Huddart J.A. declined the respondents' invitation to read s. 9(1)(*c*) in a manner that "respect[s] section 2(*b*) of the *Charter*" (para. 57), relying on *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, in this regard. She then concluded (at para. 58):

> In summary, I am not persuaded the line of cases on which the chambers judge relied establish the provision is ambiguous or capable of contradictory meanings. I do not consider courts have found two entirely different unambiguous meanings for the provision. The words of section 9(1)(*c*), taken alone, provide a clear basis for the determination of Parliament's intention. That meaning is consistent with the purpose of the entire regulatory scheme in the context of the international copyright agreements, with the purpose of the *Act* within that scheme, and with the scheme of the *Act* itself. Those cases interpreting the provision differently have done so with the purpose of narrowing its application to avoid penal consequences of what Parliament clearly intended to have penal consequences, as at least one of the judges taking that view explicitly acknowledged in his reasons. In my view it takes a convoluted reading of the provision to produce the result reached by the court in *R. v. Love* [(1997), 117 Man. R. (2d) 123 (Q.B.)], and the decisions that have followed it.

Huddart J.A. would have allowed the appeal and granted the declaration requested by the appellant.

V. Issues

21 This appeal raises three issues:

1. Does s. 9(1)(*c*) of the *Radiocommunication Act* create an absolute prohibition against decoding, followed by a limited exception, or does it allow all decoding, except for those signals for which there is a lawful distributor who has not granted its authorization?

2. Is s. 9(1)(*c*) of the *Radiocommunication Act* inconsistent with s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

3. If the answer to the above question is "yes", can the statutory provision be justified pursuant to s. 1 of the *Charter*?

VI. Analysis

A. *Introduction*

22 It is no exaggeration to state that s. 9(1)(*c*) of the federal *Radiocommunication Act* has received inconsistent application in the courts of this country. On one hand, there is a series of cases interpreting the provision (or suggesting that it might be interpreted) so as to create an absolute prohibition, with a limited exception where authorization from a lawful Canadian distributor is received: *R. v. Open Sky Inc.*, [1994] M.J. No. 734 (QL) (Prov. Ct.), at para. 36, aff'd (*sub nom. R. v. O'Connor*) (1995), 106 Man. R. (2d) 37 (Q.B.), at para. 10, leave to appeal refused on other grounds (1996), 110 Man. R. (2d) 153 (C.A.); *R. v. King*, [1996] N.B.J. No. 449 (QL) (Q.B.), at paras. 19-20, rev'd on other grounds (1997), 187 N.B.R. (2d) 185 (C.A.); *R. v. Knibb* (1997), 198 A.R. 161 (Prov. Ct.), aff'd (*sub nom. R. v. Quality Electronics (Taber) Ltd.)*, [1998] A.J. No. 628 (QL) (Q.B.); *ExpressVu Inc. v. NII Norsat International Inc.*, [1998] 1 F.C. 245 (T.D.), aff'd (1997), 222 N.R. 213 (F.C.A.); *WIC Premium Television Ltd. v. General Instrument Corp.* (2000), 272 A.R. 201, 2000 ABQB 628, at para. 72; *Canada (Procureure générale) v. Pearlman*, [2001] R.J.Q. 2026 (C.Q.), at para. 81.

23 On the other hand, there are a number of conflicting cases that have adopted the more restrictive interpretation favoured by the majority of the Court of Appeal for British Columbia in the case at bar: *R. v. Love* (1997), 117 Man. R. (2d) 123 (Q.B.); *R. v. Ereiser* (1997), 156 Sask. R. 71 (Q.B.); *R. v. LeBlanc*, [1997] N.S.J. No. 476 (QL) (S.C.); *Ryan v. 361779 Alberta Ltd.* (1997), 208 A.R. 396 (Prov. Ct.), at para. 12; *R. v. Thériault*, [2000] R.J.Q. 2736 (C.Q.), aff'd (*sub nom. R. v. D'Argy)*, Sup. Ct. (Drummondville), No. 405-36-000044-003, June 13, 2001; *R. v. Gregory Électronique Inc.*, [2000] Q.J. No. 4923 (QL) (C.Q.), aff'd [2001] Q.J. No. 4925 (QL) (Sup. Ct.); *R. v. S.D.S. Satellite Inc.*, C.Q. (Laval), No. 540-73-000055-980, October

31, 2000; *R. v. Scullion*, [2001] R.J.Q. 2018 (C.Q.); *R. v. Branton* (2001), 53 O.R. (3d) 737 (C.A.).

24 As can be seen, the schism is not explained simply by the adoption of different approaches in different jurisdictions. Although the highest courts in British Columbia and Ontario have now produced decisions that bind the lower courts in those provinces to the restrictive interpretation, and although the Federal Court of Appeal has similarly bound the Trial Division courts under it to the contrary interpretation, the trial courts in Alberta, Manitoba, and Quebec have produced irreconcilable decisions. Those provinces remain without an authoritative determination on the matter. This appeal, therefore, places this Court in a position to harmonize the interpretive dissonance that is echoing throughout Canada.

25 In attempting to steer its way through this maze of cases, the Court of Appeal for British Columbia, in my respectful view, erred in its interpretation of s. 9(1)(*c*). In my view, there are five aspects of the majority's decision that warrant discussion. First, it commenced analysis from the belief that an ambiguity existed. Second, it placed undue emphasis on the sheer number of judges who had disagreed as to the proper interpretation of s. 9(1)(*c*). Third, it did not direct sufficient attention to the context of the *Radiocommunication Act* within the regulatory *régime* for broadcasting in Canada, and did not consider the objectives of that *régime*, feeling that it was unnecessary to address these "wider policy issues". Fourth, the majority did not read s. 9(1)(*c*) grammatically in accordance with its structure, namely, a prohibition with a limited exception. Finally, the majority of the court effectively inverted the words of the provision, such that the signals for which a lawful distributor could

provide authorization to decode (i.e., the exception) defined the very scope of the prohibition.

B. *Does s. 9(1)(c) of the Radiocommunication Act create an absolute prohibition against decoding, followed by a limited exception, or does it allow all decoding, except for those signals for which there is a lawful distributor who has not granted its authorization?*

(1) Principles of Statutory Interpretation

26 In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, *per* Lamer C.J.)

28 Other principles of interpretation - such as the strict construction of penal statutes and the "*Charter* values" presumption - only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115, *per* Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at p. 413; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46. I shall discuss the "*Charter* values" principle later in these reasons.)

29 What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte, supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminister Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, <u>each equally in accordance with the intentions of the statute</u>, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

30 For this reason, ambiguity cannot reside in the mere fact that several courts -- or, for that matter, several doctrinal writers -- have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and <u>thereafter</u> to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, *supra*, at pp. 4-5).

(2) Application to this Case

31 The interpretive factors laid out by Driedger need not be canvassed separately in every case, and in any event are closely related and interdependent (*Chieu*, *supra*, at para. 28). In the context of the present appeal, I will group my discussion under two broad headings. Before commencing my analysis, however, I wish to highlight a number of issues on these facts. First, there is no dispute surrounding the fact that the signals of the U.S. DTH broadcasters are "encrypted" under the meaning of the Act, nor is there any dispute regarding the fact that the U.S. broadcasters are not "lawful distributors" under the Act. Secondly, all of the DTH broadcasters in Canada and the U.S. require a person to pay "a subscription fee or other charge" for unscrambled reception. Finally, I note that the "encrypted network feed" portion of s. 9(1)(*c*) is not relevant on these facts and can be ignored for the purposes of analysis.

(a) *Grammatical and Ordinary Sense*

32 In its basic form, s. 9(1)(*c*) is structured as a prohibition with a limited exception. Again, with the relevant portions emphasized, it states that:

> No person shall
>
> ...
>
> (*c*) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with authorization from the lawful distributor of the signal or feed. [Emphasis added.]
>
> Il est interdit:

> *c*) de <u>décoder</u>, <u>sans l'autorisation</u> de leur distributeur légitime ou en contravention avec celle-ci, un signal d'abonnement ou une alimentation réseau[.] [Emphasis added.]

The provision opens with the announcement of a broad prohibition ("No person shall"), follows by announcing the nature ("decode") and object ("an encrypted programming signal") of the prohibition, and then announces an exception to it ("otherwise than under and in accordance with authorization from the lawful distributor"). The French version shares the same four features, albeit in a modified order (see Provost C.Q.J. in *Pearlman*, *supra*, at p. 2031).

33 The forbidden activity is decoding. Therefore, as noted by the Court of Appeal, the prohibition in s. 9(1)(*c*) is directed towards the <u>reception</u> side of the broadcasting equation. Quite apart from the provenance of the signals at issue, where the impugned decoding occurs within Canada, there can be no issue of the statute's having an extra-territorial reach. In the present case, the reception that the appellant seeks to enjoin occurs entirely within Canada.

34 The object of the prohibition is of central importance to this appeal. What is interdicted by s. 9(1)(*c*) is the decoding of "<u>an</u> encrypted subscription programming signal" (in French, « <u>un</u> signal d'abonnement ») (emphasis added). The usage of the indefinite article here is telling: it signifies "one, some [or] any" (*Canadian Oxford Dictionary* (1998)). Thus, what is prohibited is the decoding of <u>any</u> encrypted subscription programming signal, subject to the ensuing exception.

