Court of Appeal File No. M52287
Court File No. CV-21-656040-00CL

COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

BOOK OF AUTHORITIES OF THE MOVING PARTIES

(Motion for Leave to Appeal)

March 9, 2021

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Court File No. CV-21-656040-00CL

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(COMMERCIAL LIST)

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AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **LAURENTIAN UNIVERSITY OF SUDBURY**

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Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

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Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

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Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous
Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous
Evidence
XIV Privilege

XIV.8 Public interest immunity
XIV.8.a Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

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Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

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Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — followed

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Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

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Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

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

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1[re] inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness,

both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a

confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

> A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?
>
> B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> > (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
> >
> > (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right*. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be

one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the

importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right

to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be

a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with

the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

End of Document

Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: Nortel Networks Inc. v. Pension Protection Fund | 2016 CarswellOnt 14117 | (S.C.C., Jul 29, 2016)

2016 ONCA 332
Ontario Court of Appeal

Nortel Networks Corp., Re

2016 CarswellOnt 6785, 2016 ONCA 332, 130 O.R. (3d) 481,
265 A.C.W.S. (3d) 834, 348 O.A.C. 131, 36 C.B.R. (6th) 1

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

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

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

Judgment: May 3, 2016
Docket: CA M45307, M45309, M45310 M45311, M45312, M45313

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

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Steven L. Graff, Ian Aversa, Miranda Spence, for Moving party, Nortel Trade Claims Consortium
Michael E. Barrack, D.J. Miller, John L. Finnigan, Michael S. Shakra, Andrea McEwan, for Responding parties, Board of the Pension Protection Fund and Nortel Networks U.K. Pension Trust Ltd.
Benjamin Zarnett, Jessica Kimmel, Peter Ruby, Peter Kolla, for Responding party, Monitor, Ernst & Young Inc.
Kenneth Kraft, John Salmas, for Responding party, Wilmington Trust, National Association
Derrick Tay, Jennifer Stam, for Responding parties, Canadian Debtors(2)
Kenneth Rosenberg, Lily Harmer, Massimo Starnino, for Responding party, Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund
Mark Zigler, Ari Kaplan, for Responding parties, Former Employees of Nortel and LTD Beneficiaries
Arthur O. Jacques, Paul Steep, Byron Shaw, for Responding party, Canadian Creditors' Committee
Barry E. Wadsworth, for Responding party, CAW-Canada
Matthew P. Gottlieb, Matthew Milne-Smith, for Responding parties, Joint Administrators of the EMEA Debtors(3) other than Nortel Networks S.A.

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

Related Abridgment Classifications

Bankruptcy and insolvency

XIV Administration of estate

XIV.6 Sale of assets

XIV.6.h Miscellaneous

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.4 Appeals

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals

Debtor group of companies (N group) operated as highly-integrated multinational enterprise — Cross-border insolvency proceedings went on for over seven years — Debtor group's assets, primarily intellectual property (IP), had been sold and proceeds had been placed in escrow (Lockbox Funds) — Ontario Commercial List judge (trial judge) and Judge of U.S. Bankruptcy Court presided over joint trial and both concluded that Lockbox Funds should be allocated among various N debtor estates on pro rata basis — Judges diverged on issue of IP rights under Master Research and Development Agreement (MRDA), which provided for payment of residual profits to certain entities — Trial judge held that MRDA did not govern allocation of Lockbox funds — Moving parties brought motions for leave to appeal trial judge's judgment — Motions dismissed — Test for leave to appeal was not met — There was no prima facie merit to arguments that pro rata allocation constituted substantive consolidation, that trial judge erred by failing to recognize distinct and separable property rights various N companies allegedly had in N group's IP, that allocation was arbitrary, or that trial judge erred in interpreting MRDA — Facts of case were unique and exceptional, so granting leave would not allow court to provide guidance on legal issues of significance to practice — Fact that allocation of Lockbox Funds was significant issue to parties was insufficient to warrant granting leave.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

Distribution of proceeds of sale — Debtor group of companies (N group) was highly integrated multinational enterprise — During lengthy cross-border insolvency proceedings, debtor group's assets, primarily intellectual property (IP), had been sold and proceeds had been placed in escrow (Lockbox Funds) — Ontario Commercial List judge (trial judge) and Judge of U.S. Bankruptcy Court presided over joint trial and both concluded that Lockbox Funds should be allocated among various N debtor estates on pro rata basis — Judges diverged on issue of IP rights under Master Research and Development Agreement (MRDA), which provided for payment of residual profits to certain entities — Trial judge held that MRDA did not govern allocation of Lockbox Funds — Moving parties brought motions for leave to appeal — Motions dismissed — Test for leave to appeal was not met — Grounds of appeal had no prima facie merit — There was no prima facie merit to arguments that pro rata allocation constituted substantive consolidation, that trial judge erred by failing to recognize distinct property rights various N companies allegedly had in N group's IP, that allocation was arbitrary, or that trial judge erred in interpreting MRDA — There was no reason to interfere with trial judge's interpretation of MRDA — Trial judge was alive to fairness concerns and gave reasons for adopting approach he did.

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Generally — referred to

s. 11 — considered

s. 13 — considered

Insolvency Act, 1986, c. 45

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

***Per curiam*:**

A. Introduction

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

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

• more than 6,800 Nortel former employees or pensioners have died;

• well in excess of $1 billion has been incurred in costs; and

• Nortel's assets have been sold and some $7.3 billion [1] in sale proceeds have been placed in escrow (the "Lockbox Funds").

1 All references to dollars are to U.S. dollars, unless otherwise specified.

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

2 Judge Gross's reasons are reported at 532 B.R. 494 (U.S. Bankr. D. Del. 2015).

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

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

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

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

3 In accordance with the directions of the Court of Appeal case management judge, there was one main factum filed on behalf of the moving parties by the U.S. Debtors and one main factum filed on behalf of the responding parties by the UKPC. Six supplementary factums and one reply factum were also filed.

B. Genesis of Dispute

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

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

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

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

4 With the exception of Nortel Networks (CALA) Inc.

5 The Joint Administrators were also party to the IFSA but only for the purposes of Section 17 (No Personal Liability of the Joint Administrators).

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

6 A description of "Selling Debtor" is found in s.12 (a) of the IFSA: "Each Debtor hereby agrees that its execution of definitive documentation with a purchaser (or, in the case of any auction, the successful bidder in any such auction) of, or closing of any sale of, material assets of any of the Debtors to which such Debtor (a "Selling Debtor") is proposed to be a party..."

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

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

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

7 Selling Debtors was defined in the Allocation Protocol as the "Canadian Debtors, U.S. Debtors, EMEA Debtors and Nortel Networks Optical Components Ltd., Nortel Networks AS, Nortel Networks AG, Nortel Networks South Africa (Pty) Limited, and Nortel Networks (Northern Ireland) Limited."

8 The EMEA Debtors were held to have attorned to the jurisdiction of the Canadian court and the U.S. bankruptcy court.

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

C. Trial Judge's Decision

(1) Trial Decision

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

> [16] The Nortel Group operated along business lines as a highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities organized around the world. Each entity, such as NNL, NNI, NNUK, NN Ireland and NNSA, was integrated into regional and product line management structures to share information and perform research and development ("R&D"), sales and other common functions across geographic boundaries and across legal entities. The matrix structure was designed to enable Nortel to function more efficiently, drawing on employees from different functional disciplines worldwide, allowing them to work together to develop products and attract and provide service to customers, fulfilling their demands globally.
>
> [17] As a result of Nortel's matrix structure, no single Nortel entity, either NNL or any of the other Canadian debtors in Canada, NNI or any of the other US debtors in the United States or NNUK or any of the other EMEA debtors, was able to provide the full line of Nortel products and services, including R&D capabilities, on a stand-alone basis. While Nortel ensured that all corporate entities complied with local laws regarding corporate governance, no corporate entity carried on business on its own.

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

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

9 Nortel Networks Australia was also a party to the agreement. It ceased being a Residual Profit Entity on December 31, 2007.

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

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

21 The trial judge found that, by its terms, the MRDA was to be construed in accordance with, and governed by, Ontario law. He reviewed the applicable principles of contractual interpretation, including the law on factual matrix (surrounding circumstances), commercial reasonableness, and recitals. In reviewing the law, he considered the recent authority from the Supreme Court of Canada on contractual interpretation, *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), which was released during the course of the trial. He considered in detail the parties' positions, the language of the MRDA and evidence on factual matrix.

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

> [177] I accept that the MRDA was a transfer pricing document created for tax purposes. The licenses were a part of it. The licenses granted under it were never dealt with separately from the MRDA. Their only purpose was to support the intended tax treatment resulting from the MRDA.
>
> . . . . .
>
> [185] I conclude that the circumstances surrounding the creation of the MRDA lead to no other result but that the construct of legal title to the NN Technology being in NNL in return for NNL granting exclusive licenses to the Licensed Participants was only for the purpose of supporting the proposed method to split profits or losses on a tax efficient basis while Nortel operated as a going concern business. The agreement in its application was intended to apply only to Nortel while it operated and not to deal with rights after Nortel and its subsidiaries stopped operating its businesses.

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

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

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

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

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

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

27 He observed that it is a fundamental tenet of insolvency law that all debts be paid *pari passu* and that all unsecured creditors receive equal treatment. In his view, a *pro rata* allocation could be achieved by directing an allocation of the Lockbox Funds to each Debtor Estate based on the percentage that the claims against that Estate bore to the total claims against all of the Debtor Estates.

28 In reaching this conclusion, the trial judge dealt with the argument that a *pro rata* allocation would amount to substantive consolidation. He concluded that a *pro rata* allocation would not constitute substantive consolidation in the unique circumstances of this case. In any event, even if it were substantive consolidation, there was precedent that justified substantive consolidation

in this case: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *PSINET Ltd., Re* (2002), 33 C.B.R. (4th) 284 (Ont. Gen. Div. [Commercial List]); *Northland Properties Ltd., Re* (1988), 29 B.C.L.R. (2d) 257 (B.C. S.C.).

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

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

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

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

10 The order defines "Debtor Estate" as "each of the individual legal entities" set out in Schedule B. Schedule B lists the 45 entities, including the Canadian Debtors, the U.S. Debtors, the EMEA Debtors and five "EMEA Non-Filed Entities" who have not commenced insolvency proceedings. See also the similar definition given to Selling Debtors under the Allocation Protocol.

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

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

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

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

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

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

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

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

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

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

D. Analysis

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

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

(1) Test for Leave to Appeal

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

(a) the proposed appeal is *prima facie* meritorious or frivolous;

(b) the points on the proposed appeal are of significance to the practice;

(c) the points on the proposed appeal are of significance to the action; and

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

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

(a) Whether Appeal is Prima Facie Meritorious

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

(i) Substantive consolidation

Position of the Moving Parties

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

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

38 In its supplementary factum, the Bank of New York Mellon, as Indenture Trustee, makes a related argument. It submits that since the Nortel proceeding no longer involves a restructuring, the *CCAA*'s purpose is spent and the proceeds should thereafter be distributed under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), or at least in a manner consistent with the *BIA* scheme. It says the *BIA* does not contemplate consolidation but rather distribution on an entity-by-entity basis.

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

Analysis

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

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

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

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

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

- "Nortel (a) had fully integrated and interdependent operations; (b) had intercompany guarantees for its primary indebtedness; (c) operated a consolidated treasury system in which generated cash was used throughout the Nortel Group as required; (d) disseminated consolidated financial information throughout its entire history, save for the year before its bankruptcy; and (e) created IP through integrated R&D activities that were global in scope": para. 223.

- "[N]o one entity or region was able to provide the full line of Nortel products and services": para. 202.

- "Nortel's matrix structure also allowed Nortel to draw on employees from different functional disciplines worldwide ... regardless of region or country according to need": para. 203.

- "R&D was organized around a particular project, not particular geographical locations or legal entities, and was managed on a global basis": para. 202.

- "The fact that Nortel ensured that legal entities were properly created and advised in the various countries in which it operated in order to meet local legal requirements [did] not mean that Nortel operated a separate business in each country. It did not": para. 202.

- "The intangible assets that were sold, being by far the largest type of asset sold, were not separately located in any one jurisdiction or owned separately in different jurisdictions": para. 202.

- The assets are "so intertwined that it is difficult to separate them for purposes of dealing with different entities": para. 222.

- There is "no recognized measurable right in any one of the selling Debtor Estates to all or a fixed portion of the proceeds of sale": para 224.

• "Nortel has had significant difficulty in determining the ownership of its princip[al] assets, namely the $7.3 billion representing the proceeds of the sales of the lines of business and the residual patent portfolio", which "constitutes more than 80 per cent of the total assets of all Nortel entities": para. 222.

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

• The Lockbox Funds were largely due to the sale of IP and no one Debtor Estate had any right to the funds. They did not belong in whole or in part to any one Estate or combination of Estates.

• The various entities and the various Estates were not being treated as one entity and the creditors of each entity would not become creditors of a single entity. Each entity remained separate and with its own creditors.

• Each entity would maintain its own cash on hand and would be administered separately.

• The inter-company claims would not be eliminated.

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

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

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

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

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

> Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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

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

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

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

(ii) The Interpretation of the MRDA

Position of Moving Parties

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

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

Analysis

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

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

• "Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law": para. 43.

• "[T]he historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": para. 50.

• "[T]his Court in *Housen [v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235] found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings .... These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law": para. 52.

• "[I]t may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law .... Legal errors made in the course of contractual interpretation include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor'": para. 53.

- "However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation": para. 54.

- "The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare": para. 55.

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

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

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

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

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

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

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

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

(iii) Fairness to the Parties and Related Arguments

Position of Moving Parties

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

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

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The Court is convinced that where, as here, operating entities in an integrated, multi-national enterprise developed assets in common and there is nothing in the law or facts giving any of those entities certain and calculable claims to the proceeds from the liquidation of those assets in an enterprise-wide insolvency, adopting a prorata allocation approach, which recognizes inter-company and settlement related claims and cash in hand, yields the most acceptable result.
>
> There is nothing in the law or facts of this case which weighs in favour of adopting one of the wide ranging approaches of the Debtors. There is no uniform code or international treaty or binding agreement which governs how Nortel is to allocate the Sales Proceeds between the various insolvency estates or subsidiaries spread across the globe.

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

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

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

(b) Significance of Issues to the Practice

Position of Moving Parties

90 The moving parties submit that the trial judge's decision presents important issues of first impression in the cross-border insolvency context. They submit that, without appellate intervention, there is a risk substantive consolidation will become far more widely available. In addition, they say that it creates significant uncertainty on the separation of subsidiaries within a corporate group and on the consequences of an insolvency proceeding on the rights of stakeholders, including creditors. In their submission, an appeal would permit this court to clarify these issues. Furthermore, the appeal would allow this court to clarify the proper interpretation and effect of *Sattva Capital Corp.* on commercial agreements.

Analysis

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

92 We disagree.

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

(c) Significance of Issues to the Action

Position of Moving Parties

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

Analysis

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

(d) Progress of Proceedings

Position of Moving Parties

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

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

Analysis

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

> We are concerned that the attorneys representing the respective sparring parties may be focusing on some of the technical differences governing bankruptcy in the various jurisdictions without considering that there are real live individuals who will ultimately be affected by the decisions being made in the courtrooms. It appears that the largest claimants are pension funds in the U.K. and the United States, representing pensioners who are undoubtedly dependent, or who will become dependent, on their pensions. They are the Pawns in the moves being made by the Knights and the Rooks.
>
> Mediation, or continuation of whatever mediation is ongoing, by the parties in good faith is needed to resolve the differences. [Footnote omitted.]

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

100 Numerous mediations have been ordered but have failed.

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

102 Consistent allocation decisions have been issued by the Canadian and U.S. courts. A further appeal proceeding in Canada would achieve nothing but more delay, greater expense, and an erosion of creditor recoveries. There are asymmetric appeal

routes in Canada and the U.S. However, we do not accept that the separate appeal proceedings in the U.S. somehow diminish the need to bring these proceedings in Canada to a conclusion. In our view, any additional step is a barrier to progress.

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

E. Standing Issue

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

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

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

F. Disposition

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

Motions dismissed.

Most Negative Treatment: Not followed
Most Recent Not followed: Fraser v. Ontario (Attorney General) | 2011 SCC 20, 2011 CarswellOnt 2695, 2011 CarswellOnt 2696, 91 C.C.E.L. (3d) 1, [2011] A.C.S. No. 20, [2011] S.C.J. No. 20, 415 N.R. 200, J.E. 2011-751, D.T.E. 2011T-294, 275 O.A.C. 205, 2011 C.L.L.C. 220-029, 233 C.R.R. (2d) 237, [2011] 2 S.C.R. 3, 201 A.C.W.S. (3d) 394, 331 D.L.R. (4th) 64, 108 O.R. (3d) 78 (note) | (S.C.C., Apr 29, 2011)

2007 SCC 27
Supreme Court of Canada

Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia

2007 CarswellBC 1289, 2007 CarswellBC 1290, 2007 SCC 27, [2007] 2 S.C.R. 391, [2007] 7 W.W.R. 191, [2007] B.C.W.L.D. 3380, [2007] B.C.W.L.D. 3381, [2007] B.C.W.L.D. 3383, [2007] B.C.W.L.D. 3384, [2007] S.C.J. No. 27, 137 C.L.R.B.R. (2d) 166, 157 C.R.R. (2d) 21, 157 A.C.W.S. (3d) 298, 164 L.A.C. (4th) 1, 2007 C.L.L.C. 220-035, 242 B.C.A.C. 1, 283 D.L.R. (4th) 40, 363 N.R. 226, 400 W.A.C. 1, 65 B.C.L.R. (4th) 201, J.E. 2007-1185, D.T.E. 2007T-507

Health Services and Support - Facilities Subsector Bargaining Association, Health Services and Support - Community Subsector Bargaining Association, Nurses' Bargaining Association, Hospital Employees' Union, B.C. Government and Service Employees' Union, British Columbia Nurses' Union, Heather Caroline Birkett, Janine Brooker, Amaljeet Kaur Jhand, Leona Mary Fraser, Pamela Jean Sankey-Kilduff, Sally Lorraine Stevenson, Sharleen G.V. Decillia and Harjeet Dhami (Appellants) and Her Majesty The Queen in Right of the Province of British Columbia (Respondent) and Attorney General of Ontario, Attorney General of New Brunswick, Attorney General of Alberta, Confederation of National Trade Unions, Canadian Labour Congress, Michael J. Fraser on his own behalf and on behalf of United Food and Commercial Workers Union Canada, and British Columbia Teachers' Federation (Interveners)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella JJ.

Heard: February 8, 2006
Judgment: June 8, 2007
Docket: 30554

Proceedings: reversing in part *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia* (2004), 2004 C.L.L.C. 220-047, 243 D.L.R. (4th) 175, 2004 CarswellBC 1505, 2004 BCCA 377, 30 B.C.L.R. (4th) 219, 201 B.C.A.C. 255, [2004] 11 W.W.R. 64, 120 C.R.R. (2d) 266 (B.C. C.A.); affirming *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia* (2003), 2003 BCSC 1379, 2003 CarswellBC 2192, 2004 C.L.L.C. 220-027, 110 C.R.R. (2d) 320, 19 B.C.L.R. (4th) 37 (B.C. S.C. [In Chambers])

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John Baigent, David Yorke for Intervener, British Columbia Teachers' Federation

Subject: Constitutional; Labour; Public; Human Rights
Related Abridgment Classifications
Constitutional law
XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.d Freedom of association
Constitutional law
XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.h Equality rights
XI.3.h.i General principles
Headnote
Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Freedom of association
Provincial government enacted Health and Social Services Delivery Improvement Act ("Act") — Part 2 of Act introduced changes to transfers and and multi-worksite assignment rights, contracting out and status of employees under contracting-out arrangements, job security programs and bumping rights — Section 10 of Act invalidated any part of any collective agreement, past or future, which was inconsistent with Part 2, and any collective agreement purporting to modify these restrictions — Health care sector unions, bargaining agents and employees brought unsuccessful action challenging constitutionality of Act — Health care sector unions, bargaining agents and employees appealed — Court of Appeal concluded that there was no violation of ss. 2(d) or 15 of Charter and dismissed appeal — Health care sector unions, bargaining agents and employees appealed — Appeal allowed in part — Section 2(d) of Charter protects capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues — Sections 4 and 5 of Act did not amount to substantial interference with union's ability to engage in collective bargaining so as to attract protection under s. 2(d) of Charter — Sections 6(2), 6(4) and 9 interfered significantly with ability of those bound by them to engage in associational activity of collective bargaining — Measures adopted by government constituted virtual denial of s. 2(d) right to process of good faith bargaining and consultation — Intrusions on collective bargaining represented by ss. 6(2), 6(4) and 9 were not minimally impairing and could not be saved as reasonable and justifiable limit in free and democratic society — Offending provisions of Act could not be justified as reasonable limits under s. 1 of Charter and were unconstitutional.
Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Equality rights — General principles
Provincial government enacted Health and Social Services Delivery Improvement Act ("Act") — Part 2 of Act introduced changes to transfers and and multi-worksite assignment rights, contracting out and status of employees under contracting-out arrangements, job security programs and bumping rights — Section 10 of Act invalidated any part of any collective agreement, past or future, which was inconsistent with Part 2, and any collective agreement purporting to modify these restrictions — Health care sector unions, bargaining agents and employees brought unsuccessful action challenging constitutionality of Act — Health care sector unions, bargaining agents and employees appealed — Court of Appeal concluded that there was no violation of ss. 2(d) or 15 of Charter and dismissed appeal — Health care sector unions, bargaining agents and employees appealed — Appeal allowed in part — Distinctions made by Act related essentially to segregating different sectors of employment, in accordance with long-standing practice in labour regulation of creating legislation specific to particular segments of labour force — Distinctions did not amount to discrimination under s. 15 of Charter — Differential and adverse effects of legislation on some groups of workers related to type of work they did and not to persons they were — There was no reason to depart from trial judge's view that these effects on health care workers did not constitute discrimination — Act did not violate s. 15 of Charter.
Droit constitutionnel --- Charte canadienne des droits et libertés — Nature des droits et libertés — Liberté d'association
Gouvernement provincial a promulgué la Health and Social Services Delivery Improvement Act ("Loi") — Partie 2 a modifié les droits liés aux transferts et affectations dans différents lieux de travail, la sous-traitance, le statut des employés contractuels, les programmes de sécurité d'emploi et les droits de supplantation — Article 10 invalidait toute partie d'une convention collective, présente ou future, incompatible avec la partie 2, et toute convention collective visant à modifier ces restrictions — Syndicats du

secteur de la santé, les agents négociateurs et les employés ont contesté la constitutionalité de la Loi sans succès — Syndicats du secteur de la santé, les agents négociateurs et les employés ont interjeté appel — Cour d'appel a conclu que le par. 2d) et l'art. 15 de la Charte n'avaient pas été violés et a rejeté l'appel — Syndicats du secteur de la santé, les agents négociateurs et les employés ont interjeté appel — Pourvoi accueilli en partie — Paragraphe 2d) de la Charte protège la capacité des syndiqués d'engager des négociations collectives sur des problèmes reliés au milieu de travail — Article 4 et 5 de la Loi ne constituaient pas des entraves substantielles à la capacité du syndicat d'engager des négociations collectives et il ne s'agissait pas d'un cas donnant droit à la protection prévue au par. 2d) de la Charte — Paragraphes 6(2) et 6(4) et l'art. 9 entravaient substantiellement la capacité des employés visés par ces dispositions d'exercer l'acitivité associative liée à la négociation collective — Mesures adoptées par le gouvernement constituaient pratiquement une négation du droit garanti par le par. 2d) à un processus de consultation et de négociation menée de bonne foi — Ingérences dans la négociation collective représentées par les par. 6(2) et 6(4) et par l'art. 9 ne constituaient pas des atteintes minimales et ne sauraient se justifier en tant que limites raisonnables dont le bien-fondé pouvait se démontrer dans le cadre d'une société libre et démocratique — Dispositions attentatoires de la Loi ne pouvaient se justifier en tant que limites raisonnables au sens de l'article premier de la Charte et étaient inconstitutionnelles.

Droit constitutionnel --- Charte canadienne des droits et libertés — Nature des droits et libertés — Droits à l'égalité — Principes généraux

Gouvernement provincial a promulgué la Health and Social Services Delivery Improvement Act ("Loi") — Partie 2 a modifié les droits liés aux transferts et affectations dans différents lieux de travail, la sous-traitance, le statut des employés contractuels, les programmes de sécurité d'emploi et les droits de supplantation — Article 10 invalidait toute partie d'une convention collective, présente ou future, incompatible avec la partie 2, et toute convention collective visant à modifier ces restrictions — Syndicats du secteur de la santé, les agents négociateurs et les employés ont contesté la constitutionalité de la Loi sans succès — Syndicats du secteur de la santé, les agents négociateurs et les employés ont interjeté appel — Cour d'appel a conclu que le par. 2d) et l'art. 15 de la Charte n'avaient pas été violés et a rejeté l'appel — Syndicats du secteur de la santé, les agents négociateurs et les employés ont interjeté appel — Pourvoi accueilli en partie — Distinctions créées par la Loi tenaient essentiellement aux différences qui existaient entre les secteurs d'emploi en raison des pratiques suivies de longue date selon lesquelles la réglementation en matière de travail était établie par des mesures législatives propres à chaque secteur du marché du travail — Distinctions ne constituaient pas une forme de discrimination au sens de l'art. 15 de la Charte — Différenciation et les effets préjudiciables de la loi envers certains groupes de travailleurs tenaient essentiellement au genre de travail qu'ils exécutaient et non à leur personne — Rien ne justifiait de s'écarter du point de vue de la juge de première instance selon qui ces effets sur les travailleurs du secteur des services de la santé ne constituaient pas de la discrimination — Loi ne violait pas l'art. 15 de la Charte.

Three days after receiving first reading before the Legislature, the Health and Social Services Delivery Improvement Act was enacted. There was no meaningful consultation with unions before it became law. The Act affects labour relations between health sector employers and their unionized employees. Part 2 of the Act introduced changes to transfers and and multi-worksite assignment rights in ss. 4 and 5, contracting out and the status of employees under contracting-out arrangements in s. 6, job security programs is ss. 7 and 8 and layoffs and bumping rights in s. 9. Section 10 invalidated any part of any collective agreement, past or future, which was inconsistent with Part 2, and any collective agreement purporting to modify these restrictions.

An action was brought by health care sector unions, bargaining agents and employees challenging the constitutionality of the Act. The trial judge dismissed the plaintiffs' freedom of association claim on the ground that collective bargaining was not an activity recognized by the Supreme Court of Canada as falling within the scope of s. 2(d) of the Canadian Charter of Rights and Freedoms. The trial judge also dismissed the plaintiffs' claim under the equality provisions in s. 15 of the Charter, holding that there was no violation of s. 15.

The plaintiffs appealed. The Court of Appeal concluded that there was no violation of ss. 2(d) or 15 of the Charter and dismissed the appeal. The plaintiffs appealed.

Held: The appeal was allowed in part.

Per McLachlin C.J.C. and LeBel J. (Bastarache, Binnie, Fish, Abella JJ. concurring): Section 2(d) of the Charter protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental work place issues. The conclusion that s. 2(d) protected a process of collective bargaining rested on four propositions. First, a review of the s. 2(d) jurisprudence revealed that the reasons invoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining could no longer stand. Second, an interpretation of s. 2(d) that precluded collective bargaining from its ambit was inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining was an integral component of freedom of association in international law, which may inform the interpretation of Charter guarantees. Finally, interpreting s. 2(d) as including a right to collective bargaining was consistent with, and indeed, promoted other Charter rights, freedoms and values.

The right to collective bargaining was a limited right. The right was to a general process of collective bargaining. Section 2(d) did not guarantee the particular objectives sought through this associational activity but rather the process through which those goals were pursued. Section 2(d) imposed a corresponding duty on government employers to agree to meet and discuss with them. Section 2(d) also put constraints on the exercise of legislative powers in respect of the right to collective bargaining. Section 2(d) only protects against "substantial interference" with associational activity. The interference must be so substantial that it interferes not only with the attainment of the union members' objectives, but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer. Section 2(d) may be breached by government legislation or conduct that substantially interferes with the collective bargaining process. Substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished.

The effect of ss. 4 and 5 of the Act, in conjunction with s. 10 of the Act, was to render future collective bargaining over transfers and reassignments largely meaningless, since collective bargaining could not alter the employer's right to make transfers and reassignments. The combined effect of ss. 6(2), 6(4) and 10 of the Act was to forbid the incorporation into future collective agreements of provisions protecting employees from contracting out, or the inclusion of a provision requiring the employer to consult with the union. Sections 6(3), 6(5) and 6(6) simply modified the protections available under the Labour Relations Code and did not deal with the entitlements of employees based on collective bargaining. Sections 6(3), 6(5) and 6(6) did not interfere with collective bargaining and did not infringe the protection over collective bargaining offered by s. 2(d). Neither ss. 7 or 8 had the purpose or effect of interfering with collective bargaining, past or future. Section 9 made collective bargaining over specified aspects of layoff and bumping meaningless and also invalidated parts of collective agreements dealing with these issues up to December 31, 2005. This constituted interference with both past and future collective bargaining. Sections 4, 5, 6(2), 6(4) and 9, in conjunction with s. 10, interfered with the process of collective bargaining, either by disregarding past processes of collective bargaining, by pre-emptively undermining future processes of collective bargaining or both.

The Act's interference with collective bargaining over matters pertaining to contracting out, layoff conditions and bumping constituted substantial interference with the s. 2(d) right of freedom of association. The same could not be said of the transfers and reassignments covered under ss. 4 and 5. Sections 6(2), 6(4) and 9 interfered significantly with the ability of those bound by them to engage in the associational activity of collective bargaining. The measures adopted by the government constituted a virtual denial of the s. 2(d) right to a process of good faith bargaining and consultation. The infringement of the plaintiffs' rights to bargain collectively was prescribed by law. The intrusions on collective bargaining represented by ss. 6(2), 6(4) and 9 were not minimally impairing and could not be saved as a reasonable and justifiable limit in a free and democratic society. The record disclosed no consideration by the government of whether it could reach its goal by less intrusive measures, and virtually no consultation with unions on the matter.

The distinctions made by the Act related essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force and did not amount to discrimination under s. 15 of the Charter. The differential and adverse effects of the legislation on some groups of workers related to the type of work they did and not to the persons they were. The differential treatment based on personal characteristics required to get a discrimination analysis off the ground was absent. There was no reason to depart from the trial judge's view that these effects on health care workers did not constitute discrimination. The Act did not violate s. 15.