35 The definition of "subscription programming signal" suggests that the prohibition extends to signals emanating from other countries. Section 2 of the Act

defines that term as, "radiocommunication that is intended for reception either directly or indirectly by the public in Canada <u>or elsewhere</u> on payment of a subscription fee or other charge" (emphasis added). I respectfully disagree with the respondents and Weiler J.A. in *Branton*, *supra*, at para. 26, "that the wording 'or elsewhere' is limited to the type of situation contemplated in s. 3(3)" of the Act. Subsection 3(3) reads:

> **3.** ...
>
> (3) This Act applies within Canada and on board
>
> (*a*) any ship, vessel or aircraft that is
>
> (i) registered or licensed under an Act of Parliament, or
>
> (ii) owned by, or under the direction or control of, Her Majesty in right of Canada or a province;
>
> (*b*) any spacecraft that is under the direction or control of
>
> (i) Her Majesty in right of Canada or a province,
>
> (ii) a citizen or resident of Canada, or
>
> (iii) a corporation incorporated or resident in Canada; and
>
> (*c*) any platform, rig, structure or formation that is affixed or attached to land situated in the continental shelf of Canada.

36 This provision is directed at an entirely different issue from that which is at play in the definition of "subscription programming signal". Section 3(3) specifies the geographic scope of the *Radiocommunication Act* and all its constituent provisions, as is confirmed by the marginal note accompanying the subsection, which states "*Geographical application*". To phrase this in the context of the present appeal, any person within Canada or on board any of the things enumerated in ss. 3(3)(*a*) through (*c*) could potentially be subject to liability for unlawful decoding under s. 9(1)(*c*); in

this way, s. 3(3) addresses the "where" question. On the other hand, the definition of "subscription programming signal" provides meaning to the s. 9(1)(*c*) liability by setting out the class of signals whose unauthorized decoding will trigger the provision; this addresses the object of the prohibition, or the "what" question. These are two altogether separate issues.

37 Furthermore, it was not necessary for Parliament to include the phrase "or elsewhere" in the s. 2 definition if it merely intended "subscription programming signal" to be interpreted as radiocommunication intended for direct or indirect reception by the public on board any of the s. 3(3) vessels, spacecrafts or rigs. In my view, the words "or elsewhere" were not meant to be tautological. It is sometimes stated, when a court considers the grammatical and ordinary sense of a provision, that "[t]he legislator does not speak in vain". (*Quebec (Attorney General) v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.) Parliament has provided express direction to this effect through its enactment of s. 10 of the *Interpretation Act*, which states in part that "[t]he law shall be considered as always speaking". In any event, "or elsewhere" (« ou ailleurs », in French) suggests a much broader ambit than the particular and limited examples in s. 3(3), and I would be reticent to equate the two.

38 In my opinion, therefore, the definition of "subscription programming signal" encompasses signals originating from foreign distributors and intended for reception by a foreign public. Again, because the *Radiocommunication Act* does not prohibit the broadcasting of subscription programming signals (apart from s. 9(1)(*e*), which forbids their unauthorized retransmission within Canada) and only concerns decrypting that occurs in the s. 3(3) locations, this does not give rise to any extra-

territorial exercise of authority. At this stage, what this means is that, contrary to the holdings of the chambers judge and the majority of the Court of Appeal in the instant case, Parliament <u>did</u> in fact choose language in s. 9(1)(*c*) that prohibits the decoding of all encrypted subscription signals, regardless of their origin, "otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed". I shall now consider this exception.

39 The Court of Appeal relied upon the definite article found in this portion of s. 9(1)(*c*) ("the signal"), in order to support its narrower reading of the provision. Before this Court, counsel for the respondents submitted as well that the definite article preceding the words "lawful distributor" confirms that the provision "is only intended to operate where there is a lawful distributor". Finally, the respondents draw to our attention the French language version of the provision, and particularly the word « leur » that modifies « distributeur légitime »: a number of cases considering the French version of s. 9(1)(*c*) have relied upon that word to arrive at the narrower interpretation (see the Court of Quebec judgments in *Thériault*, *supra*, at p. 2739; *Gregory Électronique Inc.*, *supra*, at paras. 24-26; and *S.D.S. Satellite*, *supra*, at p. 7. See also *Branton*, *supra*, at para. 25).

40 I do not agree with these opinions. The definite article "the" and the possessive adjective « leur » merely identify the party who can authorize the decoding in accordance with the exception (see *Pearlman*, *supra*, at p. 2032). Thus, while I agree with the majority of the Court of Appeal that "[i]f there is no lawful distributor for an encrypted subscription program signal in Canada, there can be no one licensed to authorize its decoding" (para. 36), I cannot see how it necessarily follows that

decoding unregulated signals "cannot therefore be in breach of the *Radiocommunication Act*". Such an approach would require one to read words from the exception into the prohibition, which is circular and incorrect. Again, as Provost C.Q.J. stated in *Pearlman*, *supra*, at p. 2031: [TRANSLATION] "To seek the meaning of the exception at the outset, and thereafter to define the rule by reference to the exception, is likely to distort the meaning of the text and misrepresent the intention of its author."

41 In my view, the definite articles are used in the exception portion of s. 9(1)(*c*) in order to identify from amongst the genus of signals captured by the prohibition (<u>any</u> encrypted subscription programming signal) that species of signals for which the rule is "otherwise". Grammatically, then, the choice of definite and indefinite articles essentially plays out into the following rendition: No person shall decode any (indefinite) encrypted subscription programming signal unless, for <u>the</u> (definite) particular signal that is decoded, the person has received authorization from <u>the</u> (definite) lawful distributor. Thus, as might happen, if no lawful distributor exists to grant such authorization, the general prohibition must remain in effect.

42 Although I have already stated that the U.S. DTH distributors in the present case are not "lawful distributors" under the Act, I should discuss this term, because it is important to the interpretive process. Section 2 provides that a "lawful distributor" of an encrypted subscription programming signal is "a person who has the lawful right in Canada to transmit it and authorize its decoding". In this connection, the fact that a person is authorized to transmit programming in another country does not, by that fact alone, qualify as granting the lawful right to do so in Canada. Moreover, the

phrase "lawful right" (« légitimement autorisée ») comprehends factors in addition to licences granted by the CRTC. In defining "lawful distributor", Parliament could have made specific reference to a person holding a CRTC licence (as it did in s. 18(1)(*c*)) or a Minister's licence (s. 5(1)(*a*)). Instead, it deliberately chose broader language. I therefore agree with the opinion of Létourneau J.A. in the Federal Court of Appeal decision in *Norsat*, *supra*, at para. 4, that:

> [t]he concept of "lawful right" refers to the person who possesses the regulatory rights through proper licensing under the *Act*, the authorization of the Canadian Radio-television and Telecommunications Commission as well as the contractual and copyrights necessarily pertaining to the content involved in the transmission of the encrypted subscription programming signal or encrypted network feed.

As pointed out by the Attorney General of Canada, this interpretation means that even where the transmission of subscription programming signals falls outside of the definition of "broadcasting" under the *Broadcasting Act* (i.e., where the transmitted programming is "made solely for performance or display in a public place") and no broadcasting licence is therefore required, additional factors must still be considered before it can be determined whether the transmitter of the signals is a "lawful distributor" for the purposes of the *Radiocommunication Act.*

43 In the end, I conclude that when the words of s. 9(1)(*c*) are read in their grammatical and ordinary sense, taking into account the definitions provided in s. 2, the provision prohibits the decoding in Canada of any encrypted subscription programming signal, regardless of the signal's origin, unless authorization is received from the person holding the necessary lawful rights under Canadian law.

(b) *Broader Context*

44 Although the *Radiocommunication Act* is not, unfortunately, equipped with its own statement of purpose, it does not exist in a vacuum. The Act's focus is upon the allocation of specified radio frequencies, the authorisation to possess and operate radio apparatuses, and the technical regulation of the radio spectrum. The Act also places restrictions on the reception of and interference with radiocommunication, which includes encrypted broadcast programming signals of the sort at issue. S. Handa et al., *Communications Law in Canada* (loose-leaf ed.), at p. 3.8, describe the *Radiocommunication Act* as one "of the three statutory pillars governing carriage in Canada". These same authors note at p. 3.17 that:

> The *Radiocommunication Act* embraces all private and public use of the radio spectrum. The close relationship between this and the telecommunications and broadcasting Acts is determined by the fact that telecommunications and broadcasting are the two principal users of the radioelectric spectrum.

45 The *Broadcasting Act* came into force in 1991, in an omnibus statute that also brought substantial amendments to the *Radiocommunication Act*, including the addition thereto of s. 9(1)(*c*). Its purpose, generally, is to regulate and supervise the transmission of programming to the Canadian public. Of note for the present appeal is that the definition of "broadcasting" in the *Broadcasting Act* captures the encrypted DTH programme transmissions at issue and that DTH broadcasters such as the appellant receive their licences under, and are subject to, that Act. The *Broadcasting Act* also enumerates 20 broad objectives of the broadcasting policy for Canada (in s. 3(1)(*a*) through (*t*)). The emphasis of the Act, however, is placed on <u>broadcasting</u> and not reception.

46 Ultimately, the Acts operate in tandem. On this point, I agree with the following passage from the judgment of LeGrandeur Prov. Ct. J. in *Knibb*, *supra*, at paras. 38-39, which was adopted by Gibson J. in the Federal Court Trial Division decision in *Norsat*, *supra*, at para. 35:

> The *Broadcasting Act* and the *Radiocommunication Act* must be seen as operating together as part of a single regulatory scheme. The provisions of each statute must accordingly be read in the context of the other and consideration must be given to each statute's roll [*sic*] in the overall scheme. [Cite to R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 286.]
>
> The addition of s. 9(1)(*c*), (*d*) and (*e*) and other sections to the *Radiocommunication Act* through the provisions of the *Broadcasting Act*, 1991 are supportive of that approach in my view. Subsections 9(1)(*c*), (*d*) and (*e*) of the *Radiocommunication Act* must be seen as part of the mechanism by which the stated policy of regulation of broadcasting in Canada is to be fulfilled.

47 Canada's broadcasting policy has a number of distinguishing features, and evinces a decidedly cultural orientation. It declares that the radio frequencies in Canada are public property, that Canadian ownership and control of the broadcasting system should be a base premise, and that the programming offered through the broadcasting system is "a public service essential to the maintenance and enhancement of national identity and cultural sovereignty". Sections 3(1)(*d*) and 3(1)(*t*) enumerate a number of specific developmental goals for, respectively, the broadcasting system as a whole and for distribution undertakings (including DTH distribution undertakings) in particular. Finally, s. 3(2) declares that "the Canadian broadcasting system constitutes a single system" best regulated and supervised "by a single independent public authority".

48 In this context, one finds little support for the restrictive interpretation of s. 9(1)(*c*). Indeed, as counsel for the Attorney General of Canada argued before us, after consideration of the Canadian broadcasting policy Parliament has chosen to adopt, one may legitimately wonder

> why would Parliament enact a provision like the restrictive interpretation? Why would Parliament provide for Canadian ownership, Canadian production, Canadian content in its broadcasting and then simply leave the door open for unregulated, foreign broadcasting to come in and sweep all of that aside? What purpose would have been served?

49 On the other hand, the interpretation of s. 9(1)(*c*) that I have determined to result from the grammatical and ordinary sense of the provision accords well with the objectives set out in the *Broadcasting Act*. The fact that DTH broadcasters encrypt their signals, making it possible to concentrate regulatory efforts on the reception/decryption side of the equation, actually assists with attempts to pursue the statutory broadcasting policy objectives and to regulate and supervise the Canadian broadcasting system as a single system. It makes sense in these circumstances that Parliament would seek to encourage broadcasters to go through the regulatory process by providing that they could only grant authorization to have their signal decoded, and thereby collect their subscription fees, after regulatory approval has been granted.

50 There is another contextual factor that, while not in any way determinative, is confirmatory of the interpretation of s. 9(1)(*c*) as an absolute prohibition with a limited exception. As I have noted above, the concept of "lawful right" in the definition of "lawful distributor" incorporates contractual and copyright issues. According to the evidence in the present record, the commercial agreements between the appellant and its various programme suppliers require the appellant to respect the

rights that these suppliers are granted by the persons holding the copyright in the programming content. The rights so acquired by the programme suppliers permit the programmes to be broadcast in specific locations, being all or part of Canada. As such, the appellant would have no lawful right to authorise decoding of its programming signals in an area not included in its geographically limited contractual right to exhibit the programming.

51 In this way, the person holding the copyright in the programming can conclude separate licensing deals in different regions, or in different countries (e.g., Canada and the U.S.). Indeed, these arrangements appear typical of the industry: in the present appeal, the U.S. DTH broadcaster DIRECTV has advocated the same interpretation of s. 9(1)(*c*) as the appellant, in part because of the potential liability it faces towards both U.S. copyright holders and from Canadian licencees due to the fact that its programming signals spill across the border and are being decoded in Canada.

52 I also believe that the reading of s. 9(1)(*c*) as an absolute prohibition with a limited exception complements the scheme of the *Copyright Act*. Sections 21(1)(*c*) and 21(1)(*d*) of the *Copyright Act* provide broadcasters with a copyright in the communication signals they transmit, granting them the sole right of retransmission (subject to the exceptions in s. 31(2)) and, in the case of a television communication signal, of performing it on payment of a fee. By reading s. 9(1)(*c*) as an absolute prohibition against decoding except where authorization is granted by the person with the lawful right to transmit and authorize decoding of the signal, the provision extends protection to the holders of the copyright in the programming itself, since it would proscribe the unauthorized reception of signals that violate copyright, even where no

retransmission or reproduction occurs: see F. P. Eliadis and S. C. McCormack, "Vanquishing Wizards, Pirates and Musketeers: The Regulation of Encrypted Satellite TV Signals" (1993), 3 *M.C.L.R.* 211, at pp. 213-18. Finally, I note that the civil remedies provided for in ss. 18(1)(*a*) and 18(6) of the *Radiocommunication Act* both illustrate that copyright concerns are of relevance to the scheme of the Act, thus supporting the finding that there is a connection between these two statutes.

(c) *Section 9(1)(c) as a "Quasi-Criminal" Provision*

53 I wish to comment regarding the respondents' argument regarding the penal effects that the "absolute prohibition" interpretation would bring to bear. Although the present case only arises in the context of a civil remedy the appellant is seeking under s. 18(1) of the Act (as a person who "has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(*c*)") and does not therefore directly engage the penal aspects of the *Radiocommunication Act*, the respondents direct our attention to ss. 10(1)(*b*) and 10(2.1). These provisions, respectively, create summary conviction offences for every person providing equipment for the purposes of contravening s. 9 and for every person who in fact contravenes s. 9(1)(*c*). Respondents' counsel argued before us that, if s. 9(1)(*c*) is interpreted in the manner suggested by the appellant, "hundreds of thousands of Canadians can expect a knock on their door, because they will be in breach of the statute" and that "the effect of [the appellant's] submissions is to criminalise subscribers even if they pay every cent to which DIRECTV is entitled". The thrust of the respondents' submission is that the presence of ss. 10(1)(*b*) and 10(2.1) in the *Radiocommunication Act* provides context that is important to the interpretation of s. 9(1)(*c*), and that this context militates in favour of the respondents' position.

54 Section 9(1)(*c*) does have a "dual aspect", in so far as it gives rise to both civil and criminal penalties. I am not, however, persuaded that this plays an important role in the interpretive process here. In any event, I do not think it correct to insinuate that the decision in this appeal will have the effect of automatically branding every Canadian resident who subscribes to and pays for U.S. DTH broadcasting services as a criminal. The penal offence in s. 10(1)(*b*) requires that circumstances "give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, <u>for the purpose</u> of contravening section 9" (emphasis added), and allows for a "lawful excuse" defence. Section 10(2.5) further provides that "[n]o person shall be convicted of an offence under paragraph 9(1)(*c*) ... if the person exercised all due diligence to prevent the commission of the offence". Since it is neither necessary nor appropriate to pursue the meaning of these provisions absent the proper factual context, I refrain from doing so.

(d) *Conclusion*

55 After considering the entire context of s. 9(1)(*c*), and after reading its words in their grammatical and ordinary sense in harmony with the legislative framework in which the provision is found, I find no ambiguity. Rather, I can conclude only that Parliament intended to create an absolute bar on Canadian residents decoding encrypted programming signals. The only exception to this prohibition occurs where authorization is acquired from a distributor holding the necessary legal rights in Canada to transmit the signal and provide the required authorization. There is no need in this circumstance to resort to any of the subsidiary principles of statutory interpretation.

C. *The Constitutional Questions*

56 As I will discuss, I do not propose to answer the constitutional questions that have been stated in this appeal.

57 Rule 32 of the *Rules of the Supreme Court of Canada*, SOR/83-74 mandates that constitutional questions be stated in every appeal in which the constitutional validity or applicability of legislation is challenged, and sets out the procedural requirements to that end. As recognized by this Court, the purpose of Rule 32 is to ensure that the Attorney General of Canada, the attorneys general of the provinces, and the ministers of justice of the territories are alerted to constitutional challenges, in order that they may decide whether or not to intervene: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 49, *per* L'Heureux-Dubé J.; see also B.A. Crane and H.S. Brown, *Supreme Court of Canada Practice 2000* (1999), at p. 253. Rule 32 also serves to advise the parties and other potential interveners of the constitutional issues before the Court.

58 On the whole, the parties to an appeal are granted "wide latitude" by the Chief Justice or other judge of this Court in formulating the questions to be stated: *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 71; *Corbiere*, *supra*, at para. 48. This wide latitude is especially appropriate in a case like the present, where the motion to state constitutional questions was brought by the respondents: generally, a respondent may advance any argument on appeal that would support the judgment below (*Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 240; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at pp. 643-44, *per* Cory J.). Like many general rules, however,

this one is subject to an exception. A respondent, like any other party, cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial: *Perka*, *supra*; *Idziak*, *supra*; *R. v. Gayle* (2001), 54 O.R. (3d) 26 (C.A.), at para. 69, leave to appeal refused January 24, 2002.