Deschamps J. (dissenting in part): Legislation that altered terms of a collective agreement bearing on significant workplace issues, or that precluded negotiations on significant workplace issues that would normally be negotiable, would interfere with the collective bargaining process. Such legislative measures nullified negotiations that had already taken place or prevented future negotiations on the topics they covered. Sections 6(3), 6(5) and 6(6) did not infringe the Charter. They did not interfere with the collective bargaining process but merely modified entitlements under a statutory scheme. Sections 7 and 8, which dealt with statutory job security programs, did not infringe s. 2(d). Sections 4 and 5 nullified some existing terms of collective agreements and limited the scope of future negotiations. Sections 6(2) and 6(4) nullified past collective bargaining relating to contracting out, thereby rendering the process nugatory, and precluded future collective bargaining on the issue. They concerned a significant issue of employment security and negotiating such issues was one of the purposes of associational activities in the workplace. Section 9 dealt with significant workplace issues relating to s. 2(d).

Substantial deference had to be shown in determining whether the measures adopted in this case were justified under s. 1 in light of the crisis of sustainability in the health care sector, the vulnerability of patients, whose rights are constitutional in nature, the recommendations of the health care association as an employer and as an administrator of the health care system, and the highly political context of health care reform in British Columbia. The impugned provisions were prescribed by law, were enacted in pursuit of a pressing and substantial objective and the measures taken were rationally connected with the objective being pursued. The government considered a range of alternatives in seeking to address the crisis of sustainability in the province's health care system. Other alternatives would not have enabled the government to achieve its objectives and Part 2 of the Act was not aimed directly at the Charter rights of affected employees.

Sections 4 and 5 were carefully tailored to ensure that the government's objective was attained while infringing s. 2(d) as little as possible. Without s. 6(2), the government would be effectively prohibited from making a policy decision to restructure non-clinical health services in the province. Section 6(2) satisfied the minimal impairment test. The impact of s. 9(d) on workers was minimized by safeguards provided for in s. 5 of the Regulations made under the Act. There was sufficient evidence that s. 9 enabled the government to meet its objective. Section 9 satisfied the minimal impairment test as a transitional clause that represented government policy and was carefully circumscribed. Sections 4 and 5 of the Act did not have a serious impact on employees. They were a proportionate response to the crisis of sustainability in health care. Section 6(2) struck an appropriate balance between the government's objectives and the freedom of association of employees. The infringement resulting from s. 6(2) was justified under s. 1 of the Charter. The marginal benefits of s. 6(4) were outweighed by the deleterious effects of denying consultation to affected unions. Section 6(4) failed to satisfy s. 1 of the Charter and was unconstitutional. The negative effects of the infringement by s. 9 were minimal because it was time-limited and while bumping and layoff protections were attenuated, they were not abolished. The procedural infringement was outweighed by the evidence that layoff and bumping provisions in collective agreements would place serious obstacles in the way of the timely restructuring of the health care system. Section 9 was a proportionate response and the infringement was justified under s. 1 of the Charter.

La Health and Social Services Delivery Improvement Act ("Loi") est entrée en vigueur trois jours après avoir franchi l'étape de la première lecture devant l'Assemblée législative. Aucune véritable consultation des syndicats n'est intervenue avant que le projet devienne loi. Celle-ci touche aux relations du travail entre les employeurs du secteur de la santé et leurs employés syndiqués. La partie 2 modifie les droits liés aux transferts et affectations dans différents lieux de travail aux art. 4 et 5, la sous-traitance et le statut des employés contractuels à l'art. 6, les programmes de sécurité d'emploi aux art. 7 et 8 et les droits de mise en disponibilité et de supplantation à l'art. 9. L'art. 10 invalidait toute partie d'une convention collective, présente ou future, incompatible avec la partie 2, et toute convention collective visant à modifier ces restrictions.

Les syndicats du secteur de la santé, les agents négociateurs et les employés ont contesté la constitutionalité de la Loi. La juge de première instance a rejeté l'argument fondé sur la liberté d'association qu'ont fait valoir les demandeurs au motif que la négociation collective ne constituait pas une activité que la Cour suprême du Canada considérait comme visée par le par. 2d) de la Charte canadienne des droits et libertés. La juge a aussi rejeté les prétentions des demandeurs fondées sur les droits à l'égalité garantis à l'article 15 de la Charte et a conclu à l'absence de violation de l'art. 15.

Les demandeurs ont interjeté appel. La Cour d'appel a conclu qu'il n'y avait pas de violation du par. 2d) et de l'art. 15 de la Charte et a rejeté l'appel. Les demandeurs ont formé le présent pourvoi.

Arrêt: Le pourvoi a été accueilli en partie.

McLachlin, J.C.C., LeBel, J. (Bastarache, Binnie, Fish, Abella, JJ., souscrivant à leur opinion): Le par. 2d) de la Charte protège la capacité des syndiqués de participer en groupe à la négociation collective des questions fondamentales liées au milieu de travail. La conclusion que le par. 2d) protège le processus de négociation collective reposait sur quatre prémisses. Premièrement, l'examen de la jurisprudence sur le par. 2d) a révélé que les raisons invoquées par le passé pour expliquer que le droit à la liberté d'association ne s'étendait pas à la négociation collective ne valaient plus. Deuxièmement, une interprétation du par. 2d) qui excluait la négociation collective de son champ d'application ne se conciliait pas avec le fait que le Canada a toujours reconnu l'importance de ce processus en matière de liberté d'association. Troisièmement, la négociation collective faisait partie intégrante de la liberté d'association selon le droit international qui pouvait inspirer l'interprétation des garanties reconnues par la Charte. Enfin, interpréter le par. 2d) comme comprenant le droit de négociation collective s'intégrait dans la logique, voire la défense, des autres droits, libertés et valeurs consacrés par la Charte.

Le droit de négociation collective demeurait un droit à portée restreinte. Il conférait le droit de participer à un processus général de négociation collective. Le par. 2d) ne protégeait pas les objectifs particuliers recherchés par cette activité associative mais il protégeait toutefois le processus de réalisation de ces objectifs. Le par. 2d) imposait aux employeurs du secteur public une obligation correspondante d'accepter de rencontrer les employés pour discuter avec eux. Le par. 2d) restreignait aussi le pouvoir de légiférer en matière de négociation collective. Le par. 2d) protégeait uniquement contre les « entraves substantielles » à l'activité associative. L'atteinte au droit devait être substantielle au point de constituer une entrave non seulement à la réalisation des objectifs des syndiqués mais aussi au processus même qui leur permettait de poursuivre ces objectifs en s'engageant dans de véritables négociations avec l'employeur. Une loi ou un acte gouvernemental qui constituait une ingérence substantielle dans le processus de négociation collective pouvait contrevenir au par. 2d). La question de l'existence d'une atteinte substantielle devait être tranchée selon le contexte de chaque cas d'espèce, compte tenu de l'importance des sujets visés pour l'activité collective et de la manière dont la mesure a été mise en application.

Les art. 4 et 5, appliqués conjointement avec l'art. 10, videraient de sens, pour l'essentiel, les futures négociations collectives sur les transferts et les nouvelles affectations, car la négociation collective ne pouvait modifier le droit de l'employeur de procéder à des transferts et de nouvelles affectations. L'application combinée des par. 6(2) et (4) et de l'art. 10 interdisait l'intégration dans les futures conventions collectives de clauses protégeant les employés contre la sous-traitance ou obligeant l'employeur à consulter les syndicats avant de procéder à celle-ci. Les par. 6(3), 6(5) et 6(6) ont simplement modifié les protections prévues au Labour Relations Code qui ne touchaient pas aux droits issus de négociations collectives reconnus aux employés. Les par. 6(3), 6(5) et 6(6) ne constituaient pas une ingérence dans la négociation collective ni une atteinte à la protection que confère le par. 2(d) à la négociation collective. Ni l'art. 7 ni l'art. 8 n'avaient pour objet ou effet de permettre une ingérence dans les négociations collectives, antérieures ou à venir. L'article 9 vidait ainsi de sens la négociation collective de certains aspects de la mise en disponibilité et de la supplantation et invalidait certaines parties de conventions collectives portant sur ces questions, jusqu'au 31 décembre 2005. Cette disposition constituait alors une ingérence dans les processus de négociation collective, antérieurs et à venir. Les art. 4, 5 et 9 et les par. 6(2) et (4), appliqués conjointement avec l'art. 10, constituaient une ingérence dans le processus de négociation collective, soit en mettant de côté les processus de négociation collective antérieurs, soit en compromettant à l'avance l'intégrité des futurs processus de négociation collective sur ce sujet, ou les deux à la fois.

L'ingérence de la Loi dans la négociation collective au sujet de la sous-traitance ainsi que des conditions de mise en disponibilité et de la supplantation constituait une atteinte substantielle au droit à la liberté d'association garanti au par. 2d). On ne saurait tirer une conclusion identique à propos des transferts et des nouvelles affectations que visaient les art. 4 et 5. Les par. 6(2) et (4) et l'art. 9 entravaient de façon substantielle la capacité des employés visés par ces dispositions d'exercer l'activité associative liée à la négociation collective. Les mesures adoptées par le gouvernement constituaient pratiquement une négation du droit garanti au par. 2d) à un processus de consultation et de négociation menée de bonne foi. L'atteinte aux droits des demandeurs de négocier collectivement était prescrite par la loi. Les ingérences dans la négociation collective représentées par les par. 6(2) et 6(4) et par l'art. 9 ne constituaient pas des atteintes minimales et ne sauraient se justifier en tant que limites raisonnables dont le bien-fondé pouvait se démontrer dans le cadre d'une société libre et démocratique. Selon le dossier, le gouvernement ne s'est pas demandé s'il pouvait atteindre son objectif par des mesures moins attentatoires et n'a pas vraiment consulté les syndicats à ce sujet.

Les distinctions créées par la Loi tenaient essentiellement aux différences qui existaient entre les secteurs d'emploi en raison des pratiques suivies de longue date selon lesquelles la réglementation en matière de travail était établie par des mesures législatives propres à chaque secteur du marché du travail et ne constituait pas une forme de discrimination au sens de l'art. 15 de la Charte. La différenciation et les effets préjudiciables de la loi envers certains groupes de travailleurs tenaient essentiellement au genre de travail qu'ils exécutaient et non à leur personne. Il ne s'agissait pas de traitements différents fondés sur des caractéristiques personnelles justifiant qu'on amorce l'analyse de la question de la discrimination. Rien ne justifiait de s'écarter du point de vue de la juge de première instance selon qui ces effets sur les travailleurs du secteur des services de la santé ne constituaient pas de la discrimination. La Loi ne violait pas l'art. 15.

Deschamps, J. (dissident en partie): Une loi qui a pour effet de modifier une convention collective portant sur d'importantes questions liées au milieu de travail ou qui exclut de la négociation d'importantes questions liées au milieu de travail qui seraient normalement négociables constituerait une ingérence dans le processus de négociation collective. Des mesures législatives de cette nature ont rendu sans effet les négociations ayant déjà eu lieu ou ont exclu, pour l'avenir, la tenue de négociations sur les sujets qu'elles visaient. Les par. 6(2) et (4) et 6(6) ne contrevenaient pas à la Charte. Ils ne constituaient pas une ingérence dans le processus de négociation collective; ils ne faisaient que modifier des droits conférés dans le cadre d'un régime légal. Les art. 7 et 8, qui concernaient des programmes de sécurité d'emploi, n'enfreignaient pas le par. 2d). Les art. 4 et 5 annulaient des stipulations de conventions collectives existantes et limitaient la portée des négociations futures. Les par. 6(2) et (4) rendaient nulles les négociations collectives antérieures sur la sous-traitance et du même coup en ont rendu le processus inopérant; elles excluaient aussi, pour l'avenir, la négociation collective de cette question. Elles traitaient d'une importante question touchant la sécurité d'emploi, et la négociation des questions de cette nature était l'un des objets des activités associatives en milieu de travail. L'art. 9 concernait d'importantes questions liées au milieu de travail touchant à l'objet du par. 2d).

Compte tenu du problème de viabilité du système de santé, de la vulnérabilité des patients, dont les droits sont de nature constitutionnelle, des recommandations de l'Association en soins de santé en tant qu'employeur et administrateur du système de santé, et du contexte hautement politique de la réforme des services de santé en Colombie-Britannique, il fallait faire preuve d'une grande déférence lorsqu'il s'agissait de déterminer si les mesures adoptées en l'espèce étaient justifiées au sens de l'article premier. Les dispositions contestées en l'espèce étaient prescrites par une règle de droit, avaient pour but l'atteinte d'un objectif urgent et réel et il existait un lien rationnel entre les mesures prises et l'objectif poursuivi. Le gouvernement a examiné une gamme de solutions en vue de résoudre la crise de viabilité que traversait le système de santé de la province. Les autres options n'auraient pas permis au gouvernement d'atteindre ses objectifs et la partie 2 de la Loi ne visait pas directement les droits que la Charte garantit aux employés concernés.

Les par. 4 et 5 ont été soigneusement conçues de façon à permettre au gouvernement d'atteindre son objectif tout en enfreignant le moins possible le par. 2(d). Sans le par. 6(2), le gouvernement n'aurait en fait pas le droit de prendre de décision de politique générale visant la restructuration des services de santé non cliniques de la province. Le par. 6(2) satisfaisait au critère de l'atteinte minimale. L'impact du par. 9d) sur les travailleurs est minimisé par les garanties prévues par l'art. 5 du Règlement adopté sous le régime de la Loi. La preuve permet de conclure que l'art. 9 a permis au gouvernement d'atteindre ses objectifs. L'art. 9 satisfaisait au critère de l'atteinte minimale en tant que mesure transitoire qui représentait une politique gouvernementale et était soigneusement circonscrite. Les art. 4 et 5 de la Loi n'entraînaient pas de sérieuses conséquences pour les employés. Il s'agissait d'une réponse proportionnée à la crise de viabilité dans le système de santé. Le par. 6(2) permettait d'établir un juste équilibre entre les objectifs du gouvernement et la liberté d'association des employés. L'atteinte au par. 6(2) était justifiée selon l'article premier de la Charte. Les effets préjudiciables que causait aux syndicats concernés le refus de consulter l'emportaient sur les minces avantages que comportait cette disposition. Le par. 6(4) ne satisfaisait pas à l'exigence de l'article premier de la Charte et il était inconstitutionnel. Les effets négatifs de l'ingérence de l'art. 9 étaient minimaux du fait qu'elle était limitée dans le temps et que les protections en matière de supplantation et de mise en disponibilité n'étaient pas abolies, même si elles se trouvaient restreintes. La preuve que les clauses relatives à la mise en disponibilité et à la supplantation dans les conventions collectives entraveraient sérieusement la restructuration en temps utile du système de santé primait l'atteinte procédurale. L'art. 9 représentait une réponse proportionnée et l'atteinte était justifiée au sens de l'article premier de la Charte.

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Generally — referred to

Canada Labour Code, R.S.C. 1985, c. L-2

Generally — referred to

Canada Labour Code, Act to amend the, S.C. 1972, c. 18

Preamble — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — considered

s. 2(d) — considered

s. 7 — considered

s. 15 — considered

s. 15(1) — considered

s. 32 — considered

s. 32(1)(b) — considered

Combinations Act, 1799 (39 Geo. 3), c. 81

Generally — referred to

Combinations Act, 1800 (39 & 40 Geo. 3), c. 106

Generally — referred to

Combinations Act, 1825 (6 Geo. 4), c. 129

Generally — referred to

Conciliation Act, 1900, S.C. 1900, c. 24

Generally — referred to

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s. 52 — considered

Criminal Law Amendment Act, 1871 (34 & 35 Vict.), c. 32

Generally — referred to

Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2

Generally — referred to

Pt. 2 — referred to

s. 3 — referred to

s. 3 "health sector employer" — referred to

s. 4 — considered

ss. 4-9 — referred to

ss. 4-10 — referred to

s. 5 — considered

s. 6 — referred to

s. 6(2) — considered

s. 6(3) — considered

s. 6(4) — considered

s. 6(5) — considered

s. 6(6) — considered

s. 7 — considered

s. 8 — considered

s. 9 — considered

s. 9(a) — referred to

s. 9(b) — referred to

s. 9(c) — referred to

s. 9(d) — referred to

s. 10 — considered

Industrial Disputes Investigation Act, 1907, S.C. 1907, c. 20

Generally — referred to

Labour Relations Code, R.S.B.C. 1996, c. 244

Generally — referred to

s. 35 — referred to

s. 38 — referred to

Public Sector Employers Act, R.S.B.C. 1996, c. 384

s. 6 — referred to

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Generally — referred to

Trade Union Act, 1871 (34 & 35 Vict.), c. 31

Generally — referred to

Trade Unions Act, 1872, S.C. 1872, c. 30

Generally — referred to

Wagner Act, 49 Stat. 449

Generally — referred to

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Generally — referred to

s. 1 — considered

s. 2(a) — considered

s. 2(d) — considered

s. 15 — considered

Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2

Generally — referred to

Pt. 2 — referred to

s. 3 — considered

s. 4 — considered

s. 5 — considered

s. 5(b) — considered

s. 6 — considered

s. 6(1) — considered

s. 6(2) — considered

s. 6(3) — considered

s. 6(4) — considered

s. 6(5) — considered

s. 6(6) — considered

s. 7 — considered

s. 8 — considered

s. 9 — considered

s. 9(d) — considered

s. 10 — considered

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Generally — referred to

Pt. I — referred to

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Generally — referred to

International Covenant on Civil and Political Rights, 1966, C.T.S. 1976/47; 999 U.N.T.S. 171; 6 I.L.M. 368

Generally — referred to

Article 22 ¶ 1 — considered

Article 22 ¶ 2 — considered

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Generally — referred to

Article 8 ¶ 1(c) — considered

Regulations considered by *LeBel J.*:

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Health Sector Labour Adjustment Regulation, B.C. Reg. 39/2002

Generally — referred to

s. 2(1)(a) — referred to

s. 2(1)(b) — referred to

Regulations considered by *Deschamps J.*:

Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2

Health Sector Labour Adjustment Regulation, B.C. Reg. 39/2002

Generally — referred to

APPEAL by health care sector unions, bargaining agents and employees from judgment reported at *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia* (2004), 2004 C.L.L.C. 220-047, 243 D.L.R. (4th) 175, 2004 CarswellBC 1505, 2004 BCCA 377, 30 B.C.L.R. (4th) 219, 201 B.C.A.C. 255, [2004] 11 W.W.R. 64, 120 C.R.R. (2d) 266 (B.C. C.A.), dismissing appeal by health care sector unions, bargaining agents and employees from action challenging constitutionality of legislation.

POURVOI formé par des syndicats du secteur de la santé, des agents négociateurs et des employés à l'encontre d'un jugement publié à *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia* (2004), 2004 C.L.L.C. 220-047, 243 D.L.R. (4th) 175, 2004 CarswellBC 1505, 2004 BCCA 377, 30 B.C.L.R. (4th) 219, 201 B.C.A.C. 255, [2004] 11 W.W.R. 64, 120 C.R.R. (2d) 266 (B.C. C.A.) rejetant un appel interjeté par des syndicats du secteur de la santé, des agents négociateurs et des employés à la suite d'une action contestant la constitutionalité de la loi.

***McLachlin C.J.C., LeBel J.*:**

I. Introduction

A. Overview

1 The appellants challenge the constitutional validity of Part 2 of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2 ("Act"), as violative of the *Canadian Charter of Rights and Freedoms* guarantees of freedom of association (s. 2(*d*)) and equality (s. 15).

2 We conclude that the s. 2(*d*) guarantee of freedom of association protects the capacity of members of labour unions to engage in collective bargaining on workplace issues. While some of the impugned provisions of the Act comply with this guarantee, ss. 6(2), 6(4) and 9 breach it and have not been shown to be justified under s. 1 of the *Charter*. We further conclude that the Act does not violate the right to equal treatment under s. 15 of the *Charter*. In the result, the appeal is allowed in part.

B. The Background

3 This case requires the Court to balance the need for governments to deliver essential social services effectively with the need to recognize the *Charter* rights of employees affected by such legislation, who were working for health and social service employers. The respondent government characterizes the impugned legislation as a crucial element of its response to a pressing health care crisis, necessary and important to the well-being of British Columbians. The appellants, unions and individual workers representing some of the subsectors of the health care sector affected by the legislation, by contrast, see the Act as an

affront to the fundamental rights of employees and union members under the *Charter*, which they understand as including a collective right to pursue fundamental workplace goals through collective bargaining in respect of terms of employment.

C. The Act

4 The Act was adopted as a response to challenges facing British Columbia's health care system. Demand for health care and the cost of providing needed health care services had been increasing significantly for years. For example, in the period from 1991 to 2001, the growth rate of health care costs in British Columbia was three times that of the provincial economy. As a result, the government of British Columbia found itself struggling to provide health care services to its citizens. The government characterized the state of affairs in 2001 as a "crisis of sustainability" in the health care system (Respondent's Factum, at para. 3).

5 The goals of the Act were to reduce costs and to facilitate the efficient management of the workforce in the health care sector. Not wishing to decrease employees' wages, the government attempted to achieve these goals in more sustainable ways. According to the government, the Act was designed in particular to focus on permitting health care employers to reorganize the administration of the labour force and on making operational changes to enhance management's ability to restructure service delivery (see British Columbia, *Debates of the Legislative Assembly*, 2nd Sess., 37th Parl., vol. 2, No. 28, January 25, 2002, at p. 865).

6 The Act was quickly passed. It came into force three days after receiving a first reading as Bill 29 before the British Columbia legislature.

7 There was no meaningful consultation with unions before it became law. The government was aware that some of the areas affected by Bill 29 were of great concern to the unions and had expressed a willingness to consult. However, in the end, consultation was minimal. A few meetings were held between representatives of the unions and the government on general issues relating to health care. These did not deal specifically with Bill 29 and the changes that it proposed. Union representatives expressed their desire to be further consulted. The Minister of Health Services telephoned a union representative 20 minutes before Bill 29 was introduced in the legislative assembly to inform the union that the government would be introducing legislation dealing with employment security and other provisions of existing collective agreements. This was the only consultation with unions before the Act was passed (A.R., at p. 1076).

8 In British Columbia, the collective bargaining structure in the health services is sectoral. Thus, the Act affects labour relations between "health sector employers" and their unionized employees. A "health sector employer", as defined under the Act, is a member of the Health Employers Association of British Columbia ("HEABC") established under s. 6 of the *Public Sector Employers Act*, R.S.B.C. 1996, c. 384, and whose employees are unionized (s. 3 of the Act). The HEABC is an employers' association accredited to act as the representative of its members in the bargaining process with health sector employees. Members of the HEABC are hospitals and other employers designated by regulation, including employers in the health sector receiving a substantial amount of funding from the Ministry of Health (A.R., at p. 212). Therefore, while the Act applies mainly to public sector employers, it also applies to some private sector employers.

9 The appellants in the present case are unions and members of the unions representing the nurses, facilities or community subsectors — groups affected by the legislation. Although they were affected by the legislation, other groups like residents and paramedical professionals did not join the litigation.

10 Only Part 2 of the Act is at issue in the current appeal (see Appendix). It introduced changes to transfers and multi-worksite assignment rights (ss. 4 and 5), contracting out (s. 6), the status of employees under contracting-out arrangements (s. 6), job security programs (ss. 7 and 8), and layoffs and bumping rights (s. 9).

11 Part 2 gave health care employers greater flexibility to organize their relations with their employees as they see fit, and in some cases, to do so in ways that would not have been permissible under existing collective agreements and without adhering to requirements of consultation and notice that would otherwise obtain. It invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues. Section 10 invalidated any part of a collective agreement, past or future, which was inconsistent with Part 2, and any collective agreement

purporting to modify these restrictions. In the words of the Act, s. 10: "Part [2] prevails over collective agreements". It is not open to the employees (or the employer) to contract out of Part 2 or to rely on a collective agreement inconsistent with Part 2.

12 The details of the legislation and its practical ramifications for employees and their unions will be considered in greater detail later in these reasons. It suffices to state at this point that while some of the changes were relatively innocuous administrative changes, others had profound effects on the employees and their ability to negotiate workplace matters of great concern to them.

II. Judicial History

13 Neither the trial court nor the British Columbia Court of Appeal was willing to recognize a right to collective bargaining under s. 2(*d*) of the *Charter*, although the Court of Appeal acknowledged that the Supreme Court of Canada had opened the door to the recognition of such a right. In the result, the Act was held to be constitutional under ss. 2(*d*) and 15.

14 The plaintiffs argued at trial that the impugned legislation violated several constitutional rights guaranteed under the *Charter*: freedom of association (under s. 2(*d*)), life, liberty and security of the person (under s. 7), and equality (under s. 15). The s. 7 argument was not pursued on subsequent appeals.

A. British Columbia Supreme Court (2003), 19 B.C.L.R. (4th) 37, 2003 BCSC 1379 (B.C. S.C. [In Chambers])

15 The trial judge, Garson J., dismissed the plaintiffs' freedom of association claim on the ground that collective bargaining was not an activity recognized by the Supreme Court of Canada as falling within the scope of s. 2(*d*) of the *Charter*. Indeed, she noted that the Supreme Court's jurisprudence consistently and explicitly stated that the ability to bargain collectively was not a *Charter*-protected activity. In her opinion, the plaintiffs had not proved that the law targeted associational conduct because of its concerted nature.

16 The trial judge also dismissed the plaintiffs' claim under the equality provisions in s. 15 of the *Charter*. The plaintiffs argued that the Act subjected them to differential treatment in a manner affecting their dignity and personhood, based on overlapping grounds of sex and being workers who work in "women's jobs" (para. 154). The trial judge, applying *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), held that there was no violation of s. 15. First, the Act did not distinguish between the plaintiffs and others in appropriate comparator groups on the basis of personal characteristics; the distinctions made were based on the claimants' sector of employment, not their personal characteristics. Second, any adverse effects of the impugned law on the claimants did not amount to differential treatment as required for a s. 15 violation; "the fact that this group is predominantly female does not constitutionally shield it from governmental action that may adversely affect them without evidence that it is being subject to differential treatment on the basis of s. 15 characteristics" (see para. 174). Third, the Act did not discriminate on the basis of an enumerated or analogous ground. In making this finding, the trial judge characterized the ground of discrimination primarily in terms of occupational status as health care workers, although she explicitly acknowledged that health care workers were more predominantly female than other groups of unionized workers in British Columbia and that their work continued to be considered "women's work" (see para. 181). Finally, in the opinion of the trial judge, any adverse treatment imposed by the Act did not affect the dignity of the claimants, as required for a violation of s. 15 (para. 189).

B. British Columbia Court of Appeal (2004), 30 B.C.L.R. (4th) 219, 2004 BCCA 377 (B.C. C.A.)

17 The Court of Appeal (*per* Thackray J.A., Esson and Low JJ.A. concurring) concluded that there was no violation of s. 2(*d*) or s. 15 of the *Charter* and dismissed the appeal. After engaging in a detailed review of the Supreme Court's s. 2(*d*) jurisprudence, Thackray J.A. concluded that the current state of authority was insufficient to sustain the conclusion that a right of collective bargaining was protected under s. 2(*d*). He acknowledged that the decisions of the Supreme Court, especially in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94 (S.C.C.), left room to recognize a right to collective bargaining in future cases. However, his view was that the appropriate forum for recognizing a right to collective bargaining under s. 2(*d*) of the *Charter* was the Supreme Court of Canada, not lower courts (see para. 106).

18 Having held that the impugned legislation did not violate s. 2(*d*) of the *Charter*, Thackray J.A. went on to consider whether the legislation was also valid under the equality rights provisions in s. 15. He found no error in the analysis of the trial judge. Like the trial judge, he inclined to the view that any disadvantages imposed on health care workers under the Act related to their role as health care workers under a particular scheme of labour relations, and did not involve their personal characteristics, the enumerated or analogous grounds, or their dignity. Even though the appellants had legitimate complaints about the effects of the Act on their lives and work, these adverse effects were outside the scope of s. 15 of the *Charter*.

III. Analysis

A. Section 2(d) of the Charter

19 At issue in the present appeal is whether the guarantee of freedom of association in s. 2(*d*) of the *Charter* protects collective bargaining rights. We conclude that s. 2(*d*) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(*d*) of the *Charter*: *Dunmore*. We note that the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association.

20 Our conclusion that s. 2(*d*) of the *Charter* protects a process of collective bargaining rests on four propositions. First, a review of the s. 2(*d*) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of s. 2(*d*) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees. Finally, interpreting s. 2(*d*) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values.

21 In the sections that follow, we discuss each of these propositions. We then elaborate on the scope of the protection for collective bargaining found in s. 2(*d*) of the *Charter*. Ultimately, in applying our analysis to the facts of the case, we find provisions of the Act to be in violation of s. 2(*d*) and not justified by s. 1 of the *Charter*.

(1) Reasons for Excluding Collective Bargaining from Section 2(d) in the Past Require Reconsideration

22 In earlier decisions, the majority view in the Supreme Court of Canada was that the guarantee of freedom of association did not extend to collective bargaining. *Dunmore*, opened the door to reconsideration of that view. We conclude that the grounds advanced in the earlier decisions for the exclusion of collective bargaining from the *Charter*'s protection of freedom of association do not withstand principled scrutiny and should be rejected.

23 The first cases dealing squarely with the issue of whether collective bargaining is protected under s. 2(*d*) of the *Charter* were a group of three concurrently released appeals known as the labour "trilogy": *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 (S.C.C.) ("*Alberta Reference*"), *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424 (S.C.C.), and *R.W.D.S.U., Locals 544, 496, 635, 955 v. Saskatchewan*, [1987] 1 S.C.R. 460 (S.C.C.). The main reasons were delivered in the *Alberta Reference*, a case involving compulsory arbitration to resolve impasses in collective bargaining and a prohibition on strikes. Of the six justices participating in the case, three held that collective bargaining was not protected by s. 2(*d*); four held that strike activity was not protected. The next case to deal with the issue was *P.I.P.S. v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 (S.C.C.) ("*PIPSC*"), in which the government of the Northwest Territories refused to enact legislation required in order for the PIPSC union to bargain collectively on behalf of nurses. A majority of four held that collective bargaining was not protected by s. 2(*d*).

24 In these cases, different members of the majorities put forth five main reasons in support of the contention that collective bargaining does not fall within s. 2(*d*)'s protection.

25 The first suggested reason was that the rights to strike and to bargain collectively are "modern rights" created by legislation, not "fundamental freedoms" (*Alberta Reference, per* Le Dain J., writing on behalf of himself, Beetz and La Forest JJ., at p. 391). The difficulty with this argument is that it fails to recognize the history of labour relations in Canada. As developed more thoroughly in the next section of these reasons, the fundamental importance of collective bargaining to labour relations was the very reason for its incorporation into statute. Legislatures throughout Canada have historically viewed collective bargaining rights as sufficiently important to immunize them from potential interference. The statutes they passed did not create the right to bargain collectively. Rather, they afforded it protection. There is nothing in the statutory entrenchment of collective bargaining that detracts from its fundamental nature.