59 In like manner, even where constitutional questions are stated under Rule 32, it may ultimately turn out that the factual record on appeal provides an insufficient basis for their resolution. The Court is not obliged in such cases to provide answers: *Bisaillon*, *supra*; Crane and Brown, *supra*, at p. 254. In fact, there are compelling reasons not to: while we will not deal with abstract questions in the ordinary course, "[t]his policy ... is of particular importance in constitutional matters" (*Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572, at p. 1580; see also *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099; *Baron v. Canada*, [1993] 1 S.C.R. 416, at p. 452; *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 38, *per* McLachlin and Iacobucci JJ.). Thus, as Sopinka J. stated for the Court in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 357: "The procedural requirements of Rule 32 of the *Supreme Court Rules* are not designed to introduce new issues but to define with precision the constitutional points in issue which emerge from the record". (Emphasis added.)

60 Respondents' counsel properly conceded during oral argument that there is no *Charter* record permitting this Court to address the stated questions. Rather, he argued that "*Charter* values" must inform the interpretation given to the *Radiocommunication Act*. This submission, inasmuch as it is presented as a stand alone proposition, must be rejected. Although I have already set out the preferred

approach to statutory interpretation above, the manner in which the respondents would have this Court consider and apply the *Charter* warrants additional attention at this stage.

61 It has long been accepted that, where it will not upset the appropriate balance between judicial and legislative action, courts should apply and develop the rules of the common law in accordance with the values and principles enshrined in the *Charter*: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603, *per* McIntyre J.; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 184; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *R. v. Golden*, 2001 SCC 83, at para. 86, *per* Iacobucci and Arbour JJ.; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, at paras. 18-19. One must keep in mind, of course, that the common law is the province of the judiciary: the courts are responsible for its application, and for ensuring that it continues to reflect the basic values of society. The courts do not, however, occupy the same role *vis-à-vis* statute law.

62 Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not" (Sullivan, *supra*, at p. 325), it must be stressed that, to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can <u>only</u> receive application in circumstances of genuine ambiguity, i.e.,

where a statutory provision is subject to differing, but equally plausible, interpretations.

63 This Court has striven to make this point clear on many occasions: see, e.g., *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 558, *per* L'Heureux-Dubé J.; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078, *per* Lamer J. (as he then was); *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 771, *per* McLachlin J. (as she then was); *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 660; *Mossop*, *supra*, at pp. 581-82, *per* Lamer C.J.; *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 66, *per* Cory J.; *Mills*, *supra*, at paras. 22 and 56; *R. v. Sharpe*, *supra*, at para. 33.

64 These cases recognize that a blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction. Moreover, another rationale for restricting the "*Charter* values" rule was expressed in *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 752:

> [T]o consult the *Charter* in the absence of such ambiguity is to deprive the *Charter* of a more powerful purpose, namely, the determination of a statute's constitutional <u>validity</u>. If statutory meanings must be made congruent with the *Charter* even in the absence of ambiguity, then it would never be possible to <u>apply</u>, rather than simply <u>consult</u>, the values of the *Charter*. Furthermore, it would never be possible for the government to justify infringements as reasonable limits under s. 1 of the *Charter*, since the interpretive process would preclude one from finding infringements in the first place. [Emphasis in original.]

(See also *Willick v. Willick*, [1994] 3 S.C.R. 670, at pp. 679-80, *per* Sopinka J.)

65 This last point touches, fundamentally, upon the proper function of the courts within the Canadian democracy. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 136-42, the Court described the relationship among the legislative, executive, and judicial branches of governance as being one of dialogue and mutual respect. As was stated, judicial review on *Charter* grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches. "The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*)" (*Vriend*, *supra*, at para. 139).

66 To reiterate what was stated in *Symes* and *Willick*, *supra*, if courts were to interpret all statutes such that they conformed to the *Charter*, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the *Charter* right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret <u>this</u> sort of enactment in light of *Charter* principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As

such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result.

67 It may well be that, when this matter returns to trial, the respondents' counsel will make an application to have s. 9(1)(*c*) of the *Radiocommunication Act* declared unconstitutional for violating the *Charter*. At that time, it will be necessary to consider evidence regarding whose expressive rights are engaged, whether these rights are violated by s. 9(1)(*c*), and, if they are, whether they are justified under s. 1.

VII. Disposition

68 In the result, I would allow the appeal with costs throughout, set aside the judgment of the Court of Appeal for British Columbia, and declare that s. 9(1)(*c*) of the *Radiocommunication Act* creates a prohibition against all decoding of encrypted programming signals, followed by an exception where authorization is received from the person holding the lawful right in Canada to transmit and authorize decoding of the signal. No answer is given to the constitutional questions stated by order of the Chief Justice.

52P

scc Thu, Jan 18, 2001 leave to appeal granted
Gonthier, Binnie and Arbour JJ.
(2001), 191 D.L.R. (4th) vi; 267 N.R. 194 n; 146 O.A.C. 198 n

Ontario

Français

Auditor General Act

R.S.O. 1990, CHAPTER A.35

Consolidation Period: From December 6, 2018 to the e-Laws currency date.

Last amendment: 2018, c. 17, Sched. 3.

Legislative History: [+]

CONTENTS [−]

Definitions

1 In this Act,

"agency of the Crown" means an association, authority, board, commission, corporation, council, foundation, institution, organization or other body,

(a) whose accounts the Auditor General is appointed to audit by its shareholders or by its board of management, board of directors or other governing body,

(b) whose accounts are audited by the Auditor General under any other Act or whose accounts the Auditor General is appointed by the Lieutenant Governor in Council to audit,

(c) whose accounts are audited by an auditor, other than the Auditor General, appointed by the Lieutenant Governor in Council, or

(d) the audit of the accounts of which the Auditor General is required to direct or review or in respect of which the auditor's report and the working papers used in the preparation of the auditor's statement are required to be made available to the Auditor General under any other Act,

but does not include one that the *Crown Agency Act* states is not affected by that Act or that any other Act states is not a Crown agency within the meaning or for the purposes of the *Crown Agency Act*; ("organisme de la Couronne")

"audit" includes a special audit; ("vérification", "vérifier")

"Board" means the Board of Internal Economy referred to in section 87 of the *Legislative Assembly Act*; ("Commission")

"Crown controlled corporation" means a corporation that is not an agency of the Crown and having 50 per cent or more of its issued and outstanding shares vested in Her Majesty in right of Ontario or having the appointment of a majority of its board of directors made or approved by the Lieutenant Governor in Council or one or more members of the Executive Council of Ontario; ("société contrôlée par la Couronne")

"fiscal year" has the same meaning as in the *Financial Administration Act*; ("exercice")

"grant recipient" means an association, authority, board, commission, corporation, council, foundation, institution, organization or other body that receives a reviewable grant directly or indirectly; ("bénéficiaire d'une subvention")

"public money" has the same meaning as in the *Financial Administration Act*; ("deniers publics") "recognized party" has the same meaning as in subsection 62 (5) of the *Legislative Assembly Act*; ("parti reconnu")

"reviewable grant" means a grant or other transfer payment from the Consolidated Revenue Fund, from an agency of the Crown or from a Crown controlled corporation; ("subvention susceptible d'examen")

"special audit" means an examination with respect to the matters described in subclauses 12 (2) (f) (i) to (v). ("vérification spéciale") R.S.O. 1990, c. A.35, s. 1; 2004, c. 17, s. 2; 2006, c. 33, Sched. B, s. 1; 2009, c. 34, Sched. J, s. 26; 2018, c. 17, Sched. 3, s. 1.

Section Amendments with date in force (d/m/y) [+]

References to former names

1.1 A reference in an Act, regulation, order in council or document to a person or office by the former title of that person or the former name of that office set out in Column 1 of the following Table or by a shortened version of that title or name shall be deemed, unless a contrary intention appears, to be a reference to the new title of that person or the new name of that office set out in Column 2:

Column 1/Colonne 1	Column 2/Colonne 2
Former titles and names/Anciens titres et anciennes appellations	New titles and names/Nouveaux titres et nouvelles appellations
Assistant Provincial Auditor/vérificateur provincial adjoint	Deputy Auditor General/sous-vérificateur général
Office of the Provincial Auditor/Bureau du vérificateur provincial	Office of the Auditor General/Bureau du vérificateur général
Provincial Auditor/vérificateur provincial	Auditor General/vérificateur général

2004, c. 17, s. 3.

Section Amendments with date in force (d/m/y) [+]

Auditor General

2 (1) There shall be an Auditor General who is an officer of the Assembly. 2018, c. 17, Sched. 3, s. 2.

Appointment

(2) The Assembly shall, by order, appoint the Auditor General. 2018, c. 17, Sched. 3, s. 2.

Same, conditions

(3) An order appointing the Auditor General shall be made only after,

(a) unless decided otherwise by unanimous consent of the Assembly, the person to be appointed has been selected by unanimous agreement of a panel composed of one member of the Assembly from each recognized party, chaired by the Speaker who is a non-voting member; and

(b) the chair of the standing Public Accounts Committee of the Assembly has been consulted. 2018, c. 17, Sched. 3, s. 2.

Section Amendments with date in force (d/m/y) [+]

Office of the Auditor General

3 The Office of the Auditor General consists of the Auditor General, the Deputy Auditor General, the Advertising Commissioner, the Commissioner of the Environment appointed under section 50 of the *Environmental Bill of Rights, 1993* and such other employees as the Auditor General may require for the proper conduct of the business of the Office. 2018, c. 17, Sched. 3, s. 2.

Section Amendments with date in force (d/m/y) [+]

Term of office

4 (1) The Auditor General shall hold office for a term of 10 years and may not be reappointed for another term. 2018, c. 17, Sched. 3, s. 2.

Reappointment after resignation

(2) Despite subsection (1), if an Auditor General resigns before the expiry of his or her term of office, he or she may be reappointed for a second term that expires no later than at the expiry of the original term. 2018, c. 17, Sched. 3, s. 2.

Selection by panel

(3) Subsection 2 (3) applies with respect to a reappointment under subsection (2) of this section. 2018, c. 17, Sched. 3, s. 2.

Continuation in office

(4) By order of the Assembly, the Auditor General may continue to hold office after expiry of his or her term of office until a temporary Auditor General is appointed under section 5.3 or until a successor is appointed. 2018, c. 17, Sched. 3, s. 2.

Transition

(5) The Auditor General in office immediately before the day the *Restoring Trust, Transparency and Accountability Act, 2018* receives Royal Assent shall continue to hold office for the remainder of his or her term and may not be reappointed for another term. 2018, c. 17, Sched. 3, s. 2.

Section Amendments with date in force (d/m/y) [+]

Removal or suspension

5 (1) The Assembly may, by order passed by a vote of at least two thirds of the members of the Assembly, remove or suspend the Auditor General from office for cause. 2018, c. 17, Sched. 3, s. 2.

Suspension if Assembly not in session

(2) If the Assembly is not in session, the Board may on unanimous agreement suspend the Auditor General for cause. 2018, c. 17, Sched. 3, s. 2.

Duration of suspension

(3) A suspension under subsection (1) continues until revoked by order of the Assembly or until the Auditor General is removed from office pursuant to subsection (1). 2018, c. 17, Sched. 3, s. 2.

Same

(4) Unless the Board revokes the suspension before the next sitting of the Assembly, a suspension under subsection (2) continues until revoked by order of the Assembly or until the Auditor General is removed from office pursuant to subsection (1). 2018, c. 17, Sched. 3, s. 2.

Same

(5) Despite subsection (4), no suspension imposed under subsection (2) continues past the 20th sessional day of the next sitting of the Assembly. 2018, c. 17, Sched. 3, s. 2.

Report to Assembly

(6) The Board shall report to the Assembly any action taken under subsections (2) and (4) at the earliest opportunity of the next sitting of the Assembly. 2018, c. 17, Sched. 3, s. 2.

Meaning of "not in session"

(7) For the purposes of this section and sections 5.3 and 5.5, the Assembly is not in session when it is,

(a) prorogued; or

(b) adjourned for an indefinite period or to a day that is more than seven days after the date on which the Assembly was adjourned. 2018, c. 17, Sched. 3, s. 2.

Section Amendments with date in force (d/m/y) [+]

Salary and benefits

5.1 (1) The Board shall determine and review annually the salary and benefits of the Auditor General, which shall be within the highest range of salaries paid to deputy ministers in the public service of Ontario, and the Auditor General is entitled to the privileges of office of a senior deputy minister. 2018, c. 17, Sched. 3, s. 2.

Pension plan

(2) Subject to subsections (3) and (4), the Auditor General is a member of the Public Service Pension Plan. 2018, c. 17, Sched. 3, s. 2.

Notice re pension plan

(3) Within 60 days after his or her appointment takes effect, the Auditor General may notify the Speaker in writing that he or she elects not to be a member of the Public Service Pension Plan. 2018, c. 17, Sched. 3, s. 2.

Same

(4) If the Auditor General gives notice of their election to the Speaker in accordance with subsection (3), the election is irrevocable and is deemed to have taken effect when the appointment took effect. 2018, c. 17, Sched. 3, s. 2.

Expenses

(5) Subject to the approval of the Board, the Auditor General is entitled to be reimbursed for reasonable expenses that he or she incurs in respect of anything done under this Act. 2018, c. 17, Sched. 3, s. 2.

Transition

(6) The salary and benefits of the Auditor General in office immediately before the day the *Restoring Trust, Transparency and Accountability Act, 2018* receives Royal Assent continue to be determined in accordance with section 5, clause 22 (1) (a) and subsection 22 (1.1) of this Act, as they read immediately before that day, for the remainder of the Auditor General's term of office. 2018, c. 17, Sched. 3, s. 2.

Section Amendments with date in force (d/m/y) [+]

Designation by the Auditor General

5.2 (1) The Auditor General shall designate an individual from among the employees of the Office of the Auditor General who shall have the powers and duties of the Auditor General if the Auditor General is absent or unable to fulfil the duties of his or her office or if the office becomes vacant. 2018, c. 17, Sched. 3, s. 2.

Designation in writing

(2) A designation under subsection (1) shall be in writing to the Speaker. 2018, c. 17, Sched. 3, s. 2.

Powers and duties

(3) The individual designated under subsection (1) shall have the powers and duties of the Auditor General unless a temporary Auditor General is appointed under section 5.3. 2018, c. 17, Sched. 3, s. 2.

Salary

(4) The Board may increase the salary of an individual who assumes the powers and duties of the Auditor General under subsection (1) in such circumstances as the Board considers appropriate. 2018, c. 17, Sched. 3, s. 2.

Removal or suspension

(5) Section 5 applies in respect of an individual who assumes the powers and duties of the Auditor General under subsection (1). 2018, c. 17, Sched. 3, s. 2.

Section Amendments with date in force (d/m/y) [+]

Temporary Auditor General

5.3 (1) If the Auditor General is unable to fulfil the duties of his or her office or the office becomes vacant, the Assembly may, by order, appoint a temporary Auditor General. 2018, c. 17, Sched. 3, s. 2.

Same, conditions

(2) An order shall be made under subsection (1) only if,

(a) the Auditor General,

(i) has not made a designation under subsection 5.2 (1), or

(ii) has made a designation under subsection 5.2 (1), but,

(A) the Auditor General has been removed or suspended under section 5, or

(B) the person designated is unable or unwilling to act or has been removed or suspended under section 5;

(b) unless decided otherwise by unanimous consent of the Assembly, the person to be appointed has been selected by unanimous agreement of a panel composed of one member of the Assembly from each recognized party, chaired by the Speaker who is a non-voting member; and

(c) the chair of the standing Public Accounts Committee of the Assembly has been consulted. 2018, c. 17, Sched. 3, s. 2.

Appointment if Assembly not in session

(3) If, while the Assembly is not in session, the Auditor General is unable to fulfil the duties of his or her office or the office becomes vacant, the Board may appoint a temporary Auditor General. 2018, c. 17, Sched. 3, s. 2.

Same

(4) Clauses (2) (a) and (c) apply with respect to an appointment under subsection (3). 2018, c. 17, Sched. 3, s. 2.

Powers, salary and benefits

(5) A temporary Auditor General shall have the powers and duties of the Auditor General and shall be paid a salary and benefits determined by the Board and, subject to the approval of the Board, be reimbursed for reasonable expenses that he or she incurs in respect of anything done under this Act. 2018, c. 17, Sched. 3, s. 2.

Duration of office

(6) A temporary Auditor General shall hold office until,

(a) the Auditor General is able to fulfil the duties of the office, where the appointment resulted from the Auditor General being unable to do so;

(b) where the appointment resulted from a suspension of the Auditor General, the suspension is revoked by order of the Assembly, by the Board under subsection 5 (4) or by operation of subsection 5 (5);

(c) the Assembly appoints a different temporary Auditor General under subsection (1); or

(d) the Assembly appoints an Auditor General under section 2. 2018, c. 17, Sched. 3, s. 2.

Section Amendments with date in force (d/m/y) [+]

Subsequent appointment not prohibited

5.4 A person who serves as a temporary Auditor General under section 5.3 is not prohibited from appointment as Auditor General under section 2 and, in the case of such an appointment, the previous time in office does not count toward the term of office set out in subsection 4 (1). 2018, c. 17, Sched. 3, s. 2.

Section Amendments with date in force (d/m/y) [+]

Restrictions re other work, etc.

5.5 (1) The Auditor General shall not be a member of the Assembly and shall not, without prior approval by the Assembly, or by the Board when the Assembly is not in session, hold any other office or employment. 2018, c. 17, Sched. 3, s. 2.

Exception

(2) Despite subsection (1), the Auditor General may hold more than one office to which he or she has been appointed by the Assembly or the Board. 2018, c. 17, Sched. 3, s. 2.

Section Amendments with date in force (d/m/y) [+]

Oath of office

5.6 (1) Before beginning the duties of his or her office, the Auditor General shall take an oath or affirmation that he or she will faithfully and impartially exercise the functions of the office. 2018, c. 17, Sched. 3, s. 2.

Same

(2) The Speaker or the Clerk of the Assembly shall administer the oath or affirmation. 2018, c. 17, Sched. 3, s. 2.

Section Amendments with date in force (d/m/y) [+]

Nature of office

5.7 (1) The Auditor General holds office for a fixed term. 2018, c. 17, Sched. 3, s. 2.