26 The second suggested reason was that recognition of a right to collective bargaining would go against the principle of judicial restraint in interfering with government regulation of labour relations (*Alberta Reference*, at p. 391). The regulation of labour relations, it is suggested, involves policy decisions best left to government. This argument again fails to recognize the fact that worker organizations historically had the right to bargain collectively outside statutory regimes and takes an overbroad view of judicial deference. It may well be appropriate for judges to defer to legislatures on policy matters expressed in particular laws. But to declare a judicial "no go" zone for an entire right on the ground that it may involve the courts in policy matters is to push deference too far. Policy itself should reflect *Charter* rights and values.

27 The third suggested reason for excluding collective bargaining from s. 2(*d*) of the *Charter* rested on the view that freedom of association protects only those activities performable by an individual (see *PIPSC, per* L'Heureux-Dubé and Sopinka JJ.). This view arises from a passage in which Sopinka J. set out the scope of s. 2(*d*) in four oft-quoted propositions (at pp. 402-3): (1) s. 2(*d*) protects the freedom to establish, belong to and maintain an association; (2) it does not protect an activity solely on the ground that the activity is foundational or essential to the association; (3) it protects the exercise in association of the constitutional rights and freedoms of individuals; and (4) it protects the exercise in association of the lawful rights of individuals. If this framework and the premise that s. 2(*d*) covers only activities performable by an individual is accepted, it follows that collective bargaining cannot attract the protection of s. 2(*d*) because collective bargaining cannot be performed by an individual.

28 This narrow focus on individual activities has been overtaken by *Dunmore*, where this Court rejected the notion that freedom of association applies only to activities capable of performance by individuals. Bastarache J. held that "[t]o limit s. 2(*d*) to activities that are performable by individuals would ... render futile these fundamental initiatives" (para. 16), since, as Dickson C.J. noted in his dissent in the *Alberta Reference*, some collective activities may, by their very nature, be incapable of being performed by an individual. Bastarache J. provided the example of expressing a majority viewpoint as being an inherently collective activity without an individual analogue (para. 16). He concluded that:

> As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. ... [B]ecause trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals". Rather, the law must recognize that certain union activities - making collective representations to an employer, adopting a majority political platform, federating with other unions - may be central to freedom of association even though they are inconceivable on the individual level. This is not to say that all such activities are protected by s. 2(*d*), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(*d*).... It is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning. [Emphasis added; para. 17.]

29 The fourth reason advanced for excluding collective bargaining rights from s. 2(*d*) was the suggestion of L'Heureux-Dubé J. that s. 2(*d*) was not intended to protect the "objects" or goals of an association (see *PIPSC*, at pp. 391-93). This argument

overlooks the fact that it will always be possible to characterize the pursuit of a particular activity in concert with others as the "object" of that association. Recasting collective bargaining as an "object" begs the question of whether or not the activity is worthy of constitutional protection. L'Heureux-Dubé J.'s underlying concern — that the *Charter* not be used to protect the substantive outcomes of any and all associations — is a valid one. However, "collective bargaining" as a procedure has always been distinguishable from its final outcomes (e.g., the results of the bargaining process, which may be reflected in a collective agreement). Professor Bora Laskin (as he then was) aptly described collective bargaining over 60 years ago as follows:

> Collective bargaining is the procedure through which the views of the workers are made known, expressed through representatives chosen by them, not through representatives selected or nominated or approved by employers. More than that, it is a procedure through which terms and conditions of employment may be settled by negotiations between an employer and his employees on the basis of a comparative equality of bargaining strength.
>
> ("Collective Bargaining in Canada: In Peace and in War" (1941), 2:3 *Food for Thought*, at p. 8.)

In our view, it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process. Thus, the characterization of collective bargaining as an association's "object" does not provide a principled reason to deny it constitutional protection.

30 An overarching concern is that the majority judgments in the *Alberta Reference* and *PIPSC* adopted a decontextualized approach to defining the scope of freedom of association, in contrast to the purposive approach taken to other *Charter* guarantees. The result was to forestall inquiry into the purpose of that *Charter* guarantee. The generic approach of the earlier decisions to s. 2(*d*) ignored differences between organizations. Whatever the organization — be it trade union or book club — its freedoms were treated as identical. The unfortunate effect was to overlook the importance of collective bargaining — both historically and currently — to the exercise of freedom of association in labour relations.

31 We conclude that the reasons provided by the majorities in the *Alberta Reference* and *PIPSC* should not bar reconsideration of the question of whether s. 2(*d*) applies to collective bargaining. This is manifestly the case since this Court's decision in *Dunmore*, which struck down a statute that effectively prohibited farm workers from engaging in collective bargaining by denying them access to the Province's labour relations regime, as violating of s. 2(*d*) of the *Charter*. *Dunmore* clarified three developing aspects of the law: what constitutes interference with the "associational aspect" of an activity; the need for a contextual approach to freedom of association; and the recognition that s. 2(*d*) can impose positive obligations on government.

32 *Dunmore* accepted the conclusion of the majority in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 (S.C.C.), that only the "associational aspect" of an activity and not the activity itself are protected under s. 2(*d*). It clarified, however, that equal legislative treatment of individuals and groups does not mean that the "associational aspect" of an activity has not been interfered with. A prohibition on an individual may not raise associational concerns, while the same prohibition on the collective may do so. *Dunmore* concluded:

> In sum, a purposive approach to s. 2(*d*) demands that we "distinguish between the associational aspect of the activity and the activity itself", a process mandated by this Court in the *Alberta Reference* [p.1043] (see *Egg Marketing, supra, per* Iacobucci and Bastarache JJ., at para. 111). Such an approach begins with the existing framework established in that case, which enables a claimant to show that a group activity is permitted for individuals in order to establish that its regulation targets the association *per se* (see *Alberta Reference, supra, per* Dickson C.J., at p. 367). Where this burden cannot be met, however, it may still be open to a claimant to show, by direct evidence or inference, that the legislature has targeted associational conduct because of its concerted or associational nature.
>
> (*Per* Bastarache J., at para. 18.)

33 Second, *Dunmore* correctly advocated a more contextual analysis than had hitherto prevailed. Showing that a legislature has targeted associational conduct because of its "concerted or associational nature" requires a more contextual assessment than found in the early s. 2(*d*) cases. This contextual approach was foreshadowed by the dissenting reasons of Bastarache J. in *R. c.*

Advance Cutting & Coring Ltd., [2001] 3 S.C.R. 209, 2001 SCC 70 (S.C.C.), expressing the view that to define the limits of s. 2(*d*), "the whole context of the right must be considered" (para. 9).

34 Finally, *Dunmore* recognized that, in certain circumstances, s. 2(*d*) may place positive obligations on governments to extend legislation to particular groups. Underinclusive legislation may, "in unique contexts, substantially impact the exercise of a constitutional freedom" (para. 22). This will occur where the claim of underinclusion is grounded in the fundamental *Charter* freedom and not merely in access to a statutory regime (para. 24); where a proper evidentiary foundation is provided to create a positive obligation under the *Charter* (para. 25); and where the state can truly be held accountable for any inability to exercise a fundamental freedom (para. 26). There must be evidence that the freedom would be next to impossible to exercise without positively recognizing a right to access a statutory regime.

35 Bastarache J. reconciled the holding in *Dunmore* of a positive obligation on government to permit farm workers to join together to bargain collectively in an effective manner with the conclusion in *Delisle c. Canada (Sous-procureur général)*, [1999] 2 S.C.R. 989 (S.C.C.), that the federal government was not under a positive obligation to provide RCMP officers with access to collective bargaining by distinguishing the effects of the legislation in the two cases. Unlike the RCMP members in *Delisle*, farm workers faced barriers that made them *substantially incapable* of exercising their right to form associations outside the statutory framework (*per* Bastarache J., at paras. 39, 41 and 48). The principle affirmed was clear: Government measures that substantially interfere with the ability of individuals to associate with a view to promoting work-related interests violate the guarantee of freedom of association under s. 2(*d*) of the *Charter*.

36 In summary, a review of the jurisprudence leads to the conclusion that the holdings in the *Alberta Reference* and *PIPSC* excluding collective bargaining from the scope of s. 2(*d*) can no longer stand. None of the reasons provided by the majorities in those cases survive scrutiny, and the rationale for excluding inherently collective activities from s. 2(*d*)'s protection has been overtaken by *Dunmore*.

37 Our rejection of the arguments previously used to exclude collective bargaining from s. 2(*d*) leads us to a reassessment of that issue, discussed below.

(2) Collective Bargaining Falls Within the Scope of Section 2(d) of the Charter

38 The question is whether the s. 2(*d*) guarantee of freedom of association extends to the right of employees to join together in a union to negotiate with employers on workplace issues or terms of employment — a process described broadly as collective bargaining.

39 The general purpose of the *Charter* guarantees and the language of s. 2(*d*) are consistent with at least a measure of protection for collective bargaining. The language of s. 2(*d*) is cast in broad terms and devoid of limitations. However, this is not conclusive. To answer the question before us, we must consider the history of collective bargaining in Canada, collective bargaining in relation to freedom of association in the larger international context, and whether *Charter* values favour an interpretation of s. 2(*d*) that protects a process of collective bargaining: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at p. 344, *per* Dickson J. Evaluating the scope of s. 2(*d*) of the *Charter* through these tools leads to the conclusion that s. 2(*d*) does indeed protect workers' rights to a process of collective bargaining.

(a) Canadian Labour History Reveals the Fundamental Nature of Collective Bargaining

40 Association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the *Charter*. This suggests that the framers of the *Charter* intended to include it in the protection of freedom of association found in s. 2(*d*) of the *Charter*.

41 The respondent argues that the right to collective bargaining is of recent origin and is merely a creature of statute. This assertion may be true if collective bargaining is equated solely to the framework of rights of representation and collective bargaining now recognized under federal and provincial labour codes. However, the origin of a right to collective bargaining in the sense given to it in the present case (i.e., a procedural right to bargain collectively on conditions of employment), precedes

the adoption of the present system of labour relations in the 1940s. The history of collective bargaining in Canada reveals that long before the present statutory labour regimes were put in place, collective bargaining was recognized as a fundamental aspect of Canadian society. This is the context against which the scope of the s. 2(*d*) must be considered.

42 Canadian labour history can be summarized by borrowing words from the 1968 *Report of the Task Force on Labour Relations*. As society entered into the industrialized era, "workers began to join unions and to engage in collective bargaining with their employers. Although employers resisted this development with all the resources at their command, it eventually became apparent that unions and collective bargaining were natural concomitants of a mixed enterprise economy. The state then assumed the task of establishing a framework of rights and responsibilities within which management and organized labour were to conduct their relations" (Task Force on Labour Relations, *Canadian Industrial Relations: The Report of Task Force on Labour Relations* (1968) ("Woods Report"), at p. 13).

43 Canadian labour law traces its roots to various legal systems, most importantly to British and American law. Prior to the 1940s, British law had a significant influence on the development of our labour law. American law became an influential force when the United States passed the *Wagner Act* in 1935 (also called *National Labor Relations Act*). And a substantial part of Quebec's law governing labour relations and collective bargaining prior to 1944 was influenced by French law (see R. P. Gagnon, L. LeBel and P. Verge, *Droit du travail* (2nd ed. 1991), at pp. 26-27).

44 The development of labour relations law in Canada may be divided into three major eras: repression, toleration and recognition. We are aware that such categorization may not necessarily draw a perfectly accurate picture of the evolution of labour law in our country (see, e.g., E. Tucker, "The Faces of Coercion: The Legal Regulation of Labor Conflict in Ontario, 1880-1889" (1994), 12 *Law & Hist. Rev.* 277). However, for present purpose, such categorization provides a sufficient historical framework in which to summarize the evolution of our law and to underline the flourishing of labour unions and collective bargaining as well as the historic openness of government and society to those organizations over the past century.

(i) Repression of Workers' Organizations

45 Workers' associations have a long history. In England, as early as the end of the Middle Ages, workers were getting together to improve their conditions of employment. They were addressing petitions to Parliament, asking for laws to secure better wages or other more favourable working conditions. Soon thereafter, strike activity began (M.-L. Beaulieu, *Les Conflits de Droit dans les Rapports Collectifs du Travail* (1955), at pp. 29-30).

46 In Canada, workers' organizations can be traced back to the end of the 18th century. "As early as 1794 employees of the North West Fur Trading Company went on strike for higher wages" (D. D. Carter et al., *Labour Law in Canada* (5th ed. 2002), at p. 48). However, it was not until the industrial revolution that workers' organizations took on more than a marginal role, and that a real labour movement was born (Carter et al., at p. 48; C. Lipton, *The Trade Union Movement of Canada, 1827-1959* (4th ed. 1978), at pp. 1-8; J. Rouillard, *Histoire du syndicalisme au Québec: Des origines à nos jours* (1989), at p. 11).

47 From the beginning, the law was used as a tool to limit workers' rights to unionize. In England, through the 18th and 19th centuries, labour organizations were considered illegal under the common law doctrine of criminal conspiracy (Lord Wedderburn, *The Worker and the Law* (3rd ed. 1986), at pp. 514-15); G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), § 1.30, at p. 1-2). Statutes soon added new limits. After the French Revolution, the British Parliament, convinced that labour organizations were the nesting ground of potential revolutions, adopted the *Combination Acts* of 1799 and 1800, making it unlawful for two or more workers to combine in an attempt to increase their wages, lessen their hours of work or persuade anyone to leave or refuse work. The Acts, which made it "a criminal offence to be a member of a trade union, to call a strike, or to contribute money for trade union purposes", had the effect of suppressing a large series of collective actions (J. G. Riddall, *The Law of Industrial Relations* (1981), at p. 24). Combinations of workers were already illegal at common law. The *Combination Acts* reinforced the common law by providing faster and more effective tools to enforce criminal penalties upon workers (W. R. Cornish and G. de N. Clark, *Law and Society in England 1750-1950* (1989), at p. 297).

48 In 1824, the English *Combination Acts* were repealed. The repeal was immediately followed by a series of strikes. The British Parliament responded with a new *Combination Act* less than a year later, which reintroduced strong criminal sanctions against workers. The new *Combination Act* of 1825 made it legal for workers to bargain collectively with their employers. However, it made strikes a criminal offence. S. Deakin and G. S. Morris summarize, as follows, the state of the law under the *Combination Act* of 1825:

> For the fifty years or so after 1825 the legal position was, in principle, that freedom of association was permitted, and that collective bargaining could be lawfully pursued; however, strike action remained tightly confined. In practice, there was no effective right to resist employers who refused to enter into collective bargaining since the main weapon open to trade unions, namely strike action, was regulated by the criminal law. The criminal law also imposed sanctions on individual workers who quit their employment in breach of contract, by virtue of the Master and Servant Act 1823 which was the successor to a number of eighteenth-century statutes which had a similar effect.
>
> (*Labour Law* (4th ed. 2005), at p. 7)

49 In the 1860s, two important events led the British Parliament to change course. First, a Royal Commission on Trade Unions was appointed in 1867. It recommended better legal recognition for trade unions. Second, a reform of suffrage law gave a large segment of the working class the right to vote, enabling them to exert more influence over Parliament (Adams, § 1.40, at p. 1-4; A. W. R. Carrothers, E. E. Palmer and W. B. Rayner, *Collective Bargaining Law in Canada* (2nd ed. 1986), at p. 16). In response to these events, in 1871 the British Parliament adopted the *Trade Union Act* and the *Criminal Law Amendment Act*, which were intended to immunize trade unions and their members from the criminal laws of conspiracy and restraint of trade. Nevertheless, British courts continued to view collective actions suspiciously, repressing strikes through the doctrine of criminal conspiracy and repressing other union activity through the application of economic torts. The British Parliament in turn responded on occasion by strengthening the legislative protection for trade unions in that country (Deakin and Morris, at pp. 8-10).

50 The question of whether the repressive common law doctrines and the *Combination Acts* of 1799 and 1800 were introduced into Canada is subject to controversy. Some scholars are of the opinion that the common law doctrines of conspiracy and restraint of trade were introduced into Canadian law (Adams, § 1.70, at p. 1-5; Beaulieu, at p. 73). Others, however, argue that the Canadian common law and the civil law of Quebec were more ambiguous and less oppressive to trade unions than the British common law (Gagnon, LeBel and Verge,at pp. 620-21; *Perrault v. Gauthier* (1898), 28 S.C.R. 241 (S.C.C.)). It is unnecessary to resolve this debate. It suffices to recognize that, at least until 1872, Canadian laws "cast shadows on the legitimacy of trade unions ..." (B. D. Palmer, *Working-Class Experience: Rethinking the History of Canadian Labour, 1800-1991* (2nd ed. 1992), at p. 66; E. Tucker, "'That Indefinite Area of Toleration': Criminal Conspiracy and Trade Unions in Ontario, 1837-77" (1991), 27 *Labour* 15; see also Carrothers, Palmer and Rayner, at p. 18).

(ii) Tolerance of Workers' Organizations and Collective Bargaining

51 A major shift in Canadian labour law took place in the aftermath of the Toronto Typographical Unions' strike that occurred in 1872. The strike by the Toronto typographers, inspired by the call for a nine-hour work day, led to numerous arrests and charges against the strikers for common law criminal conspiracy. At that time, Canada had not yet adopted legislation immunizing trade union members from criminal charges for conspiracy or restraint of trade. The criminal charges against the Toronto strikers raised public concern and revealed that Canada was behind the times — at least compared to Britain — on the issue of union protection and recognition.

52 In consequence, Canada adopted its own legislation copied in part from the British *Trade Union Act* of 1871. The Canadian *Trade Unions Act* of 1872 "made it clear that no worker could be criminally prosecuted for conspiracy solely on the basis of attempting to influence the rate of wages, hours of labour, or other aspects of the work relation" (Palmer, at p. 111). Through this legislative action, the Canadian Parliament recognized the value for the individual of collective actions in the context of labour relations. As Sir John A. Macdonald mentioned in the House of Commons, the purpose of the *Trade Unions Act* of 1872 was to immunize unions from existing laws considered to be "opposed to the spirit of the liberty of the individual" (*Parliamentary*

Debates, 5th sess., 1st Parl., 7 May 1872, at p. 392, as cited by M. Chartrand, "The First Canadian Trade Union Legislation: An Historical Perspective" (1984), 16 *Ottawa L. Rev.* 267).

53 By the beginning of the 1900s, the main criminal barriers to unionism in Canada had been brought down. Criminal law no longer prohibited employees from combining for the purposes of ameliorating their working conditions (Carrothers, Palmer and Rayner, at p. 30). However, courts continued to apply common law doctrines to restrain union activities (Adams, p. 1-5, at para. 170; Carrothers, Palmer and Rayner, at p. 19). Moreover, nothing in the law required employers to recognize unions or to bargain collectively with them. Employers could simply ignore union demands and even refuse to hire union members. As J. Fudge and E. Tucker explain:

> While workers were also privileged to combine with other workers to advance their common interests, employers were free to contract only with those workers who were not part of a combination. In short, they could refuse to hire union members and could fire those who became union members after taking up employment.
>
> (*Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (2001), at p. 2)

54 While employers could refuse to recognize and bargain with unions, workers had recourse to an economic weapon: the powerful tool of calling a strike to force an employer to recognize a union and bargain collectively with it. The law gave both parties the ability to use economic weapons to attain their ends. Before the adoption of the modern statutory model of labour relations, the majority of strikes were motivated by the workers' desire to have an employer recognize a union and bargain collectively with it (D. Glenday and C. Schrenk, "Trade Union and the State: An Interpretative Essay on the Historical Development of Class and State Relations in Canada, 1889-1949" (1978), 2 *Alternate Routes* 114, at p. 128; M. Thompson, "Wagnerism in Canada: Compared to What?", in *Proceedings of the XXXIst Conference-Canadian Industrial Relations Association* (1995), 59, at p. 60; C. D. Baggaley, *A Century of Labour Regulation in Canada* (1981), Working Paper No. 19, prepared for the Economic Council of Canada, at p. 57). The unprecedented number of strikes, caused in large part by the refusal of employers to recognize unions and to bargain collectively, led to governments adopting the American *Wagner Act* model of legislation, discussed below.

(iii) Recognition of Collective Bargaining

55 The first few decades of the 20th century saw Parliament's promotion of voluntary collective bargaining. The federal Parliament enacted a series of statutes to promote collective bargaining by conferring on the labour minister the power to impose conciliation on the parties in an attempt to bring them to compromise (*The Conciliation Act, 1900*, S.C. 1900, c. 24; *The Railway Labour Disputes Act, 1903*, S.C. 1903, c. 55; *The Industrial Disputes Investigation Act, 1907*, S.C. 1907, c. 20). This model failed, mainly because employers had no real incentive to participate in the process. (See J. Webber, "Compelling Compromise: Canada chooses Conciliation over Arbitration 1900-1907" (1991), 28 *Labour* 15; Gagnon, LeBel and Verge, at p. 25; Carrothers, Palmer and Rayner, at p. 32; Adams, at p. 1-6.) Moreover, union members did not receive any protection against unfair labour practices undertaken by employers (Carrothers, Palmer and Rayner, at p. 37). In search of a better model, Canadian governments looked at what was happening in the United States.

56 In the United States, courts also relied heavily on the doctrine of conspiracy under criminal and civil law as well as antitrust law to limit union activities (Gagnon, LeBel and Verge, at pp. 19-20). In 1914, the American Congress immunized unions from the application of antitrust law and adopted a non-interventionist attitude in order to let workers and employers use their respective economic powers to manage their own labour relations. However, the Depression and resulting industrial tension of the 1930s rendered the old laissez-faire model inappropriate. The result was the *Wagner Act*, which explicitly recognized the right of employees to belong to a trade union of their choice, free of employer coercion or interference, and imposed a duty upon employers to bargain in good faith with their employees' unions (Adams, at p. 1-10).

57 K. E. Klare has identified the following main objects of the *Wagner Act*:

> 1. *Industrial Peace*: By encouraging collective bargaining, the Act aimed to subdue "strikes and other forms of industrial strife or unrest," because industrial warfare interfered with interstate commerce; that is, it was unhealthy in a

> business economy. Moreover, although this thought was not embodied in the text, industrial warfare clearly promoted other undesirable conditions, such as political turmoil, violence, and general uncertainty.
>
> 2. *Collective Bargaining*: The Act sought to enhance collective bargaining for its own sake because of its presumed "mediating" or "therapeutic" impact on industrial conflict.
>
> 3. *Bargaining Power*: The Act aimed to promote "actual liberty of contract" by redressing the unequal balance of bargaining power between employers and employees.
>
> 4. *Free Choice*: The Act was intended to protect the free choice of workers to associate amongst themselves and to select representatives of their own choosing for collective bargaining.
>
> 5. *Underconsumption*: The Act was designed to promote economic recovery and to prevent future depressions by increasing the earnings and purchasing power of workers.
>
> 6. *Industrial Democracy*: This is the most elusive aspect of the legislative purpose, although most commentators indicate that a concept of industrial democracy is embedded in the statutory scheme, or at the least was one of the articulated goals of the sponsors of the Act. Senator Wagner frequently sounded the industrial democracy theme in ringing notes, and scholars have subsequently seen in collective bargaining "the means of establishing industrial democracy, ... the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens.
>
> ("Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978), 62 *Minn. L. Rev.* 265, at pp. 281-84)

58 By the end of the 1930s, most Canadian provinces had passed legislation incorporating the main objectives of the *Wagner Act* (Carrothers, Palmer and Rayner, at pp. 47-48). However, it is Order in Council P.C. 1003, a regulation adopted by the federal government to rule labour relations in time of war, that firmly implemented the principles of the *Wagner Act* in Canada and triggered further development of provincial labour laws (Carrothers, Palmer and Rayner, at p. 50; J. Fudge and H. Glasbeek, "The Legacy of PC 1003" (1995), 3 *C.L.E.L.J.* 357, at p. 358).

59 Fudge and Glasbeek emphasize the effects of P.C. 1003 on Canadian labour relations:

> For the first time in Canada's history, the government compelled employers to recognize and to bargain with duly elected representatives and/or trade unions. From the workers' perspective, this constituted a movement from having a right to state their interest in being represented by a union to having enforceable legal right to have their chosen representative treated as a union by their employer. There was no longer any need to use collective economic muscle — always seriously limited by the common law — to obtain the right to bargain collectively with employers. [p. 359]

60 P.C. 1003 was a compromise adopted to promote peaceful labour relations. On the one hand, it granted major protections to workers to organize without fear of unfair interference from the employers and guaranteed workers the right to bargain collectively in good faith with their employers without having to rely on strikes and other economic weapons. On the other hand, it provided employers with a measure of stability in their relations with their organized workers, without the spectre of intensive state intervention in the economy (Fudge and Glasbeek, at p. 370). These elements of P.C. 1003 continue to guide our system of labour relations to this day (Adams, at pp. 2-98 *et seq.*).

61 In all the provinces except Saskatchewan, legislation inspired by the *Wagner Act* initially applied only to the private sector. Its extension to the public sector came later. Between 1965 and 1973 statutes were passed across the country extending labour protections to public sectors. (Fudge and Glasbeek, atp. 384; see also J. R. Calvert, "Collective Bargaining in the Public Sector in Canada: Teething Troubles or Genuine Crisis?" (1987), 2 *Brit. J. Can. Stud.* 1). However, the rights conferred to public sector employees were more restricted than in the private sector:

> Some employees are not allowed to bargain about certain subjects, some employees are given the alternative of striking or accepting a compulsory arbitrated award, some employees are not given the right to strike at all. Further, governments have retained the right to determine that, even if a public sector bargaining unit is given the right to strike, some of its members should be designated as being essential workers, that is, workers who must continue to deliver a governmental service during a lawful strike by their bargaining unit colleagues. Moreover, a government's assumed right and need to continue to look after the public's welfare makes it easy to pass legislation suspending or abrogating a trade union's previously granted strike rights. In the same vein, a government can always argue that, whatever collective bargaining rights its workers have, these can justifiably be curtailed to allow the government, not just to continue to deliver services, but also to pursue a major policy, such as the reduction of inflation or the balancing of the budget.
>
> (Fudge et Glasbeek, at p. 385).

62 Moreover, on many occasions (and with increasing frequency during the 1980s and 1990s), governments used legislation to impose unilaterally upon their own employees specific conditions of employment, in most cases related to wages (J. B. Rose, "Public Sector Bargaining: From Retrenchment to Consolidation" (2004), 59 *IR* 271, at p. 275).

63 In summary, workers in Canada began forming collectives to bargain over working conditions with their employers as early as the 18th century. However, the common law cast a shadow over the rights of workers to act collectively. When Parliament first began recognizing workers' rights, trade unions had no express statutory right to negotiate collectively with employers. Employers could simply ignore them. However, workers used the powerful economic weapon of strikes to gradually force employers to recognize unions and to bargain collectively with them. By adopting the *Wagner Act* model, governments across Canada recognized the fundamental need for workers to participate in the regulation of their work environment. This legislation confirmed what the labour movement had been fighting for over centuries and what it had access to in the laissez-faire era through the use of strikes — the right to collective bargaining with employers.

(iv) Collective bargaining in the Charter era

64 At the time the *Charter* was enacted in 1982, collective bargaining had a long tradition in Canada and was recognized as part of freedom of association in the labour context. The 1968 Woods Report explained the importance of collective bargaining for our society and the special relationship between collective bargaining and freedom of association:

> Freedom to associate and to act collectively are basic to the nature of Canadian society and are root freedoms of the existing collective bargaining system. Together they constitute freedom of trade union activity: to organize employees, to join with the employer in negotiating a collective agreement, and to invoke economic sanctions, including taking a case to the public in the event of an impasse....
>
> In order to encourage and ensure recognition of the social purpose of collective bargaining legislation as an instrument for the advancement of fundamental freedoms in our industrial society, we recommend that the legislation contain a preamble that would replace the neutral tone of the present statute with a positive commitment to the collective bargaining system. [p. 138]

65 The preamble of the *Canada Labour Code*, R.S.C. 1970, c. L-1, was later modified, in 1972 (S.C. 1972, c. 18), to express the benefits that collective bargaining brings to society:

> Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;
>
> And Whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;

66 Collective bargaining, despite early discouragement from the common law, has long been recognized in Canada. Indeed, historically, it emerges as the most significant collective activity through which freedom of association is expressed in the labour context. In our opinion, the concept of freedom of association under s. 2(*d*) of the *Charter* includes this notion of a procedural right to collective bargaining.

67 This established Canadian right to collective bargaining was recognized in the Parliamentary hearings that took place before the adoption of the *Charter*. The acting Minister of Justice, Mr. Robert Kaplan, explained why he did not find necessary a proposed amendment to have the freedom to organize and bargain collectively expressly included under s. 2(*d*). These rights, he stated, were already implicitly recognized in the words "freedom of association":

> Our position on the suggestion that there be specific reference to freedom to organize and bargain collectively is that that is already covered in the freedom of association that is provided already in the Declaration or in the Charter; and that by singling out association for bargaining one might tend to d[i]minish all the other forms of association which are contemplated — church associations; associations of fraternal organizations or community organizations.
>
> (Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, Issue No. 43, January 22, 1981, at pp. 69-70)

68 The protection enshrined in s. 2(*d*) of the *Charter* may properly be seen as the culmination of a historical movement towards the recognition of a procedural right to collective bargaining.

(b) International Law Protects Collective Bargaining as Part of Freedom of Association

69 Under Canada's federal system of government, the incorporation of international agreements into domestic law is properly the role of the federal Parliament or the provincial legislatures. However, Canada's international obligations can assist courts charged with interpreting the *Charter*'s guarantees (see *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), at para. 46). Applying this interpretive tool here supports recognizing a process of collective bargaining as part of the *Charter*'s guarantee of freedom of association.

70 Canada's adherence to international documents recognizing a right to collective bargaining supports recognition of the right in s. 2(*d*) of the *Charter*. As Dickson C.J. observed in the *Alberta Reference*, at p. 349, the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.

71 The sources most important to the understanding of s. 2(*d*) of the *Charter* are the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 ("*ICESCR*"), the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 ("*ICCPR*"), and the International Labour Organization's (ILO's) *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17 ("*Convention No. 87*"). Canada has endorsed all three of these documents, acceding to both the *ICESCR* and the *ICCPR*, and ratifying *Convention No. 87* in 1972.This means that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold.