Notice not required

(2) No notice to the Auditor General is required before the expiry of the Auditor General's term of office. 2018, c. 17, Sched. 3, s. 2.

Section Amendments with date in force (d/m/y) [+]

Protection from liability

5.8 (1) No cause of action arises, no proceeding may be brought and no remedy is available or damages, costs or compensation payable in connection with any amendment made by Schedule 3 to the *Restoring Trust, Transparency and Accountability Act, 2018* to this Act or anything done or not done in accordance with those amendments. 2018, c. 17, Sched. 3, s. 2.

Same

(2) Subsection (1) applies whether the cause of action on which a proceeding is based arose before or after the day that subsection comes into force. 2018, c. 17, Sched. 3, s. 2.

Proceedings set aside

(3) Any proceeding referred to in subsection (1) commenced before the day that subsection comes into force is deemed to have been dismissed, without costs, on that day. 2018, c. 17, Sched. 3, s. 2.

Section Amendments with date in force (d/m/y) [+]

Appointment of Deputy Auditor General

6 The Auditor General may appoint a person to act as Deputy Auditor General. 2018, c. 17, Sched. 3, s. 2.

Section Amendments with date in force (d/m/y) [+]

Duties of Deputy Auditor General

7 The Deputy Auditor General, under the direction of the Auditor General, shall assist in the exercise of the powers and the performance of the duties of the Auditor General and, in the absence or inability to act of the Auditor General, shall act in the place of the Auditor General. R.S.O. 1990, c. A.35, s. 7; 2004, c. 17, s. 9.

Section Amendments with date in force (d/m/y) [+]

Qualifications

8 The persons appointed as Auditor General and Deputy Auditor General shall be persons who are licensed under the *Public Accounting Act, 2004*. R.S.O. 1990, c. A.35, s. 8; 2004, c. 8, s. 46; 2004, c. 17, s. 10.

Section Amendments with date in force (d/m/y) [+]

Appointment of Advertising Commissioner

8.1 (1) Subject to the approval of the Board, the Auditor General may appoint a person to act as Advertising Commissioner. 2004, c. 20, s. 13 (2).

Duties

(2) The Advertising Commissioner may exercise such powers and shall perform such duties as the Auditor General may delegate to him or her under subsection 24 (2). 2004, c. 20, s. 13 (2).

Section Amendments with date in force (d/m/y) [+]

Audit of Consolidated Revenue Fund

9 (1) The Auditor General shall audit, on behalf of the Assembly and in such manner as the Auditor General considers necessary, the accounts and records of the receipt and disbursement of public money forming part of the Consolidated Revenue Fund whether held in trust or otherwise. R.S.O. 1990, c. A.35, s. 9 (1); 2004, c. 17, s. 11.

Audit of agencies of the Crown

(2) Where the accounts and financial transactions of an agency of the Crown are not audited by another auditor, the Auditor General shall perform the audit, and, despite any other Act, where the accounts and financial transactions of an agency of the Crown are audited by another auditor, the audit shall be performed under the direction of the Auditor General and such other auditor shall report to the Auditor General. R.S.O. 1990, c. A.35, s. 9 (2); 2004, c. 17, s. 11.

Audit of Crown controlled corporations

(3) Where the accounts of a Crown controlled corporation are audited other than by the Auditor General, the person or persons performing the audit,

(a) shall deliver to the Auditor General forthwith after completion of the audit a copy of their report of their findings and their recommendations to the management and a copy of the audited financial statements of the corporation;

(b) shall make available forthwith to the Auditor General, when so requested by the Auditor General, all working papers, reports, schedules and other documents in respect of the audit or in respect of any other audit of the corporation specified in the request;

(c) shall provide forthwith to the Auditor General, when so requested by the Auditor General, a full explanation of work performed, tests and examinations made and the results obtained, and any other information within the knowledge of such person or persons in respect of the corporation. R.S.O. 1990, c. A.35, s. 9 (3); 2004, c. 17, s. 11.

Additional examination and investigation

(4) Where the Auditor General is of the opinion that any information, explanation or document that is provided, made available or delivered to him or her by the auditor or auditors referred to in subsection (2) or (3) is insufficient, the Auditor General may conduct or cause to be conducted such additional examination and investigation of the records and operations of the agency or corporation as the Auditor General considers necessary. R.S.O. 1990, c. A.35, s. 9 (4); 2004, c. 17, s. 11.

Section Amendments with date in force (d/m/y) [+]

Special audits

Grant recipients

9.1 (1) On or after April 1, 2005, the Auditor General may conduct a special audit of a grant recipient with respect to a reviewable grant received by the grant recipient directly or indirectly on or after the date on which the *Audit Statute Law Amendment Act, 2004* receives Royal Assent. 2004, c. 17, s. 12.

Exception

(2) Subsection (1) does not apply with respect to a grant recipient that is a municipality. 2004, c. 17, s. 12.

Crown controlled corporations, etc.

(3) The Auditor General may conduct a special audit of a Crown controlled corporation or a subsidiary of a Crown controlled corporation. 2004, c. 17, s. 12.

Section Amendments with date in force (d/m/y) [+]

Examination of accounting records

9.2 (1) The Auditor General may examine accounting records relating to a reviewable grant received directly or indirectly by a municipality. 2004, c. 17, s. 12.

Same

(2) The Auditor General may require a municipality to prepare and submit a financial statement setting out the details of its disposition of the reviewable grant. 2004, c. 17, s. 12.

Section Amendments with date in force (d/m/y) [+]

Duty to furnish information

10 (1) Every ministry of the public service, every agency of the Crown, every Crown controlled corporation and every grant recipient shall give the Auditor General the information regarding its powers, duties, activities, organization, financial transactions and methods of business that the Auditor General believes to be necessary to perform his or her duties under this Act. 2004, c. 17, s. 13.

Access to records

(2) The Auditor General is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by a ministry, agency of the Crown, Crown controlled corporation or grant recipient, as the case may be, that the Auditor General believes to be necessary to perform his or her duties under this Act. 2004, c. 17, s. 13.

No waiver of privilege

(3) A disclosure to the Auditor General under subsection (1) or (2) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege. 2004, c. 17, s. 13.

Section Amendments with date in force (d/m/y) [+]

Power to examine on oath

11 (1) The Auditor General may examine any person on oath on any matter pertinent to an audit or examination under this Act. 2004, c. 17, s. 13.

Application of *Public Inquiries Act, 2009*

(2) Section 33 of the *Public Inquiries Act, 2009* applies to the examination by the Auditor General. 2009, c. 33, Sched. 6, s. 42.

Section Amendments with date in force (d/m/y) [+]

Stationing a member in a ministry, etc.

11.1 (1) For the purpose of exercising powers or performing duties under this Act, the Auditor General may station one or more members of the Office of the Auditor General in any ministry of the public service, agency of the Crown, Crown controlled corporation or grant recipient. 2004, c. 17, s. 13.

Accommodation

(2) The ministry, agency, corporation or grant recipient, as the case may be, shall provide the accommodation required for the purposes mentioned in subsection (1). 2004, c. 17, s. 13.

Section Amendments with date in force (d/m/y) [+]

Prohibition re obstruction

11.2 (1) No person shall obstruct the Auditor General or any member of the Office of the Auditor General in the performance of a special audit under section 9.1 or an examination under section 9.2 and no person shall conceal or destroy any books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property that the Auditor General considers to be relevant to the subject-matter of the special audit or examination. 2004, c. 17, s. 13.

Offence

(2) Every person who knowingly contravenes subsection (1) and every director or officer of a corporation who knowingly concurs in such a contravention is guilty of an offence and on conviction is liable to a fine of not more than $2,000 or imprisonment for a term of not more than one year, or both. 2004, c. 17, s. 13.

Penalty, corporation

(3) If a corporation is convicted of an offence under subsection (2), the maximum penalty that may be imposed on the corporation is $25,000. 2004, c. 17, s. 13.

Section Amendments with date in force (d/m/y) [+]

Annual report

12 (1) The Auditor General shall report annually to the Speaker of the Assembly after each fiscal year is closed and the Public Accounts are laid before the Assembly, but not later than the 31st day of December in each year unless the Public Accounts are not laid before the Assembly by that day, and may make a special report to the Speaker at any time on any matter that in the opinion of the Auditor General should not be deferred until the annual report, and the Speaker shall lay each such report before the Assembly forthwith if it is in session or, if not, not later than the tenth day of the next session. R.S.O. 1990, c. A.35, s. 12 (1); 2004, c. 17, s. 14 (1).

Contents of report

(2) In the annual report in respect of each fiscal year, the Auditor General shall report on,

(a) the work of the Office of the Auditor General and on whether, in carrying on the work of the Office, the Auditor General received all the information and explanations required;

(b) the examination of accounts of receipts and disbursements of public money;

(c) the examination of the consolidated financial statements of Ontario as reported in the Public Accounts;

(d) all special warrants issued to authorize payments, stating the date of each special warrant, the amount authorized and the amount expended;

(e) all orders of the Treasury Board made to authorize payments in excess of appropriations, stating the date of each order, the amount authorized and the amount expended;

(f) such matters as, in the opinion of the Auditor General, should be brought to the attention of the Assembly including, without limiting the generality of the foregoing, any matter relating to the audit or examination of the Crown, agencies of the Crown, Crown controlled corporations or grant recipients or any cases where the Auditor General has observed that,

(i) accounts were not properly kept or public money was not fully accounted for,

(ii) essential records were not maintained or the rules and procedures applied were not sufficient to safeguard and control public property or to effectively check the assessment, collection and proper allocation of revenue or to ensure that expenditures were made only as authorized,

(iii) money was expended other than for the purposes for which it was appropriated,

(iv) money was expended without due regard to economy and efficiency, or

(v) where procedures could be used to measure and report on the effectiveness of programs, the procedures were not established or, in the opinion of the Auditor General, the established procedures were not satisfactory;

(g) expenditures for advertisements, printed matter and messages that are reviewable under the *Government Advertising Act, 2004*. R.S.O. 1990, c. A.35, s. 12 (2); 2004, c. 17, s. 14 (2-7); 2004, c. 20, s. 13 (3); 2006, c. 33, Sched. B, s. 2.

Opinion on statements

(3) In the annual report in respect of each fiscal year, the Auditor General shall express his or her opinion as to whether the consolidated financial statements of Ontario, as reported in the Public Accounts, present fairly information in accordance with appropriate generally accepted accounting principles and the Auditor General shall set out any reservations he or she may have. 2004, c. 17, s. 14 (8).

Report re government advertising

(4) In the annual report, the Auditor General may report on expenditures for government advertising generally. 2004, c. 20, s. 13 (4).

Section Amendments with date in force (d/m/y) [+]

Restrictions re: Hydro One Inc.

13 (1) Hydro One Inc. and its subsidiaries are deemed not to be agencies of the Crown or Crown controlled corporations for the purposes of this Act on and after the date on which the *Building Ontario Up Act (Budget Measures), 2015* received Royal Assent. 2015, c. 20, Sched. 3, s. 1.

Continuing duty

(2) Despite subsection (1), Hydro One Inc. shall give the Auditor General such information and access to such documents or records as is necessary and relevant to enable the Auditor General to prepare his or her report, for inclusion in the Public Accounts, on the consolidated financial statements of Ontario. 2015, c. 20, Sched. 3, s. 1.

Same

(3) The auditors of Hydro One Inc. shall comply with the requirements set out in clauses 9 (3) (a), (b) and (c) for the purpose of enabling the Auditor General to prepare his or her report, for inclusion in the Public Accounts, on the consolidated financial statements of Ontario. 2015, c. 20, Sched. 3, s. 1.

Same

(4) However, Hydro One Inc. and its auditors are not required by subsections (2) and (3) to give the Auditor General any information or access to records or documents that relate to a period for which Hydro One Inc. has not yet disclosed to the public its audited or unaudited financial statements. 2015, c. 20, Sched. 3, s. 1.

Repeal

(5) Subsections (1) to (4) and this subsection are repealed on a day to be named by proclamation of the Lieutenant Governor. 2015, c. 20, Sched. 3, s. 1.

(6), (7) REPEALED: R.S.O. 1990, c. A.35, s. 13 (7).

Section Amendments with date in force (d/m/y) [+]

14 REPEALED: 2004, c. 17, s. 15.

Section Amendments with date in force (d/m/y) [+]

Proviso

15 Nothing in this Act shall be construed to require the Auditor General,

(a) to report on any matter that, in the opinion of the Auditor General, is immaterial or insignificant; or

(b) to audit or direct the audit of or report on the accounts of a body not referred to in this Act in the absence of such a requirement in any other Act in respect of the body. R.S.O. 1990, c. A.35, s. 15; 2004, c. 17, s. 16.

Section Amendments with date in force (d/m/y) [+]

Attendance at standing Public Accounts Committee of the Assembly

16 At the request of the standing Public Accounts Committee of the Assembly, the Auditor General and any member of the Office of the Auditor General designated by the Auditor General shall attend at the meetings of the committee in order,

(a) to assist the committee in planning the agenda for review by the committee of the Public Accounts and the annual report of the Auditor General; and

(b) to assist the committee during its review of the Public Accounts and the annual report of the Auditor General,

and the Auditor General shall examine into and report on any matter referred to him or her in respect of the Public Accounts by a resolution of the committee. R.S.O. 1990, c. A.35, s. 16; 2004, c. 17, s. 17.

Section Amendments with date in force (d/m/y) [+]

Special assignments

17 The Auditor General shall perform such special assignments as may be required by the Assembly, the standing Public Accounts Committee of the Assembly, by resolution of the committee, or by a minister of the Crown in right of Ontario but such special assignments shall not take precedence over the other duties of the Auditor General under this Act and the Auditor General may decline an assignment by a minister of the Crown that, in the opinion of the Auditor General, might conflict with the other duties of the Auditor General. R.S.O. 1990, c. A.35, s. 17; 2004, c. 17, s. 18.

Section Amendments with date in force (d/m/y) [+]

Power to advise

18 The Auditor General may advise appropriate persons employed in the public service of Ontario as to any matter that comes or that may come to the attention of the Auditor General in the course of exercising the powers or performing the duties of Auditor General. R.S.O. 1990, c. A.35, s. 18; 2004, c. 17, s. 18.

Section Amendments with date in force (d/m/y) [+]

Audit working papers

19 Audit working papers of the Office of the Auditor General shall not be laid before the Assembly or any committee of the Assembly. R.S.O. 1990, c. A.35, s. 19; 2004, c. 17, s. 19.

Section Amendments with date in force (d/m/y) [+]

Employees

20 (1) Subject to the approval of the Board and to sections 22, 25 and 26, the Auditor General may employ such persons as the Auditor General considers necessary for the efficient operation of the Office of the Auditor General and may determine the salary of the Deputy Auditor General and the salaries or wages and the terms and conditions of employment of the employees of the Office of the Auditor General. 2006, c. 35, Sched. C, s. 7 (2).

Same

(2) Salaries or wages determined for the employees of the Office of the Auditor General under subsection (1) shall be comparable to the salaries or wages determined under Part III of the *Public Service of Ontario Act, 2006* for public servants employed under that Part to work in a ministry, other than in a minister's office, who are in similar positions. 2006, c. 35, Sched. C, s. 7 (2).

Section Amendments with date in force (d/m/y) [+]

Oath of office and secrecy and oath of allegiance

21 (1) Every employee of the Office of the Auditor General, before performing any duty as an employee of the Auditor General, shall take and subscribe before the Auditor General or a person designated in writing by the Auditor General,

(a) the following oath of office and secrecy, in English or in French:

I, ..., do swear (*or* solemnly affirm) that I will faithfully discharge my duties as an employee of the Auditor General and will observe and comply with the laws of Canada and Ontario and, except as I may be legally required, I will not disclose or give to any person any information or document that comes to my knowledge or possession by reason of my being an employee of the Office of the Auditor General.

So help me God. (Omit this line in an affirmation)

(b) the following oath of allegiance, in English or in French:

I, ..., do swear (*or* solemnly affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second (*or the reigning sovereign for the time being*), her heirs and successors according to law.

So help me God. (Omit this line in an affirmation)

R.S.O. 1990, c. A.35, s. 21 (1); 2004, c. 17, s. 21 (1).

Idem

(2) The Auditor General may require any person or class of persons appointed to assist the Auditor General for a limited period of time or in respect of a particular matter to take and subscribe either or both of the oaths set out in subsection (1). R.S.O. 1990, c. A.35, s. 21 (2); 2004, c. 17, s. 21 (2).

Record of oaths

(3) A copy of each oath administered to an employee of the Office of the Auditor General under subsection (1) shall be kept in the file of the employee in the Office of the Auditor General. R.S.O. 1990, c. A.35, s. 21 (3); 2004, c. 17, s. 21 (3).

Cause for dismissal

(4) The failure of an employee of the Office of the Auditor General to take and subscribe or to adhere to either of the oaths required by subsection (1) may be considered as cause for dismissal. R.S.O. 1990, c. A.35, s. 21 (4); 2004, c. 17, s. 21 (3).

Section Amendments with date in force (d/m/y) [+]

Benefits

22 (1) The benefits determined under Part III of the *Public Service of Ontario Act, 2006* for public servants employed under that Part to work in a ministry, other than in a minister's office, who are not within a bargaining unit apply to,

(a) the Auditor General;

(b) the Deputy Auditor General; and

(c) the full-time permanent and probationary employees of the Office of the Auditor General. 2006, c. 35, Sched. C, s. 7 (3).

Same

(1.1) For the purposes of clause (1) (a), if a benefit applicable to the Auditor General is contingent on the exercise of a discretionary power or the performance of a discretionary function, the power may be exercised or the function may be performed by the Board or any person authorized by order of the Board. 2006, c. 35, Sched. C, s. 7 (3).

Same

(1.2) For the purposes of clauses (1) (b) and (c), if a benefit applicable to the Deputy Auditor General or to an employee of the Office of the Auditor General is contingent on the exercise of a discretionary power or the performance of a discretionary function, the power may be exercised or the function may be performed by the Auditor General or any person authorized in writing by the Auditor General. 2006, c. 35, Sched. C, s. 7 (3).