72 The *ICESCR*, the *ICCPR* and *Convention No. 87* extend protection to the functioning of trade unions in a manner suggesting that a right to collective bargaining is part of freedom of association. The interpretation of these conventions, in Canada and internationally, not only supports the proposition that there is a right to collective bargaining in international law, but also suggests that such a right should be recognized in the Canadian context under s. 2(*d*).

73 Article 8, para. (1)(*c*) of the *ICESCR* guarantees the "right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others." This Article allows the "free functioning" of trade unions to be regulated, but not legislatively abrogated (*per* Dickson C.J., *Alberta Reference*, at p. 351). Since collective bargaining is a primary function of a trade union, it follows that Article 8 protects a union's freedom to pursue this function freely.

74 Similarly, Article 22, para. 1 of the *ICCPR* states that "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." Paragraph 2 goes on to say that no restriction may be placed on the exercise of this right, other than those necessary in a free and democratic society for reasons of national security, public safety, public order, public health or the protection of the rights of others. This Article has been interpreted to suggest that it encompasses both the right to form a union and the right to collective bargaining: *Concluding Observations of the Human Rights Committee Canada*, U.N. Doc. CCPR/C/79/Add.105 (1999).

75 *Convention No. 87* has also been understood to protect collective bargaining as part of freedom of association. Part I of the Convention, entitled "Freedom of Association", sets out the rights of workers to freely form organizations which operate under constitutions and rules set by the workers and which have the ability to affiliate internationally. Dickson C.J., dissenting in the *Alberta Reference*, at p. 355, relied on *Convention No. 87* for the principle that the ability "to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits".

76 *Convention No. 87* has been the subject of numerous interpretations by the ILO's Committee on Freedom of Association, Committee of Experts and Commissions of Inquiry. These interpretations have been described as the "cornerstone of the international law on trade union freedom and collective bargaining": M. Forde, "The European Convention on Human Rights and Labor Law" (1983), 31 *Am. J. Comp. L.* 301, at p. 302. While not binding, they shed light on the scope of s. 2(*d*) of the *Charter* as it was intended to apply to collective bargaining: *Dunmore*, at paras. 16 and 27, *per* Bastarache J., applying the jurisprudence of the ILO's Committee of Experts and Committee on Freedom of Association.

77 A recent review by ILO staff summarized a number of principles concerning collective bargaining. Some of the most relevant principles in international law are summarized in the following terms (see B. Gernigon, A. Odero and H. Guido, "ILO principles concerning collective bargaining" (2000), 139 *Intern'l Lab. Rev.* 33, at pp. 51-52):

> A. The right to collective bargaining is a fundamental right endorsed by the members of the ILO in joining the Organization, which they have an obligation to respect, to promote and to realize, in good faith (ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up).
>
> . . . . .
>
> D. The purpose of collective bargaining is the regulation of terms and conditions of employment, in a broad sense, and the relations between the parties.
>
> . . . . .
>
> H. The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.
>
> I. In view of the fact that the voluntary nature of collective bargaining is a fundamental aspect of the principles of freedom of association, collective bargaining may not be imposed upon the parties and procedures to support bargaining must, in principle, take into account its voluntary nature; moreover, the level of bargaining must not be imposed unilaterally by law or by the authorities, and it must be possible for bargaining to take place at any level.
>
> J. It is acceptable for conciliation and mediation to be imposed by law in the framework of the process of collective bargaining, provided that reasonable time limits are established. However, the imposition of compulsory arbitration in cases where the parties do not reach agreement is generally contrary to the principle of voluntary collective bargaining and is only admissible: [cases of essential services, administration of the State, clear deadlock, and national crisis].
>
> K. Interventions by the legislative or administrative authorities which have the effect of annulling or modifying the content of freely concluded collective agreements, including wage clauses, are contrary to the principle of voluntary collective bargaining. These interventions include: the suspension or derogation of collective agreements by decree without the agreement of the parties; the interruption of agreements which have already been negotiated;

> the requirement that freely concluded collective agreements be renegotiated; the annulment of collective agreements; and the forced renegotiation of agreements which are currently in force. Other types of intervention, such as the compulsory extension of the validity of collective agreements by law are only admissible in cases of emergency and for short periods.
>
> L. Restrictions on the content of future collective agreements ... are admissible only in so far as such restrictions are preceded by consultations with the organizations of workers and employers and fulfil the following conditions: [restrictions are exceptional measures; of limited duration; include protection for workers' standards of living].
>
> (See also, M. Coutu, *Les libertés syndicales dans le secteur public* (1989), at pp. 26-29.)

78 The fact that a global consensus on the meaning of freedom of association did not crystallize in the *Declaration on Fundamental Principles and Rights at Work*, 6 IHRR 285 (1999), until 1998 does not detract from its usefulness in interpreting s. 2(*d*) of the *Charter*. For one thing, the Declaration was made on the basis of interpretations of international instruments, such as *Convention No. 87*, many of which were adopted by the ILO prior to the advent of the *Charter* and were within the contemplation of the framers of the *Charter*. For another, the *Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians. Thus Canada's *current* international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*.

79 In summary, international conventions to which Canada is a party recognize the right of the members of unions to engage in collective bargaining, as part of the protection for freedom of association. It is reasonable to infer that s. 2(*d*) of the *Charter* should be interpreted as recognizing at least the same level of protection: *Alberta Reference*.

(c) Charter Values Support Protecting a Process of Collective Bargaining Under Section 2(d)

80 Protection for a process of collective bargaining within s. 2(*d*) is consistent with the *Charter*'s underlying values. The *Charter*, including s. 2(*d*) itself, should be interpreted in a way that maintains its underlying values and its internal coherence. As Lamer J. stated in *R. v. Dubois*, [1985] 2 S.C.R. 350 (S.C.C.), at p. 365:

> Our constitutional *Charter* must be construed as a system where "Every component contributes to the meaning as a whole, and the whole gives meaning to its parts" (P. A. Côté writing about statutory interpretation in *The Interpretation of Legislation in Canada* (1984), at p. 236). The courts must interpret each section of the *Charter* in relation to the others (see, for example, *R. v. Carson* (1983), 20 M.V.R. 54 (Ont. C.A.); *R. v. Konechny*, [1984] 2 W.W.R. 481 (B.C.C.A.); *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 (C.A.); *R. v. Antoine, supra*).
>
> (See also *Big M Drug Mart*, at p. 344; and *Walsh v. Bona*, [2002] 4 S.C.R. 325, 2002 SCC 83 (S.C.C.), at para. 63.)

81 Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underly the *Charter*: *R. v. Zundel*, [1992] 2 S.C.R. 731 (S.C.C.); *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 (S.C.C.), at para. 100; *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). All of these values are complemented and indeed, promoted, by the protection of collective bargaining in s. 2(*d*) of the *Charter*.

82 The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work (see *Alberta Reference*, at p. 368, and *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 93). As explained by P. C. Weiler in *Reconcilable Differences* (1980):

> Collective bargaining is not simply an instrument for pursuing external ends, whether these be mundane monetary gains or the erection of a private rule of law to protect dignity of the worker in the face of managerial authority. Rather, collective bargaining is intrinsically valuable as an experience in self-government. It is the mode in which employees participate in setting the terms and conditions of employment, rather than simply accepting what their employer chooses to give them.... [p. 33]

83 In *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, [2002] 1 S.C.R. 156, 2002 SCC 8 (S.C.C.), we underlined the importance of protecting workers' autonomy:

> Personal issues at stake in labour disputes often go beyond the obvious issues of work availability and wages. Working conditions, like the duration and location of work, parental leave, health benefits, severance and retirement schemes, may impact on the personal lives of workers even outside their working hours. Expression on these issues contributes to self-understanding, as well as to the ability to influence one's working and non-working life. [para. 34]

84 Collective bargaining also enhances the *Charter* value of equality. One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees: see *Wallace v. United Grain Growers Ltd., per* Iacobucci J. In 1889, the Royal Commission on Capital and Labour appointed by the Macdonald government to make inquiries into the subject of labour and its relation to capital, stated that "Labour organizations are necessary to enable working men to deal on equal terms with their employers" (quoted in Glenday and Schrenk, at p. 121; see also G. Kealey, ed., *Canada investigates industrialism: The Royal Commission on the Relations of Labor and Capital, 1889 (abridged)* (1973)). Similarly, Dickson C.J. rightly emphasized this concern about equality in the *Alberta Reference*:

> Freedom of association is the cornerstone of modern labour relations. Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe, or exploitative working conditions. As the United States Supreme Court stated in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1(1937), at p. 33:
>
>> Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; ...
>>
>> The "necessities of the situation" go beyond, of course, the fairness of wages and remunerative concerns, and extend to matters such as health and safety in the work place, hours of work, sexual equality, and other aspects of work fundamental to the dignity and personal liberty of employees. [pp. 334-35]

85 Finally, a constitutional right to collective bargaining is supported by the *Charter* value of enhancing democracy. Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace. Workers gain a voice to influence the establishment of rules that control a major aspect of their lives (*Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211 (S.C.C.), at pp. 260-61, *per* Wilson J.; *Alberta Reference*, at p. 369; *Dunmore*, at paras. 12 and 46; Weiler, at pp. 31-32). The 1968 Woods Report explained:

> One of the most cherished hopes of those who originally championed the concept of collective bargaining was that it would introduce into the work place some of the basic features of the political democracy that was becoming the hallmark of most of the western world. Traditionally referred to as industrial democracy, it can be described as the substitution of the rule of law for the rule of men in the work place. [p. 96]
>
> (See also Klare (quoted at para. 57 above).)

86 We conclude that the protection of collective bargaining under s. 2(*d*) of the *Charter* is consistent with and supportive of the values underlying the *Charter* and the purposes of the *Charter* as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*.

(3) Section 2(d) of the Charter and the Right to Collective Bargaining

87 The preceding discussion leads to the conclusion that s. 2(*d*) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining. The next question is what

this right entails for employees, for government employers subject to the *Charter* under s. 32, and for Parliament and provincial legislatures which adopt labour laws.

88 Before going further, it may be useful to clarify who the s. 2(*d*) protection of collective bargaining affects, and how. The *Charter* applies only to state action. One form of state action is the passage of legislation. In this case, the legislature of British Columbia has passed legislation applying to relations between health care sector employers and the unions accredited to those employers. That legislation must conform to s. 2(*d*) of the *Charter*, and is void under s. 52 of the *Constitution Act, 1982* if it does not (in the absence of justification under s. 1 of the *Charter*). A second form of state action is the situation where the government is an employer. While a private employer is not bound by s. 2(*d*), the government as employer must abide by the *Charter*, under s. 32, which provides: "This Charter applies ... (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." This case is concerned with an attack on government legislation; there is no allegation that the government of British Columbia, *qua* employer, violated s. 2(*d*) of the *Charter*.

89 The scope of the right to bargain collectively ought to be defined bearing in mind the pronouncements of *Dunmore*, which stressed that s. 2(*d*) does not apply solely to individual action carried out in common, but also to associational activities themselves. The scope of the right properly reflects the history of collective bargaining and the international covenants entered into by Canada. Based on the principles developed in *Dunmore* and in this historical and international perspective, the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief, the protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2(*d*) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(*d*) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining, which we shall discuss below.

90 Section 2(*d*) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity, in accordance with a test crafted in *Dunmore* by Bastarache J., which asked whether "excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, [can] constitute a substantial interference with freedom of association" (para. 23). Or to put it another way, does the state action target or affect the associational activity, "thereby discouraging the collective pursuit of common goals"? (*Dunmore*, at para. 16) Nevertheless, intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(*d*) of the *Charter*. It is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.

91 The right to collective bargaining thus conceived is a limited right. First, as the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method. As P. A. Gall notes, it is impossible to predict with certainty that the present model of labour relations will necessarily prevail in 50 or even 20 years ("Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword", in J.M. Weiler and R.M. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), 245, at p. 248). Finally, and most importantly, the interference, as *Dunmore* instructs, must be substantial — so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.

92 To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms

of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.

93 Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

94 Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(*d*) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(*d*) if they preserve a process of consultation and good faith negotiation.

95 Turning to the first inquiry, the essential question is whether the subject matter of a particular instance of collective bargaining is such that interfering with bargaining over that issue will affect the ability of unions to pursue common goals collectively. It may help to clarify why the importance of the subject matter of bargaining is relevant to the s. 2(*d*) inquiry. As we have stated, one requirement for finding a breach of s. 2(*d*) is that the state has "precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals" (*Dunmore*, at para. 16 (emphasis deleted)). Interference with collective bargaining over matters of lesser importance to the union and its capacity to pursue collective goals in concert may be of some significance to workers. However, interference with collective bargaining over these less important matters is more likely to fall short of discouraging the capacity of union members to come together and pursue common goals in concert. Therefore, if the subject matter is of lesser importance to the union, then it is less likely that the s. 2(*d*) right to bargain collectively is infringed. The importance of an issue to the union and its members is not itself determinative, but will bear on the "single inquiry" prescribed in *Dunmore* as it applies in the particular context of collective bargaining: does interference with collective bargaining over certain subject matter affect the ability of the union members to come together and pursue common goals? The more important the matter, the more likely that there is substantial interference with the s. 2(*d*) right. Conversely, the less important the matter to the capacity of union members to pursue collective goals, the less likely that there is substantial interference with the s. 2(*d*) right to collective bargaining.

96 While it is impossible to determine in advance exactly what sorts of matters are important to the ability of union members to pursue shared goals in concert, some general guidance may be apposite. Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements. By contrast, measures affecting less important matters such as the design of uniform, the lay out and organization of cafeterias, or the location or availability of parking lots, may be far less likely to constitute significant interference with the s. 2(*d*) right of freedom of association. This is because it is difficult to see how interfering with collective bargaining over these matters undermines the capacity of union members to pursue shared goals in concert. Thus, an interference with collective bargaining over these issues is less likely to meet the requirements set out in *Dunmore* for a breach of s. 2(*d*).

97 Where it is established that the measure impacts on subject matter important to collective bargaining and the capacity of the union members to come together and pursue common goals, the need for the second inquiry arises: does the legislative measure or government conduct in issue respect the fundamental precept of collective bargaining — the duty to consult and negotiate in good faith? If it does, there will be no violation of s. 2(*d*), even if the content of the measures might be seen as being of substantial importance to collective bargaining concerns, since the process confirms the associational right of collective bargaining.

98 Consideration of the duty to negotiate in good faith which lies at the heart of collective bargaining may shed light on what constitutes improper interference with collective bargaining rights. It is worth referring again to principle H of the ILO principles concerning collective bargaining, which emphasizes the need for good faith in upholding the right to collective bargaining and in the course of collective bargaining. Principle H thus states:

> The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.

99 Consistent with this, the *Canada Labour Code* and legislation from all provinces impose on employers and unions the right and duty to bargain in good faith (see generally Adams, at pp. 10-91 and 10-92). The duty to bargain in good faith under labour codes is essentially procedural and does not dictate the content of any particular agreement achieved through collective bargaining. The duty to bargain is aimed at bringing the parties together to meet and discuss, but as illustrated by Senator Walsh, chairman of the Senate committee hearing on the *Wagner Act*, the general rule is that: "The bill does not go beyond the office door." (Remarks of Senator Walsh, 79 Cong. Rec. 7659; see F. Morin, J.-Y. Brière and D. Roux, *Le droit de l'emploi au Québec* (3rd ed. 2006), at pp. 1026-27.)

100 A basic element of the duty to bargain in good faith is the obligation to actually meet and to commit time to the process (Carter et al., at p. 301). As explained by Adams:

> The failure to meet at all is, of course, a breach of the duty. A refusal to meet unless certain procedural preconditions are met is also a breach of the duty.
>
> . . . . .
>
> A failure to make the commitment of time and preparation required to attempt to conclude an agreement is a failure to make reasonable efforts. [pp.10-101 and 10-106]

101 The parties have a duty to engage in meaningful dialogue and they must be willing to exchange and explain their positions. They must make a reasonable effort to arrive at an acceptable contract (Adams, at p. 10-107; Carrothers, Palmer and Rayner, at p. 453). As Cory J. said in *C.A.S.A.W., Local 4 v. Royal Oak Mines Inc.*, [1996] 1 S.C.R. 369 (S.C.C.):

> In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions. [para. 41]

102 Nevertheless, the efforts that must be invested to attain an agreement are not boundless. "[T]he parties may reach a point in the bargaining process where further discussions are no longer fruitful. Once such a point is reached, a breaking off of negotiations or the adoption of a 'take it or leave it' position is not likely to be regarded as a failure to bargain in good faith" (Carter et al., at p. 302).

103 The duty to bargain in good faith does not impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions (Gagnon, LeBel and Verge, at pp. 499-500). Nor does the duty to bargain in good faith preclude hard bargaining. The parties are free to adopt a "tough position in the hope and expectation of being able to force the other side to agree to one's terms" (*C.U.P.E. v. Nova Scotia (Labour Relations Board)*, [1983] 2 S.C.R. 311 (S.C.C.), at p. 341).

104 In principle, the duty to bargain in good faith does not inquire into the nature of the proposals made in the course of collective bargaining; the content is left to the bargaining forces of the parties (Carter et al., at p. 300). However, when the examination of the content of the bargaining shows hostility from one party toward the collective bargaining process, this will constitute a breach of the duty to bargain in good faith. In some circumstances, even though a party is participating in the bargaining, that party's proposals and positions may be "inflexible and intransigent to the point of endangering the very existence of collective bargaining" (*Royal Oak Mines*, at para. 46). This inflexible approach is often referred to as "surface

bargaining". This Court has explained the distinction between hard bargaining, which is legal, and surface bargaining, which is a breach of the duty to bargain in good faith:

> It is often difficult to determine whether a breach of the duty to bargain in good faith has been committed. Parties to collective bargaining rarely proclaim that their aim is to avoid reaching a collective agreement. The jurisprudence recognizes a crucial distinction between "hard bargaining" and "surface bargaining" ... Hard bargaining is not a violation of the duty to bargain in good faith. It is the adoption of a tough position in the hope and expectation of being able to force the other side to agree to one's terms. Hard bargaining is not a violation of the duty because there is a genuine intention to continue collective bargaining and to reach agreement. On the other hand, one is said to engage in "surface bargaining" when one pretends to want to reach agreement, but in reality has no intention of signing a collective agreement and hopes to destroy the collective bargaining relationship. It is the improper objectives which make surface bargaining a violation of the Act. The dividing line between hard bargaining and surface bargaining can be a fine one.
>
> (*Canadian Union of Public Employees*, at p. 341; see also *Royal Oak Mines*, at para. 46)

105 Even though the employer participates in all steps of the bargaining process, if the nature of its proposals and positions is aimed at avoiding the conclusion of a collective agreement or at destroying the collective bargaining relationship, the duty to bargain in good faith will be breached: see *Royal Oak Mines Inc*. To the words of Senator Walsh, that collective bargaining does not go beyond the office door, we would add that, on occasion, courts are nevertheless allowed to look into what is going on in the room, to ensure that parties are bargaining in good faith.

106 In Canada, unlike in the United States, the duty to bargain in good faith applies regardless of the subject matter of collective bargaining. Under Canadian labour law, all conditions of employment attract an obligation to bargain in good faith unless the subject matter is otherwise contrary to the law and could not legally be included in a collective agreement (Adams, at pp. 10-96 and 10-97; J.-P. Villaggi, "La convention collective et l'obligation de négocier de bonne foi: les leçons du droit du travail" (1996), 26 *R.D.U.S.* 355, at pp. 360-61). However, the refusal to discuss an issue merely on the periphery of the negotiations does not necessarily breach the duty to bargain in good faith (Carter et al., at p. 302).

107 In considering whether the legislative provisions impinge on the collective right to good faith negotiations and consultation, regard must be had for the circumstances surrounding their adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith. Different situations may demand different processes and timelines. Moreover, failure to comply with the duty to consult and bargain in good faith should not be lightly found, and should be clearly supported on the record. Nevertheless, there subsists a requirement that the provisions of the Act preserve the process of good faith consultation fundamental to collective bargaining. That is the bottom line.

108 Even where a s. 2(*d*) violation is established, that is not the end of the matter; limitations of s. 2(*d*) may be justified under s. 1 of the *Charter*, as reasonable limits demonstrably justified in a free and democratic society. This may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis.

109 In summary, s. 2(*d*) may be breached by government legislation or conduct that substantially interferes with the collective bargaining process. Substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(*d*). Conversely, less central matters may be changed more summarily, without violating s. 2(*d*). Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation, will s. 2(*d*) be breached.

(4) Application of the Law to the Facts at Bar

110 Having established that there is a right to bargain collectively under the protection of freedom of association in s. 2(*d*) of the *Charter*, and identified its scope, we must now apply it to the facts of this case. Ultimately, we conclude that ss. 6(2), 6(4) and 9 of the Act are unconstitutional because they infringe the right to collective bargaining protected under s. 2(*d*) and

cannot be saved under s. 1. The remainder of Part 2 of the Act (consisting of ss. 3, 4, 5, 7, 8 and 10) does not violate the right to collective bargaining and withstands constitutional scrutiny under s. 2(*d*).

(a) Does the Act Infringe the Right to Bargain Collectively Under Section 2(d) of the Charter?

111 The question before us is whether particular provisions of the Act violate the procedural right to collective bargaining by significantly interfering with meaningful collective bargaining. In this context, examples of acts that may have such an impact are: failure to consult, refusal to bargain in good faith, taking important matters off the table and unilaterally nullifying negotiated terms.

112 On the analysis proposed above, two questions suggest themselves. First, does the measure interfere with collective bargaining, in purpose or effect? Secondly, if the measure interferes with collective bargaining, is the impact, evaluated in terms of the matters affected and the process by which the measure was implemented, significant enough to substantially interfere with the associational right of collective bargaining, so as to breach the s. 2(*d*) right of freedom of association?

(i) Does the Act Interfere with Collective Bargaining?

113 Sections 4 to 10 of the Act have the potential to interfere with collective bargaining in two ways: first, by invalidating existing collective agreements and consequently undermining the past bargaining processes that formed the basis for these agreements; and second, by prohibiting provisions dealing with specified matters in future collective agreements and thereby undermining future collective bargaining over those matters. Future restrictions on the content of collective agreements constitute an interference with collective bargaining because there can be no real dialogue over terms and conditions that can never be enacted as part of the collective agreement.

114 We pause to reiterate briefly that the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion. This rebuts arguments made by the respondent that the Act does not interfere with collective bargaining because it does not explicitly prohibit health care employees from making collective representations. While the language of the Act does not technically prohibit collective representations to an employer, the right to collective bargaining cannot be reduced to a mere right to make representations. The necessary implication of the Act is that prohibited matters cannot be adopted into a valid collective agreement, with the result that the process of collective bargaining becomes meaningless with respect to them. This constitutes interference with collective bargaining.

115 A more detailed examination of Part 2 of the Act suggests that some of the provisions substantially interfere with the process of collective bargaining. They affect matters of substantial importance to employees, and they fail to safeguard the basic processes of collective bargaining. In proceeding through this analysis, it is critical to bear in mind the relationship between ss. 4 to 9 and s. 10 of the Act, which has the effect of voiding provisions of any collective agreement to the extent that these provisions are inconsistent with Part 2 of the Act.

1. Sections 4 and 5

116 Sections 4 and 5 deal with transfer and reassignment of employees. Their effect was summarized by Garson J. at trial:

> Sections 4 and 5 of [the Act] give health sector employers the right to reorganize the delivery of their services. Pursuant to these sections, employers have the right to transfer functions, services and employees to another health sector employer or within a worksite. The Regulation sets out employee transfer rights and obligations. For example employees must not be transferred outside of their geographic location without their consent. Employees who decline transfers in such circumstances are entitled to lay-off notice and the limited bumping rights available under the Act. Employees who decline transfers within their geographic region, however, will be deemed to have resigned 30 days after the refusal. [para. 38]

117 Sections 4 and 5 altered the provisions for transfer and reassignment, as they existed in some collective agreements prior to the Act. Specific rights in existing collective agreements that employees lost when ss. 4 and 5 were enacted included: a

requirement that the employer consider enumerated criteria in making hiring decisions, a guarantee that temporary assignments would not exceed four months, some protections for seniority, and the right to refuse a transfer if the employee has other employment options with the original employer under the collective agreement.

118 However, through the *Health Sector Labour Adjustment Regulation*, B.C. Reg. 39/2002, referred to in s. 4, protections similar in part to what the employees had under existing collective agreements were preserved. Notably, the regulation provided employees with a right to refuse being transferred outside of their geographic location without their consent, and a right to reasonable relocation expenses (see s. 2(1)(a) and (b)). These were substantially similar to entitlements that some employees previously had under their collective agreements. Thus although ss. 4 and 5 of the Act (together with s. 10) nullified some of the employee's entitlements under existing collective agreements, they appear to have preserved the substance of the central aspects of the provisions of existing collective agreements that dealt with those questions. We therefore conclude that ss. 4 and 5 may have had some impact on prior collective agreements, although the impact was not great.

119 Nevertheless, the effect of ss. 4 and 5, in conjunction with s. 10, is to render *future* collective bargaining over transfers and reassignments largely meaningless, since collective bargaining cannot alter the employer's right to make transfers and reassignments. Section 10 of the Act would render void any terms inconsistent with ss. 4 and 5. Because it is meaningless to bargain over an issue which cannot ever be included in a collective agreement, ss. 4 and 5, considered together with s. 10, interfere with future collective bargaining.

2. Section 6

120 Section 6(2) gives the employer increased power to contract out non-clinical services. Prior to the enactment of the Act, all collective agreements in the health care sector contained provisions restricting the right of management to contract out work. These provisions were inconsistent with s. 6(2) when that section was passed. The effect of s. 6(2), together with s. 10, is to invalidate these provisions in prior collective agreements. Further, s. 6(4), in conjunction with s. 10, invalidates any provision of a collective agreement that requires an employer to consult with a trade union prior to contracting outside the bargaining unit. For example, s. 17.12 of the Facilities Subsector Collective Agreement, which limits the ways in which the employer can contract out, is made void by ss. 6(4) and 10.

121 The combined effect of ss. 6(2), 6(4) and 10 is to forbid the incorporation into future collective agreements of provisions protecting employees from contracting out, or the inclusion of a provision requiring the employer to consult with the union. The prohibition on including certain provisions in a collective agreement related to contracting out is reflected in explicit language in s. 6(2), that "[a] collective agreement ... must not contain a provision" dealing with certain aspects of contracting out. The prohibition both repudiates past collective bargaining relating to the issue of contracting out and makes future collective bargaining over this issue meaningless. It follows that ss. 6(2) and 6(4) have the effect of interfering with collective bargaining.

122 Sections 6(3), 6(5) and 6(6) deal with a different but related issue, namely, the status of employees and the recognition of successorship rights where business is contracted out by the original employer. Section 6(3) sets out a more onerous definition of the employer-employee relationship under the *Labour Relations Code*, R.S.B.C. 1996, c. 244, making it less likely that a health sector employer will still be considered the "true" employer owing duties to the union and its members if work is contracted out. Sections 6(5) and 6(6) prevent employees from retaining their collective bargaining rights with the subcontractor, as they would otherwise have done under ss. 35 and 38 of the *Labour Relations Code* if work was contracted out.

123 Although some might see ss. 6(3), 6(5) and 6(6) as harsh provisions aimed solely at employees of the health care sector, these sections simply modify the protections available under the *Labour Relations Code* and do not deal with entitlements of employees based on collective bargaining. Consequently, ss. 6(3), 6(5) and 6(6) do not interfere with collective bargaining and do not infringe the protection over collective bargaining offered by s. 2(*d*).

3. Sections 7 and 8 — Job Security Programs

124 Sections 7 and 8 deal with job security programs. Section 7 abolishes the Employment Security and Labour Force Adjustment Agreement ("ESLA"), a program giving employees of the health sector one year of training, assistance and financial

support. This program was administered by the Healthcare Labour Adjustment Agency ("HLAA"), which is also abolished under the Act.

125 The ESLA did not arise out of collective bargaining but, rather, was imposed by the government on health sector employers pursuant to the recommendations of an inquiry committee. Since neither the ESLA nor the HLAA was the outcome of a collective bargaining process, modifying them cannot constitute an interference with past bargaining processes. Further, since the ESLA and HLAA rely heavily on the authority of the government for their existence, and are outside of the power of health sector employees and employers, there is no potential for future collective bargaining over matters relating to either the ESLA and HLAA. Since there can be no future collective bargaining relating to the ESLA or the HLAA, there can be no interference with future collective bargaining over these matters either. It follows that neither s. 7 nor s. 8 has the purpose or effect of interfering with collective bargaining, past or future.

4. Section 9 — Layoff and Bumping

126 Section 9, which applies only to collective agreements up until December 31, 2005, deals with layoff and bumping. During the currency of this section, collective agreements could not contain provisions dealing with certain aspects of layoff and bumping. With respect to layoff, no collective agreement could restrict the right of health care employers to lay off employees (s. 9(a)), nor require them to meet conditions before giving layoff notice (s. 9(b)), nor provide notice beyond the 60 days guaranteed under the *Labour Relations Code* (s. 9(c)). With respect to bumping, no collective agreement could contain a provision providing an employee with bumping options other than those set out in regulations pursuant to the Act (s. 9(d)).

127 Section 9 made collective bargaining over specified aspects of layoff and bumping meaningless and also invalidated parts of collective agreements dealing with these issues, up to December 31, 2005. This constituted interference with both past and future collective bargaining, albeit an interference limited to the period between the enactment of the Act and December 31, 2005.

128 We conclude that ss. 4, 5, 6(2), 6(4) and 9, in conjunction with s. 10, interfere with the process of collective bargaining, either by disregarding past processes of collective bargaining, by pre-emptively undermining future processes of collective bargaining, or both. This requires us to determine whether these changes substantially interfere with the associational right of the employees to engage in collective bargaining on workplace matters and terms of employment.

(ii) Was the Interference Substantial, so as to Constitute a Breach of Freedom of Association?

129 To amount to a breach of the s. 2(*d*) freedom of association, the interference with collective bargaining must compromise the essential integrity of the process of collective bargaining protected by s. 2(*d*). Two inquiries are relevant here. First, substantial interference is more likely to be found in measures impacting matters central to the freedom of association of workers, and to the capacity of their associations (the unions) to achieve common goals by working in concert. This suggests an inquiry into the nature of the affected right. Second, the manner in which the right is curtailed may affect its impact on the process of collective bargaining and ultimately freedom of association. To this end, we must inquire into the process by which the changes were made and how they impact on the voluntary good faith underpinning of collective bargaining. Even where a matter is of central importance to the associational right, if the change has been made through a process of good faith consultation it is unlikely to have adversely affected the employees' right to collective bargaining. Both inquiries, as discussed earlier, are essential.