Pension plan

(2) The Deputy Auditor General is a member of the Public Service Pension Plan. 2006, c. 15, s. 2.

(3)-(5) REPEALED: 2018, c. 17, Sched. 3, s. 3.

Section Amendments with date in force (d/m/y) [+]

Expert assistance

23 Subject to the approval of the Board, the Auditor General from time to time may appoint one or more persons having technical or special knowledge of any kind to assist the Auditor General for a limited period of time or in respect of a particular matter and the money required for the purposes of this section shall be charged to and paid out of the Consolidated Revenue Fund. R.S.O. 1990, c. A.35, s. 23; 2004, c. 17, s. 23.

Section Amendments with date in force (d/m/y) [+]

Delegation of authority

24 (1) The Auditor General may delegate in writing to a person employed in the Office of the Auditor General the Auditor General's authority to exercise any power or perform any duty other than his or her duty to report to the Assembly. 2004, c. 17, s. 24.

Same

(2) The Auditor General may delegate in writing to the Advertising Commissioner or to a person employed in the Office of the Auditor General any of the Auditor General's powers and duties under the *Government Advertising Act, 2004* and may impose conditions and restrictions with respect to the delegation. 2004, c. 20, s. 13 (5).

Section Amendments with date in force (d/m/y) [+]

Political activities of employees of the Office of the Auditor General

25 (1) An employee of the Office of the Auditor General shall not,

(a) be a candidate in a provincial or federal election or in an election for any municipal office including a local board of a municipality within the meaning of the *Municipal Affairs Act*;

(b) solicit funds for a provincial, federal or municipal party or candidate; or

(c) associate his or her position in the Office of the Auditor General with any political activity. R.S.O. 1990, c. A.35, s. 25 (1); 2004, c. 17, s. 25.

Cause for dismissal

(2) Contravention of any of the provisions of subsection (1) may be considered as cause for dismissal. R.S.O. 1990, c. A.35, s. 25 (2).

Section Amendments with date in force (d/m/y) [+]

Conduct of business and employee discipline, etc.

26 (1) The Auditor General may make orders and rules for the conduct of the internal business of the Office of the Auditor General. 2006, c. 35, Sched. C, s. 7 (4).

Same

(2) The Auditor General may, in accordance with subsection (3),

(a) impose disciplinary measures, including suspension or dismissal, for cause on an employee of the Office of the Auditor General; or

(b) dismiss an employee of the Office of the Auditor General from employment other than for cause. 2006, c. 35, Sched. C, s. 7 (4).

Same

(3) Sections 34 to 36 and 38 and 39 of the *Public Service of Ontario Act, 2006* apply, with necessary modifications, to the discipline or dismissal under subsection (2) of an employee by the Auditor General and, for the purpose,

(a) a reference to a public servant appointed by the Public Service Commission, including the reference in section 38 of that Act to such a public servant who is employed in a class of position that is prescribed, shall be read as a reference to an employee of the Office of the Auditor General;

(b) a reference to the Public Service Commission shall be read as a reference to the Auditor General. 2006, c. 35, Sched. C, s. 7 (4).

Same

(4) An employee who is disciplined under clause (2) (a) may file a grievance with respect to the Auditor General's decision with the Public Service Grievance Board continued under the *Public Service of Ontario Act, 2006*. 2006, c. 35, Sched. C, s. 7 (4).

Same

(5) The provisions of Part II of the *Public Service of Ontario Act, 2006* and the regulations under that Part that apply in relation to grievances authorized by those regulations apply, with necessary modifications, to a grievance authorized by subsection (4). 2006, c. 35, Sched. C, s. 7 (4).

Section Amendments with date in force (d/m/y) [+]

Proceedings privileged

27 (1) No proceedings lie against the Auditor General, the Deputy Auditor General, the Advertising Commissioner, the Commissioner of the Environment appointed under section 50 of the *Environmental Bill of Rights, 1993*, any employee of the Office of the Auditor General or any person appointed to assist the Auditor General for a limited period of time or in respect of a particular matter, for anything he or she may do or report or say in the course of the exercise or the intended exercise of functions under this or any other Act, unless it is shown that he or she acted in bad faith. R.S.O. 1990, c. A.35, s. 27 (1); 2004, c. 17, s. 27 (1); 2004, c. 20, s. 13 (6); 2018, c. 17, Sched. 3, s. 4.

(2) Repealed: 2004, c. 17, s. 27 (2).

Section Amendments with date in force (d/m/y) [+]

Duty of confidentiality

27.1 (1) The Auditor General, the Deputy Auditor General, the Advertising Commissioner, the Commissioner of the Environment appointed under section 50 of the *Environmental Bill of Rights, 1993*, each employee of the Office of the Auditor General and any person appointed to assist the Auditor General for a limited period of time or in respect of a particular matter shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her employment or duties under this Act. 2004, c. 17, s. 28; 2004, c. 20, s. 13 (7); 2018, c. 17, Sched. 3, s. 5.

Same

(2) Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate to another person any matter described in subsection (1) except as may be required in connection with the administration of this Act or any proceedings under this Act or under the *Criminal Code* (Canada). 2004, c. 17, s. 28.

Same

(3) A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 10 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege. 2004, c. 17, s. 28.

Section Amendments with date in force (d/m/y) [+]

Confidentiality of personal information

27.2 (1) No person shall collect, use or retain personal information on behalf of the Auditor General unless the personal information is reasonably necessary for the proper administration of this Act or for a proceeding under it. 2004, c. 17, s. 28.

Same

(2) No person shall collect, use or retain personal information on behalf of the Auditor General if other information will serve the purpose for which the personal information would otherwise be collected, used or retained. 2004, c. 17, s. 28.

Retention of information

(3) If the Auditor General retains personal information relating to the medical, psychiatric or physiological history of the individual or information relating to the individual's health care or well-being, the Auditor General shall,

(a) remove all references in the information to the name of the individual and to other identifying information;

(b) retain the information by using a system of identifiers, other than the name of the individual and the other identifying information mentioned in clause (a); and

(c) ensure that the information is not,

(i) easily identifiable by a person who is not authorized to have access to it,

(ii) used or disclosed for purposes not directly related to the Auditor General's duties under this Act,

(iii) published, disclosed or distributed in any manner that would allow the information to be used to identify the individual or to infer the individual's identity, or

(iv) combined, linked or matched to any other information that could identify the individual, except if the Auditor General finds it necessary to do so to fulfil his or her duties under this Act. 2004, c. 17, s. 28.

Definition

(4) In this section,

"personal information" has the same meaning as in the *Freedom of Information and Protection of Privacy Act*. 2004, c. 17, s. 28.

Section Amendments with date in force (d/m/y) [+]

Examination of accounts of Office of the Auditor General

28 A person or persons, not employed by the Crown or the Office of the Assembly, licensed under the *Public Accounting Act, 2004* and appointed by the Board, shall examine the accounts relating to the disbursements of public money on behalf of the Office of the Auditor General and shall report thereon to the Board and the chair of the Board shall cause the report to be laid before the Assembly if it is in session or, if not, at the next session. R.S.O. 1990, c. A.35, s. 28; 2004, c. 8, s. 46; 2004, c. 17, s. 29.

Section Amendments with date in force (d/m/y) [+]

Estimates

29 (1) The Auditor General shall present annually to the Board estimates of the sums of money that will be required for the purposes of this Act. R.S.O. 1990, c. A.35, s. 29 (1); 2004, c. 17, s. 30.

Review by Board

(2) The Board shall review and may alter as it considers proper the estimates presented by the Auditor General, and the chair of the Board shall cause the estimates as altered by the Board to be laid before the Assembly and the Assembly shall refer the estimates laid before it to a committee of the Assembly for review. R.S.O. 1990, c. A.35, s. 29 (2); 2004, c. 17, s. 30.

Notice

(3) Notice of meetings of the Board to review or alter the estimates presented by the Auditor General shall be given to the chair and the vice-chair of the standing Public Accounts Committee of the Assembly and the chair and the vice-chair may attend at the review of the estimates by the Board. R.S.O. 1990, c. A.35, s. 29 (3); 2004, c. 17, s. 30.

Money

(4) The money required for the purposes of this Act, other than under subsection 5.1 (1) and section 23, shall be paid out of the money appropriated therefor by the Legislature. R.S.O. 1990, c. A.35, s. 29 (4); 2018, c. 17, Sched. 3, s. 6.

Section Amendments with date in force (d/m/y) [+]

Transitional regulations

30 (1) The Lieutenant Governor in Council may make regulations providing for transitional matters arising from the enactment of Schedule 3 to the *Restoring Trust, Transparency and Accountability Act, 2018*. 2018, c. 17, Sched. 3, s. 7.

Conflict

(2) If there is a conflict between a regulation made under subsection (1) and a provision of this or any other Act or a provision of another regulation made under any other Act, the regulation made under subsection (1) prevails. 2018, c. 17, Sched. 3, s. 7.

Section Amendments with date in force (d/m/y) [+]

Français

AUDITOR GENERAL OF ONTARIO
Applicant

-and-

LAURENTIAN UNIVERSITY
Respondent

Court File No. CV-21-00669471-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

SUPPLEMENTARY BOOK OF AUTHORITIES OF THE AUDITOR GENERAL OF ONTARIO

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