1. The Importance of the Provisions

130 The provisions dealing with contracting out (ss. 6(2) and 6(4)), layoffs (ss. 9(a), 9(b) and 9(c)) and bumping (s. 9(d)) deal with matters central to the freedom of association. Restrictions in collective agreements limiting the employer's discretion to lay off employees affect the employees' capacity to retain secure employment, one of the most essential protections provided to workers by their union. Similarly, limits in collective agreements on the management rights of employers to contract out allow workers to gain employment security. Finally, bumping rights are an integral part of the seniority system usually established under collective agreements, which is a protection of significant importance to the union. "Seniority is one of the most important

and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process" (*U.E., Local 512 v. Tung-Sol of Canada Ltd.* (1964), 15 L.A.C. 161 (Ont. Arb.), at p. 162; see D. J. M. Brown and D. M. Beatty, *Canadian Labour Arbitration* (4th ed. (loose-leaf)), vol. 2, para. 6:0000, at p. 6-1). Viewing the Act's interference with these essential rights in the context of the case as a whole, we conclude that its interference with collective bargaining over matters pertaining to contracting out, layoff conditions and bumping constitutes substantial interference with the s. 2(*d*) right of freedom of association.

131 The same cannot be said of the transfers and reassignments covered under ss. 4 and 5 of the Act. These provisions, as discussed above, are concerned with relatively minor modifications to in-place schemes for transferring and reassigning employees. Significant protections remained in place. It is true that the Act took these issues off the collective bargaining table for the future. However, on balance ss. 4 and 5 cannot be said to amount to a substantial interference with the union's ability to engage in collective bargaining so as to attract the protection under s. 2(*d*) of the *Charter*.

2. The Process of Interference with Collective Bargaining Rights

132 Having concluded that the subject matter of ss. 6(2), 6(4) and 9 of the Act is of central importance to the unions and their ability to carry on collective bargaining, we must now consider whether those provisions preserve the processes of collective bargaining. Together, these two inquiries will permit us to assess whether the law at issue here constitutes significant interference with the collective aspect of freedom of association, which *Dunmore* recognized.

133 This inquiry refocuses our attention squarely and exclusively on how the provisions affect the process of good faith bargaining and consultation. In this case, we are satisfied that ss. 6(2), 6(4) and 9 interfere significantly with the ability of those bound by them to engage in the associational activity of collective bargaining.

134 It is true that the government was facing a situation of exigency. It was determined to come to grips with the spiralling cost of health care in British Columbia. This determination was fuelled by the laudable desire to provide quality health services to the people of British Columbia. Concerns such as these must be taken into account in assessing whether the measures adopted disregard the fundamental s. 2(*d*) obligation to preserve the processes of good faith negotiation and consultation with unions.

135 The difficulty, however, is that the measures adopted by the government constitute a virtual denial of the s. 2(*d*) right to a process of good faith bargaining and consultation. The absolute prohibition on contracting out in s. 6(2), as discussed, eliminates any possibility of consultation. Section 6(4) puts the nail in the coffin of consultation by making void any provisions in a collective agreement imposing a requirement to consult before contracting out. Section 9, in like fashion, effectively precludes consultation with the union prior to laying off or bumping.

136 We conclude that ss. 6(2), 6(4) and 9 of the legislation constitute a significant interference with the right to bargain collectively and hence violate s. 2(*d*) of the *Charter*. The remaining issue is whether these infringements can be saved under s. 1 of the *Charter*, as limits that are reasonable and justifiable in a free and democratic society.

(b) Are the Violations of Section 2(d) Justified Under Section 1?

137 Section 1 provides:

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

138 The analysis for assessing whether or not a law violating the *Charter* can be saved as a reasonable limit under s. 1 is set out in *Oakes*. A limit on *Charter* rights must be prescribed by law to be saved under s. 1. Once it is determined that the limit is prescribed by law, then there are four components to the *Oakes* test for establishing that the limit is reasonably justifiable in a free and democratic society (*Oakes*, at pp. 138-40). First, the objective of the law must be pressing and substantial. Second, there must be a rational connection between the pressing and substantial objective and the means chosen by the law to achieve the objective. Third, the impugned law must be minimally impairing. Finally, there must be proportionality between the objective

and the measures adopted by the law, and more specifically, between the salutary and deleterious effects of the law (*Oakes*, at p. 140; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), at p. 889).

139 The s. 1 analysis focuses on the particular context of the law at issue. Contextual factors to be considered include the nature of the harm addressed, the vulnerability of the group protected, ameliorative measures considered to address the harm, and the nature and importance of the infringed activity: *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (S.C.C.), and *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33 (S.C.C.). This said, the basic template of *Oakes* remains applicable, and each of the elements required by that test must be satisfied. The government bears the onus of establishing each of the elements of the *Oakes* test and hence of showing that a law is a reasonable limit on *Charter* rights on a balance of probabilities (see *Oakes*, at pp. 136-37).

140 In this case, the infringement of the appellants' right to bargain collectively is unquestionably prescribed by law, since the interference with collective bargaining is set out in legislation. The question is whether the remaining elements of the *Oakes* test are made out, such that the law is a reasonable limit on the appellants' right to collective bargaining under s. 2(*d*).

141 We find that the intrusions on collective bargaining represented by ss. 6(2), 6(4) and 9 are not minimally impairing, and therefore cannot be saved as a reasonable and justifiable limit in a free and democratic society. We turn now to the *Oakes* test to explain this conclusion.

(i) Does the Act Pursue a Pressing and Substantial Objective?

142 The first step of the *Oakes* test requires the government to establish that the limit on *Charter* rights was undertaken in pursuit of an objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*Big M Drug Mart*, at p. 352). At minimum, the objective must relate to concerns which are pressing and substantial in a free and democratic society.

143 The government set out its objectives for enacting the Act as follows:

> The objective of the *Act* is to improve the delivery of health care services by enabling health authorities to focus resources on the delivery of clinical services, by enhancing the ability of health employers and authorities to respond quickly and effectively to changing circumstances, and by enhancing the accountability of decision-makers in public health care.
>
> (Respondent's Factum, at para. 144)

144 These are pressing and substantial objectives. We agree with the respondent that the health care crisis in British Columbia is an important contextual factor in support of the conclusion that these objectives are pressing and substantial. (R.F., at para. 141). We also agree with the respondent that this Court's recent ruling in *Chaoulli c. Québec (Procureur général)*, [2005] 1 S.C.R. 791, 2005 SCC 35 (S.C.C.), that governments are constitutionally obliged to provide public health care of a reasonable standard within a reasonable time, at least in some circumstances, reinforces the importance of the objectives, particularly of the main objective of delivering improved health care services (R.F., at para. 141).

145 The appellants argue that the objectives behind the legislation are not pressing and substantial on two bases. First, they contend that the objective is framed too broadly and is not linked to the specific harm that the legislation is aimed at addressing. Second, they argue that the evidence suggests that the true objective behind the Act is to increase the rights of management, and to save costs, which constitute a suspect basis for finding a pressing and substantial objective. (See *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66 (S.C.C.), at para. 72, and *Martin v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, 2003 SCC 54 (S.C.C.), at para. 109).

146 We reject the argument that the government's objective is stated too broadly. The government states its objective in terms of one main objective (improving health care delivery), pursued by way of several sub-objectives (enabling health authorities to focus resources on clinical services, enhancing the ability of health employers and authorities to respond quickly to changing circumstances, and enhancing the accountability of decision-makers in public health care). Even if it is accepted that the main

objective is somewhat broad, the more precise aims of the government are made clear in the sub-objectives. Therefore, the objective is not stated too broadly.

147 The appellants' contention that cutting costs and increasing the power of management are also objectives of the legislation has merit. The record indicates that at least part of the government's intention in enacting the Act was to cut costs and increase the rights of management. (A.F. (Reply), at paras. 8 and 14). To the extent that the objective of the law was to cut costs, that objective is suspect as a pressing and substantial objective under the authority in *N.A.P.E.* and *Martin*, indicating that "courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints" (*N.A.P.E.*, at para. 72, see also *Martin*). Nor, on the facts of this case, is it clear that increasing management power is an objective that is "pressing and substantial in a free and democratic society". However, this does not detract from the fact that the government has established other pressing and substantial objectives.

(ii) Is There a Rational Connection Between the Means Adopted by the Act and the Pressing and Substantial Objectives?

148 The second stage of the *Oakes* analysis requires the government to establish that there is a rational connection between the pressing and substantial objective and the means chosen by the government to achieve the objective. In other words, the government must establish, on the balance of probabilities, that the means adopted in the Act are rationally connected to achieving its pressing and substantial objectives. This element of the *Oakes* test has been described in this Court as "not particularly onerous" (see *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 (S.C.C.), at para. 228, cited in *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835, 2003 SCC 34 (S.C.C.), at para. 34).

149 Broadly speaking, the means adopted by the Act include: modifying the scheme of bumping rights, winding up the HLAA and ESLA, and loosening restrictions on the employer's capacity to contract out non-clinical services, transfer and reassign employees, and lay off employees. Although the evidence does not conclusively establish that the means adopted by the Act achieve the government's objectives, it is at least logical and reasonable to conclude so. We therefore move to the determinative inquiry of minimal impairment.

(iii) Does the Act Minimally Impair the Charter Rights of the Appellants?

150 At the third stage of the *Oakes* test, the court is directed to inquire whether the impugned law minimally impairs the *Charter* right (*Oakes*, at p. 139, citing *Big M Drug Mart*, at p. 352). The government need not pursue the least drastic means of achieving its objective. Rather, a law will meet the requirements of the third stage of the *Oakes* test so long as the legislation "falls within a range of reasonable alternatives" which could be used to pursue the pressing and substantial objective (*RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), at para. 160).

151 We conclude that the requirement of minimal impairment is not made out in this case. The government provides no evidence to support a conclusion that the impairment was minimal. It contents itself with an assertion of its legislative goal — "to enhance management flexibility and accountability in order to make the health care system sustainable over the long term", — adding that "the *Act* is a measured, reasonable, and effective response to this challenge, and ... satisfies the minimal impairment requirement" (R.F., at para. 147). In the absence of supportive evidence, we are unable to conclude that the requirement of minimal impairment is made out in this case.

152 The provisions at issue bear little evidence of a search for a minimally impairing solution to the problem the government sought to address.

153 Section 6(2) forbids any provision "that in any manner restricts, limits or regulates the right of a health sector employer to contract outside of the collective agreement". It gives the employers absolute power to contract out of collective agreements. There is no need or incentive to consult with the union or the employees before sending the work they normally perform to an outside contractor. To forbid any contracting out clause completely and unconditionally strikes us as not minimally impairing. A more refined provision, for example, permitting contracting out after meaningful consultation with the union, might be envisaged.

154 Section 6(4) makes void a provision in a collective agreement to consult before contracting out. The bite of s. 6(4) is arguably small; given the employer's absolute power to contract out under s. 6(2), there would appear to be no reason for an employer to agree to such a clause in any event. However, insofar as it hammers home the policy of no consultation under any circumstances, it can scarcely be described as suggesting a search for a solution that preserves collective bargaining rights as much as possible, given the legislature's goal.

155 Section 9 evinces a similar disregard for the duty to consult the union, in this case before making changes to the collective agreement's layoff and bumping rules. It is true that s. 9 was temporally limited, being in force only to December 31, 2005. However, this is scant comfort to employees who may have been laid off or bumped before this date, without the benefit of a union to represent them on the issue.

156 An examination of the record as to alternatives considered by the government reinforces the conclusion that the impairment in this case did not fall within the range of reasonable alternatives available to the government in achieving its pressing and substantial objective of improving health care delivery. The record discloses no consideration by the government of whether it could reach its goal by less intrusive measures, and virtually no consultation with unions on the matter.

157 Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be useful to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to adopt its preferred approach. The Court has looked at pre-legislative considerations in the past in the context of minimal impairment. This is simply evidence going to whether other options, in a range of possible options, were explored.

158 In this case, the only evidence presented by the government, including the sealed evidence, confirmed that a range of options were on the table. One was chosen. The government presented no evidence as to why this particular solution was chosen and why there was no consultation with the unions about the range of options open to it.

159 The evidence establishes that there was no meaningful consultation prior to passing the Act on the part of either the government or the HEABC (as employer). The HEABC neither attempted to renegotiate provisions of the collective agreements in force prior to the adoption of Bill 29, nor considered any other way to address the concerns noted by the government relating to labour costs and the lack of flexibility in administrating the health care sector. The government also failed to engage in meaningful bargaining or consultation prior to the adoption of Bill 29 or to provide the unions with any other means of exerting meaningful influence over the outcome of the process (for example, a satisfactory system of labour conciliation or arbitration). Union representatives had repeatedly expressed a desire to consult with government regarding specific aspects of the Act, and had conveyed to the government that the matters to be dealt with under the Act were of particular significance to them. Indeed, the government had indicated willingness to consult on prior occasions. Yet, in this case, consultation never took place. The only evidence of consultation is a brief telephone conversation between a member of the government and a union representative within the half hour before the Act (then Bill 29) went to the legislature floor and limited to informing the union of the actions that the government intended to take.

160 This was an important and significant piece of labour legislation. It had the potential to affect the rights of employees dramatically and unusually. Yet it was adopted with full knowledge that the unions were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government's choices.

161 We conclude that the government has not shown that the Act minimally impaired the employees' s. 2(*d*) right of collective bargaining. It is unnecessary to consider the proportionality between the pressing and substantial government objectives and the means adopted by the law to achieve these objectives. We find that the offending provisions of the Act (ss. 6(2), 6(4) and 9) cannot be justified as reasonable limits under s. 1 of the *Charter* and are therefore unconstitutional.

B. Does the Act Violate Section 15 Equality Rights?

162 Having established that ss. 6(2), 6(4) and 9 are unconstitutional on the basis that they infringe the right to bargain collectively in s. 2(*d*), we must consider whether the remainder of Part 2 of the Act violates the guarantee of equality under s. 15 of the *Charter*.

163 Section 15(1) of the *Charter* provides:

> **15**. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

164 At issue is whether the Act violates s. 15 of the *Charter*, and more specifically, that the Act discriminates against health care workers based on a number of interrelated enumerated and analogous grounds including: sex, employment in the health care sector, and status as non-clinical workers.

165 The courts below found no discrimination contrary to s. 15 of the *Charter*. We would not disturb these findings. Like the courts below, we conclude that the distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination under s. 15 of the *Charter*. The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that the Act reflects the stereotypical application of group or personal characteristics. Without minimizing the importance of the distinctions made by the Act to the lives and work of affected health care employees, the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here.

166 Accordingly, we see no reason to depart from the view of the trial judge that these effects on health care workers, however painful, do not, on the evidence adduced in this case, constitute discrimination under s. 15 of the *Charter*.

167 In summary, we find that the impugned Act does not violate s. 15 of the *Charter*. Therefore, there is no need to consider potential reasonable justification under s. 1.

IV. Conclusions and Disposition

168 For the above reasons, we allow the appeal in part, with costs. We conclude that ss. 6(2), 6(4) and 9 of the Act are unconstitutional. However, we suspend this declaration for a period of 12 months to allow the government to address the repercussions of this decision. We would answer the constitutional questions as follows:

> 1. Does Part 2 of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, in whole or in part, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?
>
> Yes, in part. Sections 6(2), 6(4) and 9 infringe s. 2(*d*).
>
> 2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
>
> No.
>
> 3. Does Part 2 of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, in whole or in part, infringe s. 15 of the *Canadian Charter of Rights and Freedoms*?
>
> No.
>
> 4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

***Deschamps J.*:**

169 The future of our health care system is a matter of serious concern across the country. Sharply escalating health care costs combined with an aging population have spurred governments to attempt to find new ways to ensure that health care services will be available to those who need them. When, in doing so, a government makes a policy decision that infringes a *Charter* right, it is required to justify its choice as a reasonable limit on the protected right.

170 I am in general agreement with the Chief Justice and LeBel J. concerning the scope of freedom of association under s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* in the collective bargaining context. I also agree that no claim of discrimination contrary to s. 15 of the *Charter* has been established. However, I part company with my colleagues over their analysis relating to both the infringement of s. 2(*d*) and the justification of the infringement under s. 1 of the *Charter*.

171 The interpretation that the Court is now giving to s. 2(*d*) of the *Charter* is a major step forward in the recognition of collective activities. However, the importance of this advance should not overshadow the justification analysis under s. 1 of the *Charter*. Throughout the litigation, the government of British Columbia has maintained that in the event that Part 2 of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2 ("Act"), is found to have infringed the *Charter*, the infringement will be justified under s. 1. I find that ss. 4, 5, 6(2), 6(4) and 9 of the Act infringe s. 2(*d*) of the *Charter*, but in my view only s. 6(4) of the Act is not demonstrably justified in a free and democratic society.

I. Relevant Constitutional and Statutory Provisions

172 It will be helpful to recall the constitutional and statutory provisions that are at issue:

Canadian Charter of Rights and Freedoms

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

2. Everyone has the following fundamental freedoms:

. . . . .

(d) freedom of association.

Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2

Right to reorganize service delivery

4 (1) A health sector employer has the right to reorganize the delivery of its services by transferring functions or services within a worksite or to another worksite within the region or to another health sector employer, including, but not limited to, partnerships or joint ventures with other health sector employers or subsidiaries.

(2) A health sector employer has the right to transfer

(a) functions or services that are to be performed or provided by another health sector employer under subsection (1) to that other health sector employer, and

(b) functions or services that are to be performed or provided at another worksite in the region to that other worksite.

(3) If a function or service is transferred to another health sector employer or within or to a worksite under this section, an employee who performs that function or service may be transferred to that employer or within or to that worksite in accordance with the regulations.

Multi-worksite assignment rights

5 A health sector employer

(a) has a right to assign an employee within or to any worksite of that employer or to a worksite operated by another health sector employer for a period not exceeding that set out in the regulations and under conditions specified in the regulations, and

(b) must post any position pursuant to the collective agreement if the employer requires the successful candidate for that position to work on a regular ongoing basis at more than one worksite of that employer as a condition of employment in that position.

Contracting outside of the collective agreement for services

6 (1) In this section:

"acute care hospital" means a hospital or part of a hospital designated by regulation;

"designated health services professional" means

(a) a nurse licensed under the *Nurses (Registered) Act*,

(b) a person who is a member of a health profession designated under the *Health Professions Act* on the date on which this section comes into force, or

(c) a person in an occupation or job classification designated by regulation;

"non-clinical services" means services other than medical, diagnostic or therapeutic services provided by a designated health services professional to a person who is currently admitted to a bed in an inpatient unit in an acute care hospital, and includes any other services designated by regulation.

(2) A collective agreement between HEABC and a trade union representing employees in the health sector must not contain a provision that in any manner restricts, limits or regulates the right of a health sector employer to contract outside of the collective agreement for the provision of non-clinical services.

(3) The labour relations board or an arbitrator appointed under the Code or under a collective agreement must not declare a person who

(a) provides services under a contract between a health sector employer and an employer that is not a health sector employer, and

(b) is an employee of the employer that is not a health sector employer

to be an employee of the health sector employer unless the employee is fully integrated with the operations and under the direct control of the health sector employer.

(4) A provision in a collective agreement requiring an employer to consult with a trade union prior to contracting outside of the collective agreement for the provision of non-clinical services is void.

(5) A collective agreement does not bind, and section 35 of the Code does not apply to, a person who contracts with a health sector employer.

(6) A health sector employer must not be treated under section 38 of the Code as one employer with any other health sector employer or a contractor.

Employment Security and Labour Force Adjustment Agreement

7 (1) A party to ESLA is not required to carry out a term of ESLA on or after the coming into force of this section.

(2) A party to a collective agreement is not required to carry out any part of a provision that is based on or derived from ESLA in the collective agreement.

(3) ESLA does not apply for the purposes of the interpretation or application of the collective agreement.

Healthcare Labour Adjustment Society

8 (1) In this section, **"HLAA"** means The Healthcare Labour Adjustment Society of British Columbia incorporated under the *Society Act*.

(2) The minister may appoint an administrator for HLAA.

(3) The administrator appointed under subsection (2) replaces the directors of HLAA and may exercise all the rights and duties of directors under the *Society Act*.

(4) The administrator must ensure that HLAA's programs and activities operate only to the extent necessary to honour obligations to employees of health sector employers who were laid off under ESLA and to honour existing financial commitments made to health sector or other employers for reimbursement under one of HLAA's programs.

(5) The minister may direct the administrator to offer programs and activities beyond those in subsection (4).

(6) The administrator is responsible for winding up HLAA in accordance with the *Society Act*.

(7) The administrator may wind up HLAA when its obligations under subsections (4) and (5) are complete.

(8) The administrator must complete his or her duties under this section within one year from the date on which he or she is appointed.

(9) Any money remaining in HLAA at the time it is wound up must be paid into the Health Special Account referred to in the *Health Special Account Act*.

Layoff and bumping

9 For the period ending December 31, 2005, a collective agreement must not contain a provision that

(a) restricts or limits a health sector employer from laying off an employee,

(b) subject to paragraph (c), requires a health sector employer to meet conditions before giving layoff notice,

(c) requires a health sector employer to provide more than 60 days' notice of layoff to an employee directly or indirectly affected and to the trade union representing the employee, or

(d) provides an employee with bumping options other than the bumping options set out in the regulations.

Part prevails over collective agreements

10 (1) A collective agreement that conflicts or is inconsistent with this Part is void to the extent of the conflict or inconsistency.

(2) A provision of a collective agreement that

(a) requires a health sector employer to negotiate with a trade union to replace provisions of the agreement that are void as a result of subsection (1), or

(b) authorizes or requires the labour relations board, an arbitrator or any person to replace, amend or modify provisions of the agreement that are void as a result of subsection (1),

is void to the extent that the provision relates to a matter prohibited under this Part.

II. Analysis

173 I will begin by discussing s. 2(*d*) of the *Charter* in the context of legislation that interferes with collective bargaining where the government is not acting as a party to a collective bargaining process but is, as in this case, performing its legislative function. I will then examine the alleged infringement of s. 2(*d*) in the case at bar. Next, turning to s. 1 of the *Charter*, I will review the contextual approach, after which I will assess the impugned legislative measures.

A. Freedom of Association and Collective Bargaining Under the Charter

174 I am in agreement with the following key propositions stated by the majority concerning the scope of s. 2(*d*) of the *Charter*:

1) The constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment;

2) The right is to a process of collective bargaining — it does not guarantee a certain substantive or economic outcome or access to any particular statutory regime; and

3) The right places constraints on the exercise of legislative powers in respect of the collective bargaining process.

175 However, I have concerns with the majority's test for determining whether a government measure amounts to an infringement of s. 2(*d*). According to my colleagues, the test involves two inquiries, the first into the importance of the matter for the union and the employees, and the second into the impact of the measure on the collective right to good faith negotiation and consultation. They summarize it as follows (para. 93):

> Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

176 The majority focus on "substantial" interference with a collective bargaining process and purport to do so on the basis of this Court's decision in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94 (S.C.C.), (majority reasons at paras. 19, 35 and 90). However, the "substantial interference" standard cannot be adopted in this case simply because it was mentioned in *Dunmore*. It is necessary to look closely at the principles applied in that case. The concept of "substantial interference" was introduced by Bastarache J. in *Dunmore* because that case dealt with whether the government had a positive obligation to extend to a claimant the benefits of a particular statutory regime from which he or she was excluded. Requiring "substantial interference" was presented as one of the considerations circumscribing "the possibility of challenging

underinclusion under s. 2 of the *Charter*" (para. 24). The term referred to the heavier burden on a claimant attempting to make a case of underinclusion that had been established by the Court in *Haig v. R.*, [1993] 2 S.C.R. 995 (S.C.C.), *Native Women's Assn. of Canada v. R.*, [1994] 3 S.C.R. 627 (S.C.C.), and *Delisle c. Canada (Sous-procureur général)*, [1999] 2 S.C.R. 989 (S.C.C.). The use of the "substantial interference" criterion is explained in para. 25 of *Dunmore*. The following excerpt captures its essence:

> In my view, the evidentiary burden in these cases is to demonstrate that exclusion from a statutory regime permits a substantial interference with the exercise of protected s. 2(*d*) activity. [Emphasis omitted; para. 25]

177 Since the present appeal does not involve a claim of underinclusive legislation, but an obligation that the state not interfere in a collective bargaining process, I cannot agree with imposing a "substantial interference" standard.

178 Moreover, the first inquiry of the majority's test ("the importance of the matter affected to the process of collective bargaining" (para. 93)) is focused on the substance of the workplace issue rather than on interference with the collective bargaining process, which is what the constitutionally guaranteed right protects against. Since there is no constitutional protection for the substantive outcome of a collective bargaining process, I consider that the matter affected is not the threshold issue when a claim is being evaluated under s. 2(*d*) of the *Charter*. Rather, the primary focus of the inquiry should be whether the legislative measures infringe the ability of workers to act in common in relation to workplace issues. However, I recognize that the significance of the matter may be relevant. In some cases, it may be helpful to consider whether the matter affected is of so little significance that the right to a collective bargaining process is not infringed and, accordingly, the purpose of freedom of association is not engaged. Nevertheless, I remain unconvinced that the importance of the workplace issue should "play a key role" in the infringement analysis.

179 With respect to the second inquiry ("the manner in which the measure impacts on the collective right to good faith negotiation and consultation" (para. 93)), I am concerned with the way this test is restated and applied in the majority's reasons. For example, rather than focussing on the impact on the right, the majority refer to "the manner in which the government measure is accomplished" (para. 109), "the process by which the measure was implemented" (para. 112) and "the process by which the changes were made" (para. 129). With respect, these formulations imply a duty to consult that is inconsistent with the proposition that "[l]egislators are not bound to consult with affected parties before passing legislation" (para. 157), one with which I fully agree. Another concern is that the majority consider the "circumstances" surrounding the adoption of the legislative provisions, such as the spiralling health care costs faced by the government, at the stage of determining whether s. 2(*d*) is infringed. In my view, those considerations are entirely relevant to the s. 1 justification analysis, but are irrelevant where the issue is whether freedom of association is infringed.

180 Given these concerns, I find it more appropriate to rely on a somewhat different test than the one suggested by the majority, although the test I propose is built on the same foundation as theirs (see majority's reasons, para. 96). I am adjusting their test to take into consideration the fact that what is in issue is a positive infringement, not underinclusiveness, and that what is under scrutiny is legislation, not government action. My test can be stated as follows:

> Laws or state actions that prevent or deny meaningful discussion and consultation about significant workplace issues between employees and their employer may interfere with the activity of collective bargaining, as may laws that unilaterally nullify negotiated terms on significant workplace issues in existing collective agreements.

181 This test still involves two inquiries. The first is into whether the process of negotiation between employers and employees or their representatives is interfered with in any way, and the second into whether the interference concerns a significant issue in the labour relations context. An approach under which interference with the process is considered first has the merit of focussing attention on the constitutionally protected right itself, rather than having the court indirectly protect the substance of clauses in collective agreements. Only if the court determines that there has been interference with a process of negotiation should it turn to the second inquiry and consider whether the issues involved are significant, in order to ensure that the scope of s. 2(*d*) is not interpreted so as to exceed its purpose. In this way, not all workplace issues, but only significant ones, are relevant to s. 2(*d*). I agree with the majority that the "protection does not cover all aspects of'collective bargaining', as that term is understood in the

statutory labour relations regimes that are in place across the country" (para. 19). There may be matters covered by collective agreements that do not warrant constitutional protection — it is not every workplace issue that triggers s. 2(*d*) protection, but only those of significance.

182 Thus, legislation that alters terms of a collective agreement bearing on significant workplace issues, or that precludes negotiations on significant workplace issues that would normally be negotiable, will interfere with the collective bargaining process. Such legislative measures nullify negotiations that have already taken place or prevent future negotiations on the topics they cover.

183 Even though I disagree with significant aspects of the majority's test for determining whether an infringement has occurred, I agree, for the reasons set out below, that certain provisions of the Act infringe s. 2(*d*) of the *Charter*.

B. Infringement of Section 2(d) of the Charter

184 This case concerns a claim that legislation enacted by the government of British Columbia interferes with the collective bargaining process, both because it unilaterally nullifies significant terms in existing collective agreements and because it precludes future collective bargaining on certain issues. The relevant collective bargaining process in this case involves, on the one hand, the Health Employers Association of British Columbia ("HEABC"), whose members are both public and private sector employers, and, on the other hand, health care unions. I will deal first with the provisions that do not infringe s. 2(*d*) of the *Charter*, before turning to those that do.

185 Sections 3 and 6(1) of the Act, which are definition provisions, and s. 10, which is an interpretative clause that operates only in conjunction with other provisions, do not need to be reviewed independently. Moreover, I agree with the majority that ss. 6(3), 6(5) and 6(6) of the Act do not infringe s. 2(*d*) of the *Charter*. They do not interfere with the collective bargaining process, but merely modify entitlements under a statutory scheme, which is within the legislature's authority. Similarly, for the reasons given by the majority, I agree that ss. 7 and 8 of the Act, which deal with statutory job security programs, do not infringe s. 2(*d*) of the *Charter*. They do not relate to a collective bargaining process, past or future.

186 Sections 4 and 5 of the Act deal with the transfer and assignment of employees. Certain existing collective agreement provisions establish when an employee may refuse a transfer and how assignments are to take place. Similarly, existing collective agreements contain provisions relating to contracting out, which is dealt with in ss. 6(2) and 6(4) of the Act, and to layoffs and bumping, which are dealt with in s. 9 of the Act.

187 Therefore, ss. 4 and 5 of the Act (in conjunction with s. 10) nullify some existing terms of collective agreements and limit the scope of future negotiations; they prevent workers from engaging in associational activities on transfers and assignments. The majority appear to consider such provisions as importing "relatively innocuous administrative changes" (para. 12). However, I have some difficulty with discounting the importance of these working conditions by regarding them as insignificant. I prefer to consider the impact of the *Health Sector Labour Adjustment Regulation*, B.C. Reg. 39/2002 ("Regulation") at the justification stage. Accordingly, I find that these provisions infringe s. 2(*d*) of the *Charter*.

188 I agree with the majority that ss. 6(2) and 6(4) of the Act (in conjunction with s. 10) explicitly "repudiat[e] past collective bargaining relating to the issue of contracting out and mak[e] future collective bargaining over this issue meaningless" (para. 121). These provisions nullify past collective bargaining relating to contracting out, thereby rendering the process nugatory, and preclude future collective bargaining on the issue. They concern a significant issue of employment security, and negotiating such issues is one of the purposes of associational activities in the workplace. I also agree with the majority that s. 9 of the Act (in conjunction with s. 10) interferes with collective bargaining in that it makes "collective bargaining over specified aspects of layoff and bumping meaningless and also invalidate[s] parts of collective agreements dealing with these issues" (para. 127). Section 9 deals with significant workplace issues related to the purpose of s. 2(*d*): layoff provisions give union members a degree of support at times when their livelihoods may be in jeopardy; bumping rights implicate seniority rights, and seniority is a cornerstone of employees' rights in most collective agreements. Therefore, I find that ss. 6(2), 6(4) and 9 also infringe s. 2(*d*) of the *Charter*.

189 Having stated my view regarding the infringement of s. 2(*d*) of the *Charter* in this case, I will now discuss the applicable legal framework for the s. 1 analysis.

C. Contextual Approach Required in the Section 1 Analysis

190 Over the past decade, my colleague Bastarache J. has been at the forefront of articulating the basis for and operation of the contextual approach to s. 1 in a trilogy of judgments of this Court that have garnered majority support. This jurisprudence is a major contribution towards a full and proper understanding of the s. 1 analysis. Several considerations are important to highlight in reviewing this case law.

191 First, in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (S.C.C.), at paras. 87-88, Bastarache J. described the importance of considering contextual factors:

> The analysis under s. 1 of the *Charter* must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes*, [1986] 1 S.C.R. 103, requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.
>
> Characterizing the context of the impugned provision is also important in order to determine the type of proof which a court can demand of the legislator to justify its measures under s. 1. ...

192 Second, Bastarache J. recently summarized the relevant contextual factors discussed in *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33 (S.C.C.), and *R. v. Bryan*, 2007 SCC 12 (S.C.C.), as follows: "(i) the nature of the harm and the inability to measure it, (ii) the vulnerability of the group protected, (iii) subjective fears and apprehension of harm, and (iv) the nature of the infringed activity": *Bryan*, at para. 10. He had noted in *Thomson Newspapers* (at para. 90) that these factors "do not represent categories of standard of proof which the government must satisfy, but are rather factors which go to the question of whether there has been a demonstrable justification". It is not surprising that the factors considered in this trilogy of cases were so similar, since all the cases in the trilogy concerned alleged infringements of freedom of expression in the law relating to federal elections. I am of the view that, in cases on topics other than freedom of expression, a contextual approach necessarily implies that the factors may be adjusted to take into consideration differences between claims of justification under s. 1 of the *Charter*.

193 Third, in this Court's recent decision in *Bryan*, Bastarache J., again writing for the majority, explained that "only once the objectives of the impugned provision are stated can we turn to an examination of the context of those objectives to determine the nature and sufficiency of the evidence required under s. 1" (para. 11).

194 Fourth, in *Harper*, Bastarache J. explicitly noted that there is a link between the contextual factors and the degree of deference owed to the government in evaluating s. 1 of the *Charter*:

> On balance, the contextual factors favour a deferential approach to Parliament in determining whether the third party advertising expense limits are demonstrably justified in a free and democratic society. Given the difficulties in measuring this harm, a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient. [para. 88]

195 Therefore, the trilogy underlines several features of the contextual approach. First, context infuses every aspect of the proportionality stage of the framework developed in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), thereby avoiding tunnel vision in the analysis. Second, as the context varies with the nature of the claims, the factors need to be adapted accordingly. Third, the objective has to be identified before turning to the context; only then will it be possible to determine the nature of the evidence

that is required and whether the evidence that has been adduced is sufficient. Finally, the contextual factors have a specific effect on the overall degree of deference that will be afforded to the government in determining whether the measures it has adopted are demonstrably justified in a free and democratic society.

196 While the majority agree that a contextual approach to s. 1 is appropriate, they do not apply it in their justification analysis. In my view, the majority do not give context the importance it deserves. Instead, my colleagues adopt an axiological approach that does not lend itself to the justification analysis: see, e.g., S. Bernatchez, "La procéduralisation contextuelle et systémique du contrôle de constitutionnalité à la lumière de l'affaire *Sauvé*" (2006), 20 *N.J.C.L.* 73, at pp. 87-90. This is apparent from their sweeping statements concerning possible justification claims, such as the following (at para. 108):

> Even where a s. 2(*d*) violation is established, that is not the end of the matter; limitations of s. 2(*d*) may be justified under s. 1 of the *Charter*, as reasonable limits demonstrably justified in a free and democratic society. This may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis. [Emphasis added.]

With respect, it is my view that these statements prejudge the s. 1 analysis by limiting justification to exceptional and temporary measures. This is inconsistent with the Court's s. 1 jurisprudence. It is the first time that a standard of exceptional and temporary circumstances has been applied to justification.

D. Contextual Analysis

197 In the trilogy of *Thomson Newspapers, Harper* and *Bryan*, this Court refined the criteria of the contextual approach under s. 1 of the *Charter*, emphasizing the notion that "courts ought to take a natural attitude of deference toward Parliament when dealing with election laws" (*Bryan*, at para. 9). It is now incumbent on us in the instant case to identify the relevant criteria and to adapt them to a context in which health care legislation is at issue. As was mentioned in *Bryan*, we must begin by identifying the objectives of the impugned provisions before turning to the specific contextual factors.

(1) Objectives of the Impugned Provisions

198 In its factum, the government states the objectives it was pursuing as follows: "to respond to growing demands on services, to reduce structural barriers to patient care, and to improve planning and accountability, so as to achieve long term sustainability" (para. 4). Two restructuring priorities flowed from these objectives: "adopting new health service models to maintain the level and quality of publicly delivered health services within the new financial mandate, and improving value for money" (para. 5).

199 In addition to these general objectives, the record provides further insights into the objectives of the specific impugned provisions. All of them were designed to "[p]rovide a more seamless and flexible health care delivery system" and "[d]evelop more cost-effective and efficient ways of delivering health services in order to improve patient care and reduce costs" (Respondent's Record, at pp. 52, 55, 59 and 84). Facilitating the reorganization of health care service delivery was a specific goal of ss. 4 (transfers) and 9 (layoff and bumping) (R.R., at pp. 52 and 84). One objective of s. 5 of the Act (multi-worksite assignment rights) was "improved use of human resources ... [in order] to deal with fluctuations in workload" (R.R., at p. 55). Finally, the contracting-out provisions in s. 6 of the Act were intended to "[a]llow fair competition on hospital contracts and provide better value to taxpayers" (R.R., at p. 59).

200 I agree with the majority that the objectives of Part 2 of the Act are important ones and would add that the objectives of the impugned provisions are also important. The health care system is under serious strain and is, as will be discussed below, facing a crisis of sustainability. There is little hope that it can survive in its current form. Patients depend on the availability of health care services of a reasonable standard within a reasonable time: *Chaoulli c. Québec (Procureur général)*, [2005] 1 S.C.R. 791, 2005 SCC 35 (S.C.C.), at para. 112. Having discussed the objectives of Part 2 of the Act and the specific impugned provisions, I will now consider the relevant contextual factors in detail.

(2) Contextual Factors

201 Several contextual factors have been advanced for the s. 1 analysis. I will apply the guiding principles that were adopted in the elections trilogy, making adjustments to adapt them to the health care context.

(a) Nature of the Harm

202 In *Harper*, the nature of the harm that the impugned legislation was intended to address was electoral unfairness (para. 79). In the instant case, the nature of the harm that Part 2 of the Act is designed to address is a crisis of sustainability in health care. There is substantial evidence in the record that the delivery of services in British Columbia's health care system was unsustainable at the time the Act was introduced and that the Act was part of the government's approach in attempting to address the situation.

203 A growing and aging population, costly emerging high-end technology and drugs, and complexity in disease patterns have caused an explosion in the demand for health services in British Columbia and elsewhere in Canada. In British Columbia, health care costs have been rising three times faster than the rate of economic growth in the province. In a submission to the International Labour Office, the government referred to "unsustainable pressures on the budget that needed to be addressed", given that "health and education expenditures by the province represented 64.4 per cent of the total expenditure in 2001-02": International Labour Office, Committee on Freedom of Association, Report No. 330, Cases Nos. 2166, 2173, 2180 and 2196, "Complaints against the Government of Canada concerning the Province of British Columbia", *I.L.O. Official Bulletin*, vol. LXXXVI, 2003, Series B, No. 1, at para. 267. As a result, the government submitted that:

> The health care system in British Columbia is facing a crisis of sustainability, as the costs of health care will continue to rise, and a crisis of service, as the demands on the system exceed its capacity to provide service.
>
> (R.R., at p. 1040)

204 By far the largest share of health care costs are those relating to labour: "[a]pproximately 80% of healthcare costs are labour costs — the majority being unionized labour costs" (Appellants' Supplementary Record, at p. 7). In breaking these costs down further, the government presented evidence that health support workers in British Columbia receive higher wages than in other jurisdictions:

> Support workers are particularly highly paid in comparison with their counterparts in other provinces, with starting and maximum wages on average 34% and 28% higher than the national average.
>
> (R.R., at p. 1044; see also R.R., at pp. 199 and 207)

205 Based on this evidence, I consider the crisis of sustainability in the province's health care system, which this Act and the impugned provisions were designed to address, to be a contextual factor that is of the utmost importance to the s. 1 analysis in the case at bar.

(b) Vulnerability of the Protected Group

206 In *Harper*, the impugned legislation was designed to protect "the Canadian electorate by ensuring that it is possible to hear from all groups and thus promote a more informed vote" (para. 80), as well as candidates and political parties to ensure that they "have an equal opportunity to present their positions to the electorate" (para. 81). In the instant case, the primary group that Part 2 of the Act is designed to protect is composed of persons in need of health care. The government submits that the Act "advances the interests of health care users, who are a vulnerable group" (Respondent's Factum, at para. 143).

207 In the years before the Act came into force, labour relations in British Columbia's health sector were volatile and, at times, acrimonious. The interests and demands of health care unions were pursued not just at the bargaining table, but also by means of political advertising and lobbying (R.R., at p. 1033). As late as the summer of 2001, nurses and paramedics were engaged in partial strike action. Legislation was enacted by the government, first to impose a "cooling off" period, and then to end the strikes and impose collective agreements (R.R., at p. 1039). The government submits that "[c]ontrolling public health

care labour costs through collective bargaining is difficult, if not impossible. The public depends on access to health care, and cannot go elsewhere during a labour dispute for these services, as they typically can when a labour dispute involves a private sector business" (R.F., at para. 35).

208 In *Chaoulli*, the majority of this Court were critical of years of failure by the Quebec government to act to improve that province's deteriorating public health care system; patients may face serious, and even grave, consequences where the health care system fails to provide services of a reasonable standard within a reasonable time (paras. 97, 105 and 112). Accordingly, this Court cannot ignore patients' needs in considering the constitutionality of health care reforms that are designed to make the system more viable and efficient.

209 In my view, the vulnerability of health care users and their constitutionally protected rights are relevant contextual factors to be considered in determining whether the impugned legislative provisions are demonstrably justified under s. 1.

(c) Apprehension of Harm and Ameliorative Measures Considered

210 In *Harper*, the Court considered the Canadian electorate's subjective fears and apprehension of harm with respect to electoral unfairness as part of the contextual approach (paras. 82-83). This factor thus served to link the nature of the harm to the vulnerability of the group. In the instant case, two factors that led to the adoption of the Act were concerns over the need to respond to the province's health care crisis and the government's evaluation of other alternatives.

211 Governments across the country have been attempting to develop measures to reform the health care system that will address concerns about its sustainability. On introducing the Act, the Minister responsible for it, the Honourable Graham Bruce, stated: "The reality is that our health system has been on a fast track to collapse. We've got to get the situation under control so we can meet the needs of patients and the needs of the people of British Columbia" (British Columbia. *Debates of the Legislative Assembly*, 2nd Sess., 37th Parl., vol. 2, No. 29, January 26, 2002, at p. 909). In fact, as outlined below in the discussion on minimal impairment, the government considered numerous measures to address this harm.

212 As this Court recognized in *Chaoulli*, at para. 94, "courts must show deference ... [where there is] an ongoing situation in which the government makes strategic choices with future consequences that a court is not in a position to evaluate". In the case at bar, the various alternatives considered by the government to address concerns about the viability of the province's health care system constitute a contextual factor that is relevant to the s. 1 analysis.

(d) Nature of the Affected Activity

213 In *Harper*, the affected activity was expression under s. 2(*b*) of the *Charter*. The Court considered the nature of that activity in the electoral context in order to determine the degree of constitutional protection that ought to be afforded it. The instant case concerns the freedom of association of union members under s. 2(*d*) of the *Charter* in the health care context. Since the activity of collective bargaining involves both employees (through their union representatives) and their employer (in this case, the HEABC), the interests of each of them are relevant contextual factors. Additionally, since the claim in this case is against the government of British Columbia, its position must be taken into account to ensure that the entire context in which the Act was adopted is considered.

(i) The Employees' Perspective

214 Although s. 2(*d*) of the *Charter* protects only the collective bargaining process, the substance of the negotiated provisions is what matters to employees. For them, collective bargaining is a means to an end. Employees bargain, through their union representatives, on matters that are of varying degrees of importance to them.

215 Sections 4 and 5 of the Act affect a worker's ability to keep the same job description and position in the same institution. Section 6(2) of the Act could affect the ability of workers to maintain their present employment and "to gain employment security". Section 6(4) takes this a step further by signalling to the union that even consultation on contracting out would be a waste of time. With respect to s. 9 of the Act, it affects the seniority regime that is valued by unions and their members, as

well as an employee's ability to retain secure employment. There is no question that some of the issues concerned here, such as restrictions on contracting out and mobility, are high priorities for most unions and workers. However, this is not necessarily the case for all the impugned provisions. For example, the revised rules for transfer and assignment set out in ss. 4 and 5 might be considered less important, given that employees retain their employment.

(ii) The HEABC's Perspective

216 The HEABC is not a party to this appeal, but its perspective — as disclosed in the record — both as an employer and as an administrator of the health care system, is nevertheless a relevant contextual factor. In August 2001, the HEABC, in a briefing document prepared for the government, identified numerous provisions in the main health sector collective agreements that, in its view, had to be changed "to enable health employers to seek greater efficiencies in operating B.C.'s health care system" (HEABC, *Briefing Document — Collective Agreement Efficiencies* (2001), at p. 1).

217 In that document, written just five months before the Act was introduced, the HEABC outlined changes that it desired to 33 aspects of existing collective agreements. Most of the provisions that found their way into Part 2 of the Act appear among these recommendations, such as: eliminating restrictions on contracting out, removing barriers to cross-site mobility and transfers, eliminating the Healthcare Labour Adjustment Agency, making bumping less disruptive and changing layoff requirements.

218 However, the HEABC also called for numerous other changes to health sector collective agreements that went well beyond those that were ultimately adopted in Part 2 of the Act, such as: removing pay equity adjustments, adjusting vacation levels and reducing vacation entitlements, ensuring enhanced accountability for union leaves, reducing the amount of paid and unpaid time off for union-related business, requiring the unions to reimburse the employer for one half of the expense of paying union representatives to represent the union at committee meetings, amending various job classifications, allowing banked overtime only at the employer's discretion, and taking unspecified measures to "reduce" the number of employees on sick leave, workers' compensation and long-term disability.

219 I find that it is a relevant contextual factor both that the government, in adopting the impugned provisions of the Act, was reacting to the HEABC's recommendations on how to improve the health care system and that it elected *not* to pursue many of the avenues proposed by the HEABC that might have affected *Charter* rights directly and substantially (such as removing pay equity adjustments, and measures that would affect the union's ability to effectively represent employees).

(iii) The Government's Perspective

220 The government submits that the Act is part of a broader program to restructure health care in the province and that its "general philosophy about the proper boundaries of publicly provided health services as between clinical services and non-clinical services" is a relevant contextual factor in the s. 1 analysis (R.F., at para. 142). It is worth noting that the HEABC, as the employer, remains constant, whereas governments come and go as they are elected and defeated. New governments are sometimes elected on the basis of promises to reform social programs, and the need to reform the health care system is one of the most serious challenges that has ever been faced. Legislation is one of the principal tools available to governments to set policy and restructure programs. However, the terms and the duration of collective agreements that are in force when a new government takes office may operate as a severe constraint on efforts to reform programs that depend on unionized labour, such as the public health care system.

221 The political background to the introduction of the Act at issue in the case at bar is thus a relevant contextual factor. This is particularly so given that the reform of the province's health care system was part of a shift in the government's philosophy towards health care delivery after a decisive election on May 16, 2001. Some eight months later, in introducing the Act, the Minister of Skills Development and Labour characterized it as "a fundamental restructuring of the size and scope of government that reflects our New Era commitments, the core services review, and taxpayers' priorities" (R.R., at p. 337). The Act was therefore part of a much larger shift in the government's approach to the role of government services at a time of a crisis of sustainability, and of labour tensions, in the health care sector.

3. Summary on Contextual Factors

222 While the nature of some of the working conditions that are likely to be affected tends to favour a less deferential approach, substantial deference must be shown in determining whether the measures adopted in this case are justified under s. 1 in light of the crisis of sustainability in the health care sector, the vulnerability of patients, whose rights are constitutional in nature, the recommendations of the HEABC as an employer and as an administrator of the health care system, and the highly political context of health care reform in B.C.

E. Section 1 Justification Analysis

223 The majority set out the applicable framework from *Oakes* for determining whether s. 1 of the *Charter* has been satisfied. I substantially agree with them that the impugned provisions in the case at bar are prescribed by law, that they were enacted in pursuit of a pressing and substantial objective, and that the measures taken are rationally connected with the objective being pursued. However, for the reasons that follow, I find that ss. 4, 5, 6(2) and 9 of the Act satisfy the *Oakes* test and are saved by s. 1 of the *Charter*. While I agree that s. 6(4) of the Act fails the minimal impairment test and thus is not justified under s. 1 of the *Charter*, I arrive at this conclusion for different reasons than those given by the majority.

(1) Minimal Impairment Test

224 Under this Court's approach to the minimal impairment test, the government bears the burden of justifying the infringement of a *Charter* right, but deference is owed to its choice of means to attain its legitimate objectives. In *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), at para. 160, McLachlin J. (as she then was) stated: "If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement". Expanding on this in *Harper* at paras. 110-11, Bastarache J. held that "the impugned measures need not be the least impairing option. The contextual factors speak to the degree of deference to be accorded to the particular means chosen by Parliament to implement a legislative purpose".

225 Measures adopted by a government may be part of a broader legislative, administrative and operational response. They may further objectives in ways that would not otherwise be possible. As Dickson C.J. held in *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), at pp. 784-85:

> It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim.

226 This jurisprudence demonstrates that minimal impairment is a spectrum of constitutionally justifiable activity whose outer limits are defined by the courts on the basis of relevant contextual factors.

(2) Proportionate Effects Test

227 The purpose of the final stage of the *Oakes* analysis is to evaluate the proportionality between the government's objective and the measures it has adopted. This stage requires an assessment of the benefits and the harmful effects of the measures. In *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.), at p. 768, Dickson C.J. held with respect to the limiting measures that "their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights". See also *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), at p. 889. In other words, the court must ask "whether the Charter infringement is too high a price to pay for the benefit of the law": P. W. Hogg, *Constitutional Law of Canada* (2002 ed.), at p. 801.

228 Having set out the relevant contextual factors and the minimal impairment and proportionate effects tests, I can now apply them to the impugned provisions in the case at bar.

(3) Application to the Impugned Provisions

229 The government chose, in performing its legislative function, to enact the *Health and Social Services Delivery Improvement Act*, Part 2 of which was designed to improve the delivery of health care in the province and to ensure the sustainability of this vitally important social program. Sections 4 and 5 affect agreements resulting from past collective bargaining and make future collective bargaining on transfer and multi-worksite assignments meaningless. Section 6(2) provides that prohibitions on contracting out in health sector collective agreements are void, and prevents future collective bargaining on this subject. Under s. 6(4), provisions in such agreements that require an employer to consult with the affected union before contracting out are void. Section 9 modifies layoff and bumping provisions in such agreements. Each of these provisions of the Act has been found above to infringe s. 2(*d*) of the *Charter*. Bearing in mind the deference owed to the government in the instant case under the contextual approach, these impugned provisions may now be assessed to determine whether they satisfy the minimal impairment and proportionate effects tests. If they do, they will be justified under s. 1 of the *Charter*.

(a) Minimal Impairment Analysis

230 The record shows that the government considered a range of alternatives in seeking to address the crisis of sustainability in the province's health care system. Several options that required government intervention were considered, and their advantages and disadvantages were identified. These options included the following (see R.R., at pp. 13, 14, 16 and 17):

> (a) imposing an across-the-board wage reduction for all unionized health care employees (see also Appellants' Record, at p. 1870);
>
> (b) removing pay equity adjustments for "Facilities" employees;
>
> (c) increasing the work week from 36 to 37.5 hours per week without a pay increase (see also R.R., at pp. 28-30);
>
> (d) changing the employer's share of health and welfare premiums from 100% to 50%;
>
> (e) changing the governance structures of regional health authorities;
>
> (f) imposing differentiated compensatory and job security terms for new hires;
>
> (g) removing the requirement in collective agreements to provide 12 months of employment security following the end of a contractual layoff notice period; and
>
> (h) voiding collective agreement language that prohibits contracting out, while maintaining the unions' ability to advocate against contracting out on the basis of a business rationale.

231 The government also submitted that the Act was linked to the findings of several federal and provincial health care commissions and — with respect for the majority's view to the contrary — did in fact explain how the measures it had adopted would help it achieve its objectives:

> As a result of these studies, various options for reform were identified. One set of options focussed on reducing existing restrictions on management's ability to change service delivery. These included: eliminating restrictions on contracting out of services; eliminating the 'enhanced consultation', long notice periods and the employment security process required by ELSA; reducing lengthy bumping chains; and reducing restrictions on transfer of services and employees from one site to another. The other set of options focussed on directly reducing compensation for health sector workers. These included wage rollbacks, wage freezes, return to a 37.5 hour work week, reduction in holidays, elimination of pay equity increases, reduction or elimination of sick bank payouts. <u>While the latter set of options would save money in the short term, the government concluded that these options could not advance the goal of creating a different framework for conduction business [sic] or contribute to long-term sustainability. The former set of options furthered both of these objectives</u>. [Emphasis added; (R.R., at pp. 1045-46).]

232 While some of the options put forward by the HEABC and considered by the government were ultimately adopted in Part 2 of the Act, many were examined and rejected. It is notable that the rejected options included alternatives that could have affected other *Charter* rights directly and substantially, such as removing pay equity adjustments, which could have infringed the equality rights provided for in s. 15 of the *Charter*. In addition, many of the other rejected alternatives — such as imposing an across-the-board wage reduction, increasing the work week without a pay increase, changing the employer's share of health and welfare premiums, and imposing different compensation and security terms for new hires — would have interfered with the collective bargaining process and may also have infringed s. 2(*d*) of the *Charter*. Others — such as those affecting union leave and the payment of union representatives — could have affected the union's ability to represent employees effectively. The record shows that many of these rejected alternatives were not pursued at the time because the government believed that they would not meet its objective of improving the delivery of health care services. In particular, the government found that many of the options, while offering short-term cost savings, would not facilitate the longer-term structural reforms that were necessary to ensure the sustainability of service delivery for patients.

233 The government chose to enact legislation as part of its "multi-faceted policy initiative" (R.F., at para. 21). In applying the minimal impairment test, it is important to consider whether the impugned legislation or state action directly targets the *Charter* rights of an identifiable individual or group of individuals, or whether its effect infringes a *Charter* right of a more amorphous class of persons. Generally speaking, the former situation suggests that the adopted measure is more drastic than in the latter situation. For example, in *Multani c. Marguerite-Bourgeoys (Commission scolaire)*, [2006] 1 S.C.R. 256, 2006 SCC 6 (S.C.C.), the majority found that an absolute prohibition by a school board against a student's wearing a kirpan infringed the student's freedom of religion under s. 2(*a*) of the *Charter* and that the infringement was not saved by s. 1. In that case, the individual student was singled out by the administrative decision maker who refused to allow him "to wear his kirpan to school [even if] he complied with certain conditions to ensure that it was sealed in his clothing" (para. 3). Further, "there was no evidence of any violent incidents involving kirpans in Quebec schools" (para. 8).

234 In the instant case, it cannot be said that the legislation intentionally targeted the s. 2(*d*) rights of health sector union members or that it was aimed at an identifiable group. This finding flows largely from the fact that in its jurisprudence, this Court had not previously held that employees have a right to a process of collective bargaining. For the reasons given by the majority, the foundations of that case law have been displaced, and it is now appropriate for us to recognize such a right. Nor can it be said that the government disregarded rights that employees were then recognized to have or to have targeted such rights. Rather, the goal was "to respond to growing demands on services, to reduce structural barriers to patient care, and to improve planning and accountability, so as to achieve long term sustainability" (R.F., at para. 4).

235 I thus accept that other alternatives would not have enabled the government to achieve its objectives and that Part 2 of the Act was not aimed directly at the *Charter* rights of the affected employees. I will now consider the specific impugned provisions.

(i) Sections 4 and 5 of the Act (Transfer and Assignments)

236 Section 4 of the Act was specifically designed to facilitate the reorganization of health care service delivery by enabling employers to transfer functions or services to another worksite or to another health sector employer within a region. As for s. 5, it relates to the *temporary* assignment of an employee to another worksite or another employer. Employees do not lose their employment as a result of these provisions. Furthermore, as the majority noted, the Regulation adopted pursuant to the Act mitigates the impact of ss. 4 and 5 on employees (para. 118). These provisions are important to a timely restructuring of the health care system. For example, without s. 4, a transfer of functions or services to another worksite would likely result in disruption and delays if affected employees were to exercise bumping, layoff and recall rights (R.R., at p. 52). Nonetheless, s. 5(b) specifically requires that the collective agreement's provisions on posting a position be complied with where the assignment is to be on an ongoing basis. These provisions are thus carefully tailored so as to ensure that the government's objective is attained while infringing s. 2(*d*) as little as possible.

(ii) Sections 6(2) and 6(4) of the Act (Contracting Out)

237 Sections 6(2) and 6(4) were adopted to enable health sector employers to contract out certain non-clinical services in order to "[d]evelop more cost-effective and efficient ways of delivering non-clinical health services in order to improve patient care and reduce costs" (R.R., at p. 59). Section 6(2) has the effect of repudiating collective agreement provisions that in "any manner restric[t], limi[t] or regulat[e] the right of a health sector employer to contract outside of the collective agreement for the provision of non-clinical services", and prevents such provisions from being agreed to in the future. Section 6(4) voids provisions in collective agreements that require employers to consult with unions before contracting out non-clinical services.

238 The chambers judge, Garson J., found that s. 6(2) of the Act "does not restrict the ability of unions, including the plaintiff unions, to organize employees of outside contractors" ((2003), 19 B.C.L.R. (4th) 37, 2003 BCSC 1379 (B.C. S.C. [In Chambers]), at para. 24). Moreover, it is notable that contracting out is not obligatory. Rather, what s. 6(2) does is prohibit collective agreement clauses preventing contracting out. Thus, although union density may be lower when work is contracted out, there is still substantial room for *all* employees providing non-clinical services to exercise their right to freedom of association and to engage in a process of collective bargaining, even when certain of those services are contracted out.

239 An impact assessment of the Act by the Ministry of Health dated January 24, 2002 explained that the contracting-out provisions "[w]ill allow employers to control costs while focusing on care delivery" (A. Supp. R., at p. 17). The government added that:

> Eliminating contracting-out restrictions on non-clinical services, in particular, was seen as necessary to inject an 'air of reality' into compensation for these services, and to empower health authorities to appropriately allocate scarce resources as between support services and clinical services involving direct patient care and health programs. (R.R., at p. 1046)

In negotiating, the parties can avoid contracting out by agreeing to working conditions that are more consistent with those that apply when work is contracted out. The provision thus brings some competition into the bargaining process. Without s. 6(2) of the Act, the government would be effectively prohibited from making a policy decision to restructure non-clinical health services in the province, because existing collective agreements would block such a decision, without any further discussion.

240 The history of labour relations in the province, discussed above, strongly suggests that the terms set out in s. 6(2) could not have been successfully negotiated by the HEABC and the health sector unions. Moreover, in the context of the province's health care crisis, removing prohibitions on contracting out in collective agreements furthered the government's objective in ways that alternative responses could not. Furthermore, the alternative measures considered by the government were problematic in that many may have directly affected other *Charter* rights. For these reasons, in my view, s. 6(2) of the Act satisfies the minimal impairment test.

241 The same cannot be said about s. 6(4) of the Act. The only evidence in the record that may be relevant to the minimal impairment analysis in respect of s. 6(4) comes from the HEABC, which made representations to the government with respect to "enhanced consultation" between the HEABC, as the employer, and the relevant unions:

> The supposed purpose of the language was to allow the unions' input prior to the finalization of employer decisions affecting union members. The reality has proven to be constant union attempts to move from an 'input' model to a 'co-management' model and the use of the language to block or delay management initiatives. Many Employers have indicated that Labour Adjustment Committees and the Enhanced Consultation models are significant barriers to any innovative changes Employers want to make to the health system.
>
> (HEABC, *Briefing Document — Collective Agreement Efficiencies*, at p. 4.)

In that document, the HEABC was in my view expressing to the government its frustration with the "enhanced consultation" model that has been adopted in the past for other management initiatives. However, there is no constitutional entitlement to such consultation prior to contracting out. A far more direct, or time-limited, consultation between the HEABC and the affected unions might be possible. It is notable that during oral argument before this Court, even counsel for the government submitted that it would be desirable to hold consultations before contracting out.

242 Accordingly, I consider that the government has failed to establish by evidence, inference or common sense that the employers' ability to contract out would be restricted unreasonably by a requirement to consult with the relevant unions beforehand. While s. 6(4) does not, strictly speaking, prohibit consultations on contracting out, declaring that any clause in a collective agreement providing for consultation is void is an invitation to employers not to consult. Consultation is never harmful unless truly exigent circumstances do not allow time for it, or it is rendered moot because recent consultations have made further discussions unnecessary.

(iii) Section 9 of the Act (Layoff and Bumping)

243 Section 9 of the Act is designed "to allow for the timely reorganization and restructuring of health care services" (R.R., at p. 84) by modifying, for the period ending December 31, 2005, provisions of collective agreements relating to layoffs and bumping.

244 There is evidence in the record that bumping and layoff restrictions can significantly delay the restructuring of health care service delivery. In its impact assessment of the Act dated January 24, 2002, the Ministry of Health stated the following about the bumping and layoff provisions:

> Employers need the ability to lay people off quickly and efficiently. Current bumping provisions create endless chains. Numerous employees are affected and considerable time transpires before anyone is actually laid-off. New bumping provisions in the Regulations still allow for bumping but reduces its affect and inherent delays. [A. Supp. R., at p. 17]

The record contains several examples of the disruption that bumping can cause in the workplace. In one particularly clear example, the elimination of a data entry clerk position in July 1996 resulted in a chain of eight people in total bumping each other, and the last person in the chain was not placed in a position until four years later, in July 2000 (R.R., at p. 86; see also R.R., at p. 118). The HEABC advised the government that "[d]isplacement and bumping is disruptive to staff directly affected by the displacement, and those involved in the bumping chain. This disruption impacts on the quality of program delivery and occupies unnecessary administrative time. The bumping process needs to be expedited" (*Briefing Document — Collective Agreement Efficiencies*, at p. 6).

245 One feature of s. 9 that is relevant to the minimal impairment analysis is that it is a sunset provision. The Act came into force on January 28, 2002, and s. 9 ceased to operate on December 31, 2005. Section 9 impaired the collective bargaining process in respect of layoffs and bumping, but was limited by a time period approximating the mandate of the government, which had been elected some eight months previously. This suggests that it was closely tied to the health care reform being implemented, and that it was adopted as a transitional measure. The majority state that "this is scant comfort to employees who may have been laid off or bumped before this date, without the benefit of a union to represent them on the issue" (para. 155). With respect, there is nothing in the Act that prevents the union from representing an employee who is laid off as a result of the operation of s. 9.Furthermore, s. 9 did not ban bumping or layoff provisions in collective agreements, which are not, *per se*, constitutionally protected. Rather, it imposed by legislative means attenuated terms for layoffs and bumping in place of those agreed to in the collective bargaining process. As with ss. 4 and 5 of the Act, the impact of s. 9(d) on workers was minimized by safeguards provided for in s. 5 of the Regulation made under the Act. There is sufficient evidence that s. 9 of the Act enabled the government to meet its objectives of making the health care system more sustainable and improving service to patients in ways that other alternatives would not permit. As with s. 6(2), the history of labour relations in the province strongly suggests that the terms set out in s. 9 could not have been successfully negotiated by the HEABC and the health sector unions. Therefore, in my view, it satisfies the minimal impairment test as a transitional clause that represents government policy and is carefully circumscribed.

(b) Proportionate Effects Analysis

246 Sections 4, 5, 6(2) and 9 of the Act have been fashioned to facilitate the restructuring of the province's health care system in order to improve service delivery and sustainability. Are the effects of the measures proportionate? In its submission to the International Labour Office, the government emphasized the link between the Act and the health care challenges it was facing:

> Any restrictions on collective bargaining or on the right to strike were exceptional measures, enacted in view of the difficult economic and fiscal situation, in the context of protracted and difficult labour disputes, which could have serious consequences in the health and education sectors.
>
> ("Complaints against the Government of Canada concerning the Province of British Columbia", at para. 269)

It is now necessary to consider whether the benefits of the impugned measures outweigh their negative consequences in terms of the infringement of s. 2(*d*) of the *Charter*.

(i) Sections 4 and 5 of the Act (Transfer and Assignments)

247 In my view, ss. 4 and 5 of the Act do not have a serious impact on employees and, what is more, the measures provided for in s. 5 are only temporary. As noted earlier, the intrusiveness of the revised transfer and assignment process under ss. 4 and 5 is limited, given that employees retain their employment. Conversely, the benefit of these provisions is to open the door to improvements to the health care system by providing flexibility for the restructuring process. Thus, I am satisfied that they are a proportionate response to the crisis of sustainability in health care.

(ii) Sections 6(2) and 6(4) of the Act (Contracting Out)

248 Section 6(2) of the Act does not prevent employees providing contracted-out non-clinical services from exercising their right to freedom of association in a collective bargaining process. Moreover, the intention in enacting it was to facilitate the long-term reform of health care delivery, as opposed to simply seeking short-term cost savings or imposing a heavier burden on taxpayers (who are also potential health care users). Although s. 6(2) does interfere with collective bargaining on contracting out, it strikes an appropriate balance between the government's objectives and the freedom of association of employees. Therefore, the infringement resulting from s. 6(2) of the Act is justified under s. 1 of the *Charter*.

249 While I have already found that s. 6(4) fails the minimal impairment test, I would add that taking consultation, which is an important component of the collective bargaining process, off the table is also a disproportionate measure. The benefit of s. 6(4), that of reducing the pressure on employers to consult with unions before contracting out, is nominal. The marginal benefits of this provision are outweighed by the deleterious effects of denying consultation to affected unions. Accordingly, s. 6(4) fails to satisfy s. 1 of the *Charter* and is unconstitutional.

(iii) Section 9 of the Act (Layoff and Bumping)

250 Finally, s. 9 is consistent with the government's objectives relating to systemic reform, which I have found to be entitled to deference, and the cost of its enactment is limited interference with the collective bargaining process. The negative effects of the infringement are minimal because it is time-limited, and while bumping and layoff protections are attenuated, they are not abolished. The procedural infringement is thus outweighed by the evidence that layoff and bumping provisions in collective agreements would place serious obstacles in the way of the timely restructuring of the health care system. Timely restructuring simply could not take place unless such barriers were removed. Accordingly, s. 9 of the Act is a proportionate response, and the infringement is justified under s. 1 of the *Charter*.

III. Conclusion

251 In addressing the crisis of sustainability in health care, governments face a difficult public policy challenge with no end in sight in the immediate future. As alternatives are considered, competing rights and interests arise. Government must be accorded deference to enable them to navigate these difficult waters. At the same time, this Court must ensure that the path they take is respectful of the constitutional rights of those who are affected by it, and that any infringement of those rights is demonstrably justified.

252 In the case at bar, the freedom of association of health care employees has been infringed in several instances, because provisions of the legislation enacted by the government interfere with their right to a process of collective bargaining with the

employer. It is the collective bargaining process that is constitutionally protected, not the content of the actual provisions of the collective agreements. In my view, the government has established that four of the five infringements, namely those resulting from ss. 4, 5, 6(2) and 9 of the Act, are constitutionally justified. However, I find that s. 6(4) of the Act fails the minimal impairment and proportionate effects tests and thus is not saved under s. 1 of the *Charter*.

Appeal allowed in part.

APPENDIX — Health and Social Services Delivery Improvement Act S.B.C. 2002, Chapter 2

Part 2- Health Sector

Definitions

3 In this Part:

"**bumping**" means the exercise of a right of one employee to displace another employee who is on the same seniority list under a collective agreement;

"**collective agreement**" means a collective agreement between HEABC and a trade union or an association of trade unions in an appropriate bargaining unit;

"**ESLA**" means the Employment Security and Labour Force Adjustment Agreement, issued as part of the recommendations of the Industrial Inquiry Commissioner on May 8, 1996 and included in whole or in part in one or more collective agreements between HEABC and trade unions representing employees in appropriate bargaining units, and includes any collective agreement provisions arising from ESLA, including Part 4 and Schedule 1 of the Recommendations of the Industrial Inquiry Commissioner;

"**HEABC**" means the Health Employers Association of British Columbia established under section 6 of the *Public Sector Employers Act*;

"**health sector**" means all members of HEABC whose employees are unionized and includes their unionized employees;

"**health sector employer**" means an employer in the health sector;

"**worksite**" means a facility, agency, centre, program, organization or location at or from which an employee is assigned to work.

Right to reorganize service delivery

4 (1) A health sector employer has the right to reorganize the delivery of its services by transferring functions or services within a worksite or to another worksite within the region or to another health sector employer, including, but not limited to, partnerships or joint ventures with other health sector employers or subsidiaries.

(2) A health sector employer has the right to transfer

(a) functions or services that are to be performed or provided by another health sector employer under subsection (1) to that other health sector employer, and

(b) functions or services that are to be performed or provided at another worksite in the region to that other worksite.

(3) If a function or service is transferred to another health sector employer or within or to a worksite under this section, an employee who performs that function or service may be transferred to that employer or within or to that worksite in accordance with the regulations.

Multi-worksite assignment rights

5 A health sector employer

(a) has a right to assign an employee within or to any worksite of that employer or to a worksite operated by another health sector employer for a period not exceeding that set out in the regulations and under conditions specified in the regulations, and

(b) must post any position pursuant to the collective agreement if the employer requires the successful candidate for that position to work on a regular ongoing basis at more than one worksite of that employer as a condition of employment in that position.

Contracting outside of the collective agreement for services

6 (1) In this section:

"**acute care hospital**" means a hospital or part of a hospital designated by regulation;

"**designated health services professional**" means

(a) a nurse licensed under the *Nurses (Registered) Act*,

(b) a person who is a member of a health profession designated under the *Health Professions Act* on the date on which this section comes into force, or

(c) a person in an occupation or job classification designated by regulation;

"**non-clinical services**" means services other than medical, diagnostic or therapeutic services provided by a designated health services professional to a person who is currently admitted to a bed in an inpatient unit in an acute care hospital, and includes any other services designated by regulation.

(2) A collective agreement between HEABC and a trade union representing employees in the health sector must not contain a provision that in any manner restricts, limits or regulates the right of a health sector employer to contract outside of the collective agreement for the provision of non-clinical services.

(3) The labour relations board or an arbitrator appointed under the Code or under a collective agreement must not declare a person who

(a) provides services under a contract between a health sector employer and an employer that is not a health sector employer, and

(b) is an employee of the employer that is not a health sector employer

to be an employee of the health sector employer unless the employee is fully integrated with the operations and under the direct control of the health sector employer.

(4) A provision in a collective agreement requiring an employer to consult with a trade union prior to contracting outside of the collective agreement for the provision of non-clinical services is void.

(5) A collective agreement does not bind, and section 35 of the Code does not apply to, a person who contracts with a health sector employer.

(6) A health sector employer must not be treated under section 38 of the Code as one employer with any other health sector employer or a contractor.

Employment Security and Labour Force Adjustment Agreement

7 (1) A party to ESLA is not required to carry out a term of ESLA on or after the coming into force of this section.

(2) A party to a collective agreement is not required to carry out any part of a provision that is based on or derived from ESLA in the collective agreement.

(3) ESLA does not apply for the purposes of the interpretation or application of the collective agreement.

Healthcare Labour Adjustment Society

8 (1) In this section, "**HLAA**" means The Healthcare Labour Adjustment Society of British Columbia incorporated under the *Society Act*.

(2) The minister may appoint an administrator for HLAA.

(3) The administrator appointed under subsection (2) replaces the directors of HLAA and may exercise all the rights and duties of directors under the *Society Act*.

(4) The administrator must ensure that HLAA's programs and activities operate only to the extent necessary to honour obligations to employees of health sector employers who were laid off under ESLA and to honour existing financial commitments made to health sector or other employers for reimbursement under one of HLAA's programs.

(5) The minister may direct the administrator to offer programs and activities beyond those in subsection (4).

(6) The administrator is responsible for winding up HLAA in accordance with the *Society Act*.

(7) The administrator may wind up HLAA when its obligations under subsections (4) and (5) are complete.

(8) The administrator must complete his or her duties under this section within one year from the date on which he or she is appointed.

(9) Any money remaining in HLAA at the time it is wound up must be paid into the Health Special Account referred to in the *Health Special Account Act*.

Layoff and bumping

9 For the period ending December 31, 2005, a collective agreement must not contain a provision that

(a) restricts or limits a health sector employer from laying off an employee,

(b) subject to paragraph (c), requires a health sector employer to meet conditions before giving layoff notice,

(c) requires a health sector employer to provide more than 60 days' notice of layoff to an employee directly or indirectly affected and to the trade union representing the employee, or

(d) provides an employee with bumping options other than the bumping options set out in the regulations.

Part prevails over collective agreements

10 (1) A collective agreement that conflicts or is inconsistent with this Part is void to the extent of the conflict or inconsistency.

(2) A provision of a collective agreement that

(a) requires a health sector employer to negotiate with a trade union to replace provisions of the agreement that are void as a result of subsection (1), or

(b) authorizes or requires the labour relations board, an arbitrator or any person to replace, amend or modify provisions of the agreement that are void as a result of subsection (1),

is void to the extent that the provision relates to a matter prohibited under this Part.

0848-85-U Royal Conservatory of Music Faculty Association, Complainant, v. Governing Council of the University of Toronto (**Royal Conservatory of Music**), Respondent

BEFORE: *S. A. Tacon,* Vice-Chairman, and Board Members *R. J. Gallivan* and *S. 0 'Flynn.*

APPEARANCES*: H. Goldblatt, C. Michael Mitchell, S. Barrett* and *Irene McLellan* for the complainant; *B. W Binning* (on August 19, 1985, *M. Contini* (on September 11, 12) and *John Parker* for the respondent.

DECISION OF S. A. TACON, VICE-CHAIRMAN; AND BOARD MEMBER S. O'FLYNN; November 27, 1985

I

1. This is a complaint alleging violation of sections 15, 64 and 79 of the *Labour Relations Act.* The parties agreed that the alleged contravention of section 79 should be adjourned *sine die.* Having regard to that agreement, the Board hereby consents to adjourn this allegation *sine die* for a period not exceeding one year. Unless within that time the parties request that the Board proceed with the matter, it will be terminated. With respect to the other allegations, in brief, the complainant asserts that the refusal by the respondent to negotiate with respect to certain proposals, to disclose specific information as requested and to continue negotiations on other matters pending the resolution of this complaint contravenes sections 15 and 64 of the Act.

2. The parties also agreed that evidence before the Board would consist of documentary material only; no *viva voce* evidence was called. The documentation included two accounts of some five negotiating meetings, one set taken by the complainant and the other by the respondent. Counsel agreed that the minutes were substantially similar and that any discrepancy should be resolved by the Board without the benefit of *viva voce* testimony regarding those minutes and meetings. It is appropriate to note here that, in fact, counsel in argument generally referred to the minutes tendered by the other party..

3. The Board indicated, in response to the complainant's request for a decision with reasons to issue later, that the Board would reserve on that request. After review of the matter, the Board has determined that it would not be helpful to accede to the complainant's request and, accordingly, the Board's decision and reasons are set out herein.

4. The Board does not intend to detail the voluminous documentation entered as evidence. The material, as noted, was submitted on agreement of the parties. Nevertheless, it is necessary to sketch the factual background. More detailed references to the facts, as reflected in the documentation, are made throughout, as appropriate.

5. The respondent is the Governing Council of the University of Toronto, for convenience, referred to as the "university". While the precise organizational structure of the university was not placed in evidence, it is common ground that a number of committees report to the Governing Council and, further, there is what could be termed an "administrative" hierarchy, culminating with the president. The complainant is the Royal Conservatory of Music Faculty Association, again, for convenience referred to as "the union". The union was certified by the Board; the certificate is dated October 26, 1984. Notice to bargain was given by letter dated November 14, 1984. The instant complaint was filed July *5, 1985.*

6. The Royal Conservatory of Music, founded in 1886 and affiliated with the university in 1896, is recognized as a prestigious institution with a long tradition of offering instruction in music. The university assumed complete control of the Conservatory, including rights to the name, pursuant to the *Royal Conservatory of Music of Toronto Act, 1954.* The Faculty of Music at the University of Toronto was first established in 1918. In the context of an enormous simplification which is not intended to slight the quality, breadth or diversity of either body and its respective activities, the Conservatory may be described as an institution offering music as an avocation to children and adults while the Faculty offers music studies to students as a professional faculty within the university.

7. In January 1983, a committee was established to review the organization and operation of the two divisions with the objective of rationalizing resources and developing a general plan for the integration of the programs, services and resources of the Faculty of Music and the Royal Conservatory. Although the Board need not go into detail, it should be noted that this was the third official review of the relationship between the Faculty and the Conservatory since 1973.

8. The committee released a brief interim report in June 1983 which still spoke of the overall objective of integration. A summary for discussion, issued in December 1983, however, suggested formal separation of the Conservatory and the Faculty of Music in the context of a transitional period of, perhaps, ten years followed by negotiations between the university and the Conservatory with respect to matters such as the right to the name "Royal Conservatory of Music", the Frederick Harris Music Company, etc.

9. To describe the ensuing debate within the university and the faculty association as vigorous, wide-ranging and heated is an understatement. The summary for discussion is more appropriately characterized, to use a colloquialism, as a "bombshell". In the early months of 1984, written responses to the summary for discussion were produced by the faculty association and the Conservatory assembly (an academic council). Moreover, on March 13, 1984, the faculty association applied to the Board for certification. As noted, the formal certificate issued in October 1984.

10. The final report of the committee was released in June 1984. It is appropriate to set out the following excerpt from that report:

> Precis and Summary of Recommendations
>
> This report is the result of eighteen months of deliberations. In December 1983 we issued a "Summary for Discussion". Our position has evolved as a result of the reactions to that discussion paper. This report is the final report of the committee and supersedes all other documents.
>
> Our study of the history and present relationship of the Royal Conservatory of Music and the Faculty of Music of the University of Toronto has led us to believe that they should not be integrated. We have considered and rejected various models of integration including integration in the person of a single Dean. complete programmatic integration, and intermediate models that would achieve partial integration. We have concluded that the Conservatory should be separated from the University. It is our conviction that separation will be to the advantage of both units. We believe that apart they can flourish independently while remaining partners in music studies in Toronto.
>
> Before complete separation occurs, we are recommending that a series of specialized reviews beyond our competence be conducted. These reviews will assess the present situation and, in their reports, provide a more

detailed framework for the future of the two institutions.

Our recommendations concerning an independent Conservatory are based on the following premises:

1) The University will not sever the connection until it is satisfied that the Conservatory is able to function independently.

2) Accommodation will continue to be provided for the current programmes and level of activity either in McMaster Hall or in a new building.

3) The Conservatory will be governed by a strong, independent Board that will be responsible for all financial matters, be the employer of all staff associated with the Conservatory and be responsible for all its programme including the graded examination system.

4) The Conservatory will assume ownership of the Frederick Harris Music Co. Limited.

Our major recommendations are two:

1) That the Royal Conservatory of Music become independent of the University taking with it the name and all programmes and activities that are now under the direction of the Conservatory.

2) That early in the process of disengagement the following reviews be undertaken concurrently:

   i) Of the undergraduate programme of the Faculty with particular emphasis on the degree in performance, if possible in conjunction with the anticipated graduate review.

   ii) Of the teaching in the Conservatory.

   iii) Of the Graded Examination System.

   iv) Of the Branch Operation of the Conservatory.

   v) Of the organization of the Conservatory.

Our other recommendations flow from these:

3) That an implementation Committee be appointed immediately to oversee the interim period.

4) That immediate steps be taken to appoint a Principal for the Conservatory.

5) That the Governing Council of the University name an interim Board of the Conservatory as soon as possible.

11. It is also necessary to refer to another important issue during this period. A different university review committee had resulted in a Report on Campus Development Potential in March 1983. There was considerable concern amongst the faculty at the Conservatory, in particular, that the

university was actively considering relocating the Conservatory from its facilities at McMaster Hall. In June, 1983, a letter from President Ham to Principal Schabas stated that the development possibilities were not connected with the committee then reviewing the relationship between the Conservatory and the Faculty of Music. Further, the letter assured the Principal that any development scheme with respect to McMaster Hall should essentially ensure that any new facility for the Conservatory would satisfy the space requirements of the current programmes and enrolment, be near the Faculty of Music and accessible to Conservatory students. The Board notes that the Conservatory, in addition to the main building at McMaster Hall, operates through a number of branches located throughout the greater Metropolitan Toronto area.

12. Following the final report recommending separation of the Conservatory from the university, the debate intensified. The faculty association submitted a formal written response to the final report in September 1984 basically opposing separation. Acting Principal Dodson, in a letter to F. lacobucci (Vice-President and Provost) dated October 4, 1984, (and subsequently circulated to Conservatory faculty) concurred with the recommended separation, although disagreeing with two of the committee's premises. The letter, however, also outlined a number of asserted preconditions to separation dealing with the separation process, various reviews, the ownership of assets, location and a recommendation that a collective agreement first be negotiated with the newly certified union.

13. The university's position on the report may be summarized by reference to a letter of December 15, 1984 from R. N. Wolff (Vice-Provost Professional Faculties):

Stage I General Recommendations through Governing Council

Jan. and Feb. 1985	Draft recommendations prepared by the University administration and taken to the Planning Subcommittee, the Assembly of the RCMT and the Council of the Faculty of Music for discussion. These recommendations will request approval in principle for creation of an independent RCM by July 1, 1986.
March 1985	Recommendations to the Academic Affairs and Planning & Resources Committees, where appropriate.
May 1985	Recommendations to Governing Council and, if approved, a decision on the future structure of the Royal Conservatory.

Stage II Detailed Recommendations through Governing Council

June - Sept. 1985	Committee(s) to develop Presidential recommendations outlining the details of the legal organization, the resources committed and the nature of any future relationship with the University of Toronto.
Oct. - Dec. 1985	Recommendations through various committees of Governing Council, and a final decision by the Council.

Stage III Creation of the Legal Organization

Jan. - May 1986	Action by the Ontario Legislature and/or other appropriate bodies to create the new organization.

Stage IV "New" Royal Conservatory in place by July 1, 1986.

14. Concurrently with this process, the university and the union commenced negotiations for a first collective agreement. At the first such meeting on December 7, 1984, M. Mitchell, as chief negotiator for the union, asserted the union's position that it wished to bargain directly about the separation process itself and opposed a mere "consultative" role for the "faculty". (Although this bargaining session preceded the university's "position" just quoted, there had been written confirmation on December 1, 1984, of an earlier meeting wherein the university's stance had been outlined in more general terms.) J. Parker, chief negotiator for the university, responded that it was solely the university's responsibility to deal with divestment.

15. Pursuant to the timetable outlined in paragraph 13, several committees and subcommittees were struck to examine various aspects of divestment, including administration and finance, governance and curriculum. Members of the faculty and administrative staff were included on the ad-hoc committees. By late January, the administration's recommendations to the Planning Sub-committee were (in part) as follows:

> ... The Council of the Faculty of Music and the Assembly of the Royal Conservatory are being asked for their views on this administrative response as well. We also believe that interested individuals and groups outside the University of Toronto must play an active role in determining the future of the Conservatory. To this end we propose a three-stage decision-making process as follows:
>
> 1) Approval in principle from the Governing Council for the creation of an independent Royal Conservatory of Music.
>
> 2) Approval from the Governing Council for the corporate structure and resources made available to the Royal Conservatory of Music. Ii; will also be necessary to develop a long term affiliation agreement between the Royal Conservatory and the University which addresses the programmatic interaction between the Faculty of Music and the Royal Conservatory and provides the Royal Conservatory with appropriate physical facilities.
>
> 3) Recommendation of Governing Council to the Ontario Legislature for the enactment of a special statute for the creation of the Royal Conservatory.
>
> The administration believes that the action in (3) is important to the future well being of the Conservatory but, if the Legislature fails to act on the recommendation, the University will create the new corporation.
>
> This three-stage decision-making process should provide the members of the Governing Council, the University administration, teachers and students of the Conservatory and the University community generally, as well as the public at large, the opportunity to ensure that the Royal Conservatory will have a strong and viable future. This process will also allow adequate time for consultation with appropriate individuals as detailed recommendations are developed....
>
> ... We believe that each of the reviews recommended for the Royal Conservatory should be undertaken, but they should be done under the direction of the Board of Directors of an independent Royal Conservatory of Music. To provide Governing Council and the administration with the

assurances that the Royal Conservatory is able to function independently, we will ask the current administration to develop a business plan for the Conservatory. The review recommended for the undergraduate programme in the Faculty of Music will be conducted within the context of a strategic planning exercise to be initiated by the Dean of the Faculty.

The committee also recommended the immediate appointment of a Principal for the Conservatory and the creation of an interim Board of the Conservatory. The appointment of a permanent Principal should be left to the Board of Directors of the new Royal Conservatory of Music. The administration must, however, ensure that the Conservatory docs have strong leadership during the period of decision. To this end the administration will recommend the appointment of an acting Principal with a term ending June 30, 1986. The President will also appoint an Advisory Board of the Royal Conservatory whose membership will be primarily drawn from outside the University.

<u>Recommendations</u>

The administration recommends the following motions for the approval of Governing Council:

(1) The University of Toronto will take action to create an independent Royal Conservatory of Music by July 1, 1986. This organization should take the form of a Corporation without Share Capital to be controlled by a Board of Trustees. The Corporation will have control over all programmes and diplomas presently offered by the University through the Royal Conservatory of Music.

It is understood that this recommendation will be referred to the Planning and Resources Committee of Governing Council with concurrence by the Academic Affairs Committee.

(2) The Corporation will have control of the following assets currently owned by the University of Toronto:

- the Frederick Harris Music Company Ltd.
- the physical facilities housing the branch operations of the Royal Conservatory
- the musical instruments and business equipment located in all branches of the Royal Conservatory
- all funds and assets held in trust for the Royal Conservatory.

(3) The University of Toronto will provide the Corporation access to McMaster Hall or equivalent facilities.

(4) The University will request an Act of the Legislature of Ontario to establish the new Corporation.

The implementation of these motions is subject to subsequent approval by the Governing Council of the following:

a) the details of the Corporate structure,

b) the detailed listing of all assets provided to the Corporation, and

c) an affiliation agreement between the University of Toronto and the Corporation outlining the nature of programmatic interaction and the provision of facilities for the Corporation.

16. No negotiating meetings were held in the period from January to March 1985. The union, though, was not unaware of developments. In response to a written request, Parker informed Mitchell that the following motion woul.d be placed before the Governing Council on April 18, 1985.

> THAT, in principle, the University of Toronto take action to create an independent Royal Conservatory of Music by July 1st, 1986. This organization should take the form of a Corporation without Share Capital to be controlled by a Board of Trustees. The Corporation should have control over all programmes and diplomas presently offered by the University through the Royal Conservatory of Music.
>
> In principle,
>
> 1. THAT the Corporation have control of the following assets currently owned by the University of Toronto:
>
> - the Frederick Harris Music Company Ltd.;
> - the physical facilities housing the branch operations of the Royal Conservatory;
> - the musical instruments and business equipment located in all branches of the Royal Conservatory;
> - all funds and assets held in trust for the Royal Conservatory.
>
> 2. THAT the University of Toronto provide the Corporation access to McMaster Hall or equivalent facilities.
>
> 3. THAT the University request an Act of the Legislature of Ontario to establish the new Corporation.

17. The union then contacted each member of the Governing Council in writing, outlining its objection to approval of divestment other than in principle at the April 18 meeting. Attached to this letter was the union's position on separation (herein after referred to as "the 9 point programme"), as follows:

THE FUTURE OF THE ROYAL CONSERVATORY OF MUSIC

A PROGRAMME FOR SEPARATION

> The Faculty of the Royal Conservatory of Music are not opposed in principle to the separation of the Royal Conservatory of Music from the University of Toronto. However, before separation can be approved the financial integrity and future home of the Conservatory must be assured; otherwise, the University will simply cast out the Conservatory from the University community to survive as best it can, if it can! Accordingly, we will support the separation of the two institutions if, and only if, the following conditions are met:
>
> 1. The name "Royal Conservatory of Music" shall remain with the new

institution.

2. McMaster Hall shall remain as the home of the Royal Conservatory of Music.

3. All physical facilities housing the branch operations of the Conservatory shall remain with the Conservatory.

4. The musical instruments, business equipment and all other assets located in all the physical facilities now occupied by the Conservatory (including the bookstore) shall remain with the Conservatory. Satisfactory arrangements regarding access to the Edward Johnson Library shall be assured.

5. All rights to the examination system as it is currently administered by the Conservatory shall remain with the Conservatory.

6. All funds and assets held in trust for the Conservatory, including scholarships, etc. shall remain with the Conservatory.

7. The Frederick Harris Music Company Ltd. shall be transferred to the Conservatory following a financial review to ensure that this is in the best interests of the Conservatory.

5. Adequate financial arrangements to ensure the future of the Conservatory shall be in place prior to separation.

9. A satisfactory system of self-government for the new institution shall also be assured prior to separation.

18. At the second negotiating session of April 17, 1985, Mitchell formally tabled and reviewed the 9 point programme. That review included a number of requests for disclosure of information. Parker requested that the union table its entire package of proposals. Mitchell asserted that the other issues "paled" in comparison to divestment but indicated the remaining proposals would be forthcoming. Mitchell also objected to approval of separation, except in principle, by the Governing Council. Parker responded that the university was developing its position and, once developed, would communicate with the union. It should be noted that the union had agreed, through exchange of correspondence and without prejudice to its position overall in bargaining, that the university could negotiate individual contracts for 1985-86 academic year and that individual fees and subjects to be taught would not be renegotiated at the bargaining table.

19. By letter dated May 3, 1985, Parker informed Mitchell that the Governing Council had only approved separation in principle (paragraph 1 of the motion set out in para. 16 above); the remainder of the motion had been referred back to the executive committee. Parker reiterated his request for the remainder of the union's proposals. Mitchell's reply of May 7, 1985 rejected the postponement of negotiations on separation (and disclosure of the requested information) pending completion of the union's demands. By letter dated May 17, 1985, Parker confirmed the date for the next bargaining meeting and stated:

> For purposes of clarification, we would advise that our position is that divestment of the Royal Conservatory by the University of Toronto is not negotiable. However, we will continue to discuss and negotiate any issue relating to terms and conditions of employment for members of the Faculty Association at the Conservatory.

20. At the negotiating meeting of May 22, 1985, Parker reiterated the university's position that separation was non-negotiable and that information related to divestment (e.g., financial documents concerning the Frederick Harris Music Company) would not be disclosed. Parker, as a matter of information only, did respond to some matters raised in the 9 point programme, for example, by stating that the Conservatory would retain the name "Royal Conservatory of Music" subsequent to separation. Parker acknowledged that location could affect employment conditions but confirmed there would be no negotiations on McMaster Hall itself. Mitchell continued to press for direct negotiations on the union's proposals already tabled and raised the possibility of legal action. Although noting that the university intended to consult widely before reaching its decisions on separation and that the union would be kept informed of developments, Parker stated the university would not negotiate those matters with the union.

21. The next bargaining session was June 3, 1985. Both parties reaffirmed their respective positions and with specific reference to the issue of location. Parker stated he was not able, at that point, to discuss details of a proposed implementation committee. The union tabled and reviewed its remaining proposals and sought additional information. In response to Mitchell's request, Parker indicated the university was working on their proposals. Finally, Mitchell informed Parker that a legal complaint might be forthcoming but the union considered that the discussions on other matters should continue in any event. Parker replied that he intended to negotiate a collective agreement and discussions would continue, although he would need to take instructions from his principals.

22. At the June 25, 1985 negotiating meeting, Parker reviewed the university's process for implementing the recommended divestment of the Conservatory. An implementation committee, to which two *ad hoc* committees (resources; corporate structure and governance) would report, would be struck to produce an implementation plan. A representative of the union would sit on the implementation committee. Two advisory committees (one to the Provost; one to the Principal) would also be created. Faculty of the Conservatory would be represented on the Principal's Advisory Committee. The report of the implementation committee would be reviewed by the Provost's Advisory Committee and the Provost and, after approval of the President, would go to the Governing Council. The union would be notified of the recommendations and could make representations to Governing Council. Parker confirmed the university's position on the non-negotiability of divestment and, indeed, of the implementation plan. The union, too, reiterated its earlier position. Parker noted the interim agreement of the parties with respect to fees for the 1985-86 academic year. Parker also stated that the university's proposals were not yet prepared, nor would they be delivered before September, given vacation schedules. The Board notes that the union president, I. McLellan, was invited to serve as union representative on the implementation committee; the invitation was accepted without prejudice to the union's position on the negotiability of the nine point programme.

23. The instant complaint was filed on July 5, 1985, as noted. The university then took a position, best expressed in a letter from Parker dated August 12:

> Given the nature of the unfair labour practice complaint brought by your client, the nature of the collective bargaining process, involving as it inevitably does compromises and tradeoffs between the parties on positions sought to be achieved, and the obvious importance to your client of the 9 proposals in respect of divestment, it is our position that no further negotiations should take place until the Board has rendered its decision and we can be guided accordingly.

The union asserted that negotiations should continue regarding all terms and conditions of employment not directly related to divestment. The complaint was formally amended to include the allegation that the university's refusal to bargain pending the outcome of Board proceedings also constituted a violation of section 15 of the Act.

II

24. Although the evidence put before the Board was by agreement of the parties, two days were devoted to argument. The submissions of both counsel were able and thorough. Both carefully reviewed the evidence and the caselaw in support of their respective positions. As both counsel, almost without exception, referred to the same jurisprudence in support of their respective positions, it is convenient to here set out those cases: *Canadian Industries Limited,* [1976] OLRB Rep. May 199, 76 CLLC 16,014; *DeVilbiss (Canada) Limited,* [1976] OLRB Rep. March 49, 76 CLLC 16,009; *Westinghouse Canada Limited,* [1980] OLRB Rep. Apr. 577; *Sunnycrest Nursing Homes Limited,* [1982] OLRB Rep. Feb. 261; *Consolidated Bathurst Packaging Ltd.,* [1983] OLRB Rep. Sept. 1411, 83 CLLC 16,066; *Pulp and Paper Industrial Relations Bureau,* [1978] Can. LRBR 60; *Four B Manufacturing Limited,* [1978] OLRB Rep. Aug. 741; *Cable Tech Wire Company Limited,* [1978] OLRB Rep. Oct. 895; *Fotomat Canada Limited,* [1980] OLRB Rep. Oct. 1397; *United Brotherhood of Carpenters* & *Joiners of America,* [1978] OLRB Rep. Aug. 776. Counsel for the applicant also placed before the Board the following article, *B. A. Langille* "Equal Partnership in Canadian Labour Law", (1983) 21 *OHLI* 496. In a very abbreviated form, then, arguments of the parties were as follows.

25. Counsel for the complainant asserted that there were no limitations on the scope of bargaining, other than subjects "illegal" by virtue of the Act (e.g., recognition, scope of bargaining unit) and, perhaps, items "totally lacking" in merit or relevance. Counsel submitted the Act imposed no restriction on the scope of bargaining (other than the restrictions already noted), and, indeed, the definition of a collective agreement in section 1(1)(e) was expansive. That is, a collective agreement contained provisions relating to terms and conditions of employment *and* rights, privileges and duties of an employer, union and employees. It was contended any distinction between "decision" bargaining and "impact" bargaining was inappropriate. Counsel referred to the alleged distinction between bargaining about "location" (which was acknowledged by Parker to be "negotiable") and the specific location of McMaster Hall (which the university regarded as non-negotiable) to illustrate his position that any attempted distinction was unworkable and irrelevant. Thus, counsel submitted that the respondent was required to bargain about the 9 point programme by virtue of section 15 of the Act and the respondent's refusal violated that obligation, including the duty subsumed in that section to recognize the union as the bargaining agent for the employees in the bargaining unit. In the alternative, if the scope of bargaining was limited to matters with a direct or indirect impact on the terms and conditions of employment, counsel argued that the items in the 9 point programme still fell within the proper scope of bargaining. (The Board has not summarized counsel's review of each of the 9 points in support of this assertion).

With respect to the allegation that the refusal of the requested information violated section 15 of the Act, counsel submitted that the information requested must only be reasonably related to issues at the bargaining table. In the instant facts, it was argued the information was reasonably related to separation and, thus, must be disclosed. Counsel stated that there were appropriate mechanisms for dealing with any question as to the confidentiality of information so requested. Moreover, counsel asserted requesting information about a "sale" of a business (i.e., "separation" in this case) was not different from situations where an employer has raised financial circumstances in negotiations and where disclosure of such information has been required.

With regard to the respondent's refusal to bargain pending the outcome of the bad faith bargaining complaint, counsel argued that there is an obligation under section 15 to continue negotiations notwithstanding the filing of a complaint. In addition, counsel contended the university had indicated bargaining would continue. As well, it was submitted that the respondent had engaged in a pattern of delay, in effect, to take advantage of the July 1, 1986 deadline for separation. In this context, then, to permit the respondent to halt negotiations on items clearly acknowledged as related to terms and conditions of employment would place the complainant in a worse position for filing its bad faith bargaining complaint.

In conclusion, counsel asserted that the respondent had contravened the duty imposed by section 15 of the Act by refusing to negotiate with respect to the 9 point programme, by refusing to disclose the requested information, by engaging in a pattern of delay and by refusing to continue negotiations pending the outcome of the bad faith bargaining complaint.

26. Counsel for the respondent argued that, while the definition of a collective agreement was expansive, a union only had authority under the Act to bargain as agent for the employees in the bargaining unit. An employer could not refuse to recognize or seek to undermine a union as the sole bargaining agent for employees in the bargaining unit but need not deal with the union seeking to act on behalf of other groups or institutions and would not violate section 15 of the Act in refusing to do so. In the instant facts, it was asserted that the union had identified itself as the sole body entitled to speak on behalf of the Conservatory as an institution. Counsel contended the respondent was not required to deal with the union in that context. Thus, it was argued that, as the 9 point programme related to the Conservatory as an institution and was outside the employment relationship, the respondent was not obliged to bargain about those items. Counsel referred to the "sale" of a business as an illustration. That is, it was argued an employer need only bargain about the "impact" of a sale and not about the "decision" to sell, unless the sole cause of the sale decision related to employment conditions (e.g., wage costs, etc.). Moreover, counsel submitted there was no evidence as yet that there would be any impact on employment conditions as a result of divestment. Even assuming an impact, though, it was asserted the respondent need only bargain about that impact and not about the decision itself.

With respect to the information request, counsel first argued that the information related to the 9 point programme need not be disclosed as the 9 point programme itself need not be bargained. Even if the 9 point programme was negotiable, the information requested was too broad and not shown to be clearly relevant to the 9 point programme. In fact, it was contended that the request related to an alleged union intention to generate debate on the quality of management by the Governing Council and the use of funds rather than to matters relating to the employment relationship. Counsel submitted the combination of the complainant's positions that all matters were negotiable and all information reasonably related to proposals tabled must be disclosed meant that, in effect, everything was subject to disclosure. That the Board should supervise information requests and attach conditions to disclosure where the material was sensitive was characterized as unworkable.

Again, in the alternative, if the 9 point programme was negotiable, counsel submitted a violation of section 15 required either employer conduct amounting to a refusal to recognize the union as sole bargaining agent *or* conduct which suggested less than a full commitment to concluding a collective agreement. Here, it was argued the evidence did not support a finding that the respondent was not committed to a collective agreement or had failed to recognize the union as sole bargaining agent for employees in the bargaining unit. Rather, the refusal related only to the respondent's belief that the 9 point programme was not negotiable. In fact, counsel contended that, provided an employer intended to negotiate a collective agreement and particularly where (as here) the issue was unusual or peripheral to the employment relationship, the employer could refuse to negotiate that issue without contravening the duty imposed by section 15 of the Act.

With respect to the alleged delay, counsel submitted that the evidence did not disclose undue delay given the complexity of divestment and the agreement of the parties that the period from January to April 1985 should not be regarded as culpable delay by either party.

With regard to the refusal to bargain pending the outcome of the bad faith bargaining complaint, counsel asserted that, as the complainant regarded the 9 point programme as of greatest importance, as the 9 point programme and the "other" issues involved economic costs and as the respondent did not know whether it would be compelled to bargain about the 9 point programme, continued negotiations were unworkable. That is, in the circumstances, the respondent was justified in refusing to bargain until the complaint was resolved.

In summary, counsel argued there was no failure to recognize the union as sole bargaining agent for employees in the bargaining unit with respect to the employment relationship (as opposed to agent for the Conservatory as an institution) and no refusal to enter into a collective agreement. Hence, counsel submitted there was no contravention of the duty to bargain in good faith.

27. In reply, counsel for the complainant opposed any distinction between "decision" bargaining and "impact" bargaining as irrelevant to the duty imposed by section 15 of the Act. Further, counsel opposed differentiating between the union bargaining on behalf of employees in the bargaining unit and "acting on behalf' of the Conservatory as an institution, where there is an impact on the employment relationship. Counsel characterized this as an attempt to introduce a "mandatory-directory" approach to the duty to bargain, asserting that that approach had been rejected in Canadian labour relations. Counsel submitted, in any event, that the union need not wait until the impact of separation was known before seeking to bargain about the consequences of divestment, particularly since the union could not require such negotiations during the term of a collective agreement. It was argued the information requested was needed for full and frank discussions and the Board could deal with spurious requests for disclosure. Finally, counsel submitted the duty to bargain in good faith did not just require recognition of the union as sole bargaining agent and an intention to conclude a collective agreement but also obliged the parties to engage in full and rational discussions. That is, a party must state and explain its position on items tabled (as opposed to necessarily changing its position). Here, counsel asserted the respondent had not fulfilled this aspect of the duty imposed by section 15 of the Act.

III

28. Section 15 of the *Labour Relations Act* reads:

> 15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

29. The Board intends to deal with each of the four issues separately, namely, the scope of the duty to bargain, the duty to disclose information, delay, the refusal to negotiate pending the outcome of the instant complaint.

Scope of the Duty to Bargain

30. The scope of the duty to bargain imposed under section 15 of the Act is squarely raised on the instant facts and has not been dealt with quite so directly by the Board previously. It is useful to refer first to the classic exposition of the duty in *De Vilbiss (Canada) Limited, supra*, at paragraph 13:

> The section imposes an obligation upon both employers and trade unions to enter into serious, discussion with the shared intent to enter into a collective bargaining agreement. Once a trade union is certified as the exclusive bargaining agent of employees within an appropriate bargaining unit the employer of those employees must accept that status of the trade union. It cannot enter into negotiations with a view to ridding itself of the trade union. And thus it can be said that the parties are obligated to have at least one common objective—that of entering into a collective agreement and [then] section 14 is intended to convey this obligation. But this is not to say that they will or are obligated to have common objectives with respect to the contents of any collective agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism and reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. Therefore, while they must share the common objective to enter a collective agreement, the legislation envisages that they have differences with respect to just what the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions.

31. Given that "voluntarism" is the touchstone, it is implicit that the Board's role pursuant to section 15 of the Act is one of monitoring the *process* of bargaining and not the *content* of the proposals tabled. This role stands in sharp contrast with the American approach embodied in the "mandatory-directory" classification of proposals and the different consequences for bargaining of classification as a "mandatory" or "directory" item. The mandatory-directory approach has been rejected in this jurisdiction as not consonant with the legislative scheme: see *Consolidated Bathurst, supra; Pulp and Paper Industries, supra; Westinghouse Canada Limited, supra.*

32. This does not mean that the Board is totally distanced from the *content* of the parties' proposals or that there are no limits whatsoever on the scope of bargaining. The Board may have regard to the *content* of items tabled in order to determine whether either party does not intend to enter into a collective agreement (e.g., is engaging in surface bargaining) or whether the employer, for example, is seeking to undermine the union as exclusive bargaining agent by tabling an offer "tailor-made for rejection": see *Radio Shack,* [1979] OLRB Rep. Dec. 1220; *Fotomat Canada Ltd., supra; Irwin Toy Ltd.,* [1983] OLRB Rep. July 1064. Further, the Board may review the content of proposals to assess whether any items are "illegal". For example, a strike for recognition or to resolve a jurisdictional dispute is contrary to the legislative scheme: see *United Brotherhood of Carpenters & Joiners of America, supra; Toronto Star Newspapers Ltd.,* [1979] OLRB Rep. May 451, [1979] OLRB Rep. Aug. 811. See also: *Croven Limited,* [1977] OLRB Rep. Mar. 162; *A.N. Shaw Restorations Ltd.,* [1976] OLRB Rep. Sept. 504; *T. Barlisen & Sons,* [1960] OLRB Rep. May 80; *Canada Cement LaFarge Ltd.,* [1980] OLRB Rep. Nov. 1583; *Treco Machine Tool Ltd.,* [1982] OLRB Rep. Dec. 1954. The Board notes that, although two examples of demands which have been found to be "illegal" are mentioned and other examples are contained in the cases referred to, the appropriate scope of the concept of "illegality" is not before the Board in this case.

33. However, subject to the comments outlined in paragraph 32 above, the Board will not evaluate or censure the content of proposals tabled by the parties. Again, apart from those comments, if the parties are free to *agree* that any matter may become part of their collective agreement, it is implicit that each party must be free to *table* that matter for discussion. While this is perhaps the

bluntest enunciation of this principle, the proposition is not novel: see *Westinghouse, supra; Sunnycrest Nursing Homes, supra; Consolidated Bathurst, supra; Canadian Industries Limited, supra.* In the instant case, then, the respondent may not refuse to discuss the "9 point programme". The respondent characterized the 9 point programme as intruding on areas reserved to management. Quite simply, the parties are bargaining about what is reserved to management; the 9 points are not subjects *a priori* "off-limits" for discussion. The definition of a collective agreement in section 1(1)(e) of the Act is expansive; apart from illegal matters, the Board should not seek to restrict the scope of clauses which may be incorporated by agreement of the parties in *their* collective agreement. For the Board to accept the respondent's arguments would inevitably draw the Board into the mandatory-directory analysis of the duty to bargain. This, the Board will not do. Nor does the Board accept the respondent's asserted distinction between the union acting on behalf of the employees in the bargaining unit and acting on behalf of the Conservatory as an institution' as relevant to the duty imposed by section 15 of the Act. The union is the exclusive bargaining agent for employees in the bargaining unit - no more and no less. But as exclusive bargaining agent, the union is entitled to present its proposals for a collective agreement. The union may be seeking to occupy the "high ground" in an attempt to broaden its support or to introduce novel clauses in a collective agreement or be acting from other motives. Provided the motive is not the avoidance of a collective agreement, the Board will not question the wisdom of the priorities established or proposals formulated by the parties.

34. The Board, then, finds that the respondent's refusal to discuss the 9 point programme constitutes a violation of the duty to bargain in good faith. It is important, though, to clarify the obligation imposed on the respondent by virtue of section 15 of the Act. The statutory scheme establishes a structure for bargaining, a framework to facilitate full and frank discussion against a backdrop of the right to resort to economic sanctions. Thus, the respondent must *discuss* the proposals tabled by the union, including the 9 point programme. This does not mean the university must *agree* to those proposals in the current form or at all. The university, however, must respond to those proposals by stating its position with its explanation of that position. It may well be that rational communication between the parties will enable an accommodation to be reached without recourse to economic sanctions. Or, resolution of the matters in dispute may require exercise of such sanctions. That is for the parties to determine. The Board's role, apart from the *caveats* already noted in paragraph 32, is to monitor the process of bargaining to ensure that both parties intend to conclude a collective agreement and are making every reasonable effort to do so.

<u>Duty to Disclose</u>

35. The information requested by the union is as follows:

(a) all documents concerning the future use of McMaster Hall (the main location of the Conservatory) including estimates for renovations, plans for future use for both the building and the land, correspondence and documents regarding the land and building, correspondence, offers from interested purchasers, etc;

(b) any plans to sell or dispose of any of the branches of the Conservatory or of any other assets prior to separation;

(c) all assets of the Conservatory at the time it joined the University, including evaluation and allocation of those assets, and all documents concerning the sale of the College Street building to Hydro, and full disclosure of the consideration for that sale;

(d) a list of all current assets of the Conservatory at the present time, including pianos, instruments, etc.;

(e) all documentation in connection with the current examination system;

(f) a list of all trust funds, endowment funds, bursaries and scholarships used for students at the Conservatory, including books, materials and musical documents left or willed to the Conservatory over the years by teachers;

(g) all documentation concerning the]Frederick Harris Music Company, including its financial statements for the past five years;

(h) all financial information concerning the present position of the Conservatory, including its current budget, income and expenditure figures;

(i) all documentation and correspondence between the University and the Provincial Government regarding the future of the Conservatory, and what, if any, financial commitments have been made or sought from the Provincial Government concerning the Conservatory;

(j) all planning documents and memoranda concerning the future of the Conservatory, including all documents regarding the future decision making process, including the timetable of that process.

36. Counsel for the complainant asserted that the duty to bargain in good faith included a duty to disclose, on request, information reasonably related to the proposals at the bargaining table. It is true that some statements in the jurisprudence appear to support the union's assertion. For example, in *Consolidated Bathurst, supra,* (at paragraph 43) the Board stated:

> A bargaining agent can claim entitlement to information necessary for it to reach informed decisions and thereby to perform effectively its statutory responsibilities.

However, the Board considers that that statement must not be wrenched from its context to form the basis of a broad duty of disclosure. One starts with one function of the duty to bargain in good faith, as enunciated in *DeVilbiss, supra,* namely, "to foster rational, informed discussion thereby minimizing the potential for 'unnecessary' industrial conflict." (at paragraph 15). The obligation to disclose which developed to further that "informed" discussion has two aspects. One, which is not of concern here, is the "unsolicited disclosure" branch. That is, in certain circumstances, the Board has imposed a positive duty to reveal information, such as, decisions to relocate, contract out, etc.: see *Consolidated Bathurst, supra; Westinghouse Canada Ltd., supra; Inglis Ltd.,* [1977] OLRB Rep. Mar. 128; *Sunnycrest Nursing Homes, supra.* The other branch concerns the "request" for information. As stated in *Consolidated Bathurst, supra* (also at paragraph 43):

> Although the Canadian experience is limited, the American cases reveal that the employer is under no duty, as a general matter, to provide information

> until the union makes the specific request for the relevant information.... A request identifies the union's interest in specific information and thus permits a discussion by the parties on the relevance of the data. The requirement of a request also sharpens a disclosure obligation.

37. The cases in which the Board has upheld a duty to disclose, however, have dealt with information with respect to *existing* terms and conditions of employment, (such as, wages, benefit costs, classification structures). It is not difficult to understand that the absence of access to that sort of information, particularly in first contract negotiations, would entirely emasculate the duty to bargain in good faith: see *Radio Shack, supra; Globe Spring and Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303; *Northwest Merchants Ltd.*, 83 CLLC 16,055; *Windsor Star*, [1983] OLRB Rep. Dec. 2147; *DeVilbiss, supra.* The full and rational discussion aspect of the duty to bargain also may result in the imposition on one party of a duty to disclose information where that information is needed to adequately comprehend a proposal or response of that same party. (Although not precisely on point, see *Canadian Industries, supra; St. Joseph's Hospital*, 76 CLLC 16,207). What the case law does not support is the use of the virtually unlimited scope of bargaining to enable one party to use its *own* proposals as a springboard to a duty imposed on the *other* party to disclose information related to those proposals. Nor is the Board prepared to hold that the duty to disclose is co-extensive with the scope of the duty to bargain so that any request for information reasonably related to any proposal by the party initiating that proposal must be fulfilled. Information disclosure is one step removed from bargaining proposals. The Board's approach represents a balancing of *voluntarism* at the bargaining table (i.e., allowing a broad scope to parties wishing to address specific issues in a collective agreement) and of the *compulsion* to disclose information imposed on one party in negotiations. Apart from existing terms and conditions of employment (wages, benefits, classification structures, etc.), where a union has a *prima facie* right to information, the disclosure obligation is contingent upon the information being necessary for one party to adequately comprehend the position taken by the other. In other words, if one party maintains a position (whether in the form of a proposal or response) which is grounded on a rational explanation, that party may be subject to a duty to disclose information to demonstrate the *bona fides* of that rational bargaining position.

38. At present, then, the Board does not find that the university's refusal to disclose the information requested contravenes the duty imposed by section 15 of the Act. Once the university has complied with the directions of the Board in respect of the other violations of the duty to bargain, it may be that some of the information requests, as listed in paragraph 37, then fall within the categories to which the Board has stated an obligation to disclose attaches depending upon the university's response. The union would be free to raise the matter at that time.

Delay

39. The Board does not consider the delay prior to the filing of the instant complaint as constituting a violation of the duty to bargain in good faith. The parties agreed that the delay between January and April 1985, was not to be regarded as culpable. It may well be that the respondent is seeking some tactical advantage in proceeding less than expeditiously given the July 1, 1986 deadline for separation. However, it would be naive to think that negotiations do not involve both parties giving extensive consideration to the timing of proposals, counter-proposals etc. Nor is one party at the mercy of the other with respect to the pace of negotiations. In this instance, for example, the union could decide to hasten the progress through the statutory process leading to the point where economic sanctions are permitted. Delay in negotiations has been found in some circumstances to establish an anti-union motive (e.g. *Fotomat Canada Limited, supra).* In this case, however, the circumstances are not comparable and, hence, the Board does not find a contravention of section 15 on this aspect.

Refusal to Continue Negotiations once Complaint Filed

40. As noted in paragraph 23 above, the university refused to continue negotiations pending the outcome of the bad faith bargaining complaint. The respondent asserted the refusal was warranted as continued negotiations were unworkable given that the 9 point programme involved economic costs, that programme was regarded by the union as of utmost importance and it was not known whether the respondent would be compelled to bargain about that issue. In the Board's view, none of these factors justify a refusal to continue negotiations pending the resolution of the complaint. It was acknowledged that the union had tabled various other proposals which dealt with "terms and conditions of employment", read narrowly. There is no cogent reason precluding bargaining about those items. If either party wishes to preserve its flexibility pending the outcome of the Board proceedings, there are mechanisms, which the Board need not outline, for doing so.

41. Further, there are sound labour relations reasons for requiring parties to continue bargaining notwithstanding the filing of a complaint. As stated, the legislation establishes a structure to conduct full and frank discussions between the parties to resolve the matters in dispute between them and conclude a collective agreement. The parties have recourse through the filing of an unfair labour practice complaint to enforce that statutory obligation. To allow a party against whom allegations of bad faith bargaining have been raised to cease negotiations pending the disposition of the complaint rewards that party for violating the Act or, at the very least, interrupts the process of negotiations. Once interrupted, it is more difficult to restart bargaining and time is lost. Indeed, requiring the parties to continue negotiations may well enhance the likelihood of settlement of the original complaint. While it is theoretically conceivable that there might be circumstances where a refusal to continue negotiations might not violate the duty imposed by section 15, that is not the case here. The considerations which prompted the Board's refusal to grant a stay in Board proceedings pending determination of an application of judicial review are also applicable here: *Four B Manufacturing, supra; Cable Tech Wire, supra.*

42. Thus, for the policy reasons referred to, the Board finds that the respondent contravened the duty to bargain in good faith by refusing to continue negotiations pending the resolution of the complaint. The Board stresses that this obligation to continue negotiations does not depend upon the alleged agreement by Parker to continue bargaining notwithstanding the filing of a complaint but flows from the duty to bargain itself. To hold otherwise would result in the suspension of the duty to bargain wherever a complaint alleging breach of that very duty is filed. Such a consequence is not to be commended.

43. The union has also alleged contravention of section 64 of the Act. Given the findings with respect to violations of section 15, it is not necessary to consider further this aspect. Indeed, this allegation was not dealt with separately from the representations concerning the duty to bargain, and in the Board's view, is subsumed in the alleged violation of section 15 of the Act.

Remedy

44. The complainant requested the following relief: an order directing the respondent to bargain in good faith with respect to all of the union's proposals; that the Board establish a time frame for bargaining, including the tabling of the respondent's proposals; that the Board remain seized with respect to the process of bargaining so that a party could return to this panel with fresh complaints; disclosure of the information requested; a posting with a direction that copies be mailed directly to all employees. Counsel for the union stressed that this relief was necessary to prevent the duty to bargain being rendered impotent through the passage of time. Counsel for the respondent asserted that relief beyond the usual declaration and direction to resume bargaining was inappropriate.

45. As noted in *Canadian Industries, supra,* the focus of the remedial authority vested in the Board in these cases should be on repairing the bargaining relationship. The Board has found violations of the duty to bargain in the respondent's refusal to discuss the union's proposals with respect to the 9 point programme and refusal to continue negotiations pending resolution of the instant complaint. Some of the relief requested relates to allegations where the Board has not found a contravention of the Act. Further, the Board does not consider it appropriate to establish a rigid timetable for negotiations or to remain seized for the purpose of hearing fresh complaints related to the further conduct of negotiations. Rather, the Board is satisfied that the appropriate relief consists of a declaration that the respondent has contravened section 15 of the Act, as noted, and a direction to the respondent to begin to bargain in good faith and make all reasonable efforts to conclude a collective agreement. To this end, the Board also directs that the respondent table, within a reasonable period of time following the release of this decision, a full package of proposals on all issues, including a response to the union's 9 point programme. Any non-compliance with these directions may be pursued in the usual way. Finally, the Board notes that the university has dealt with the faculty association for some time, albeit prior to certification. The Board considers that both parties can adjust to the new status of the association as certified bargaining agent for the employees in the bargaining unit, within the context of the Board's findings and orders herein and, by engaging in full and frank dialogue, conclude a collective agreement.

DECISION OF BOARD MEMBER R.J. GALLIVAN;

1. Of the four matters raised by this complaint, the key issue for determination by the Board is that related to the scope of the duty to bargain. On the majority's decision on that issue and its related decision dealing with bargaining following filing of the complaint with the Board, I disagree.

2. Through the cooperation of the parties there was agreement on the multitude of key facts covering complex developments involving the University and Conservatory spanning a period of several years and involving numerous streams of events moving sometimes in parallel and sometimes on divergent courses. Among the agreed facts in evidence the Board had available to it very detailed minutes of every one of the negotiating meetings which took place between the parties from the date of the Union's certification in October 1984 to the date it filed this complaint in July 1985. In fact, two sets of minutes were submitted in evidence for each meeting: those kept by the University and those kept by the Union. As indicated by the majority, those two sets of minutes were substantially similar to each other and were referred to interchangeably by the parties in the proceedings before this Board. We can thus take it that they represent an accurate account of the bargaining meetings between the University and the Union.

3. The University has been found guilty by the majority of refusing even to discuss the 9 point programme. Yet the minutes of the negotiating meetings prove the very opposite. The 9 point programme was given wide publicity by the Union over the heads of the University's bargainers before being tabled as formal bargaining demands at the April 17th negotiating meeting. According to the minutes of that meeting, as might be expected, the dialogue consisted mainly of an explanation by the Union of the 9 points and questions raised by the University for clarification of them and of the Union's position. However, the next bargaining meeting, that of May 22nd, was devoted almost exclusively to a full and far-ranging discussion of the 9 points. Here in part is what the minutes of that meeting say:

> ... Parker said that he was prepared to comment upon the nine proposals presented by Mitchell at the last meeting. His comments are as follows:
>
> 1. Parker said it was obvious to all at the table that the institution

will continue to be called The Royal Conservatory of Music as long as the University of Toronto is involved. Afterwards it would depend on the Board of Directors or whatever group is formed.

2. McMaster Hall. He said Governing Council will consider this issue as will the University administration and it would not be appropriate to comment on this. Mitchell asked whether Parker was saying this was not negotiable. Parker made reference to President Ham's letter dated June 13, 1983 giving the University's position with respect to McMaster Hall. He showed Mitchell the letter and confirmed that Mitchell had a copy of the report. Mitchell asked whether this letter represented current policy. Parker said that it represents the University's position transmitted earlier. He noted that the letter said that the Conservatory would not be forced out of McMaster Hall without consultation. The letter expressed sensitivity and concern with respect to the location for students and teachers. Mitchell said he took it then that this was negotiable. Parker said he was not saying that. Mitchell asked if it was a matter for bargaining. Parker said that he could see that *location* might be a matter of concern for staff and that it could possibly be considered an employment condition if, for example, there were a move to Pape and Danforth he could see this as a possible issue. However, he said he did not see it as a specific matter regarding the specific property of McMaster Hall. He said the letter reflects all of this. Mitchell said that given that Governing Council passed the motion and that Parker was discussing it, he took it that the current plan was to proceed toward separation in July 1986. Parker said he had no information that would lead him to believe otherwise. Mitchell said then if that is the case, what is the present intention re the present location of the RCM as of 1986. Parker commented that Mitchell had a copy of the resolution not put to Governing Council but presumably it would be at some point. It says that McMaster Hall or other equivalent facilities. Parker said he knew of no plans to immediately move from McMaster Hall and added that furthermore Ham's letter spoke to this issue. Mitchell queried access arrangements. Parker referred to the uncertainty of any new governing body of the RCM but said that he knew of no university plans with respect to McMaster Hall.

3. & 4. Parker said that these two were answered in the resolution of Governing Council. He referred to the text of the proposal with respect to equipment and said the resolution answers the questions raised. Mitchell noted that #3 was explicitly covered and asked whether Parker was saying that those items in #4 were also covered by the motion. Parker said yes, these were an integral part of the employment relationship. Mitchell referred to ambiguity related to instruments in the main building as the resolution refers to branches. Mitchell asked specifically whether McMaster instruments in McMaster Hall such as pianos and also the bookstore would be covered. Parker said that he would get back to the Association on those two questions.

5. Parker said the University position is not finalized and won't be until divestment is resolved but that he had no reason to think other than that the exam system would go to the RCM, but that he was not able to be more specific at this time. Mitchell noted that one report indicated that the exam system would remain with the University and not the RCM and that this had resulted in a heated controversy. In the last report the University position had changed and it had been decided that the examination system would remain with the Conservatory. Parker said he would get clarification on this item. Mitchell noted that this question was not any detail but a major item as the union represents examiners. Parker acknowledged this and said that he would

respond at a later date.

6. & 7. Parker said that these were both covered in the proposed resolutions. Mitchell asked whether the University had documents for them with respect to Frederick Harris. Parker said he did not and it was not the intent to provide these as the University did not accede to the union's request. Mitchell asked why not. Parker said it was not a matter they were prepared to negotiate with the Faculty Association. Mitchell asked whether there was a reason for not disclosing. Parker said he supposed it was not considered a part of the business of negotiating a collective agreement.

8. Parker reported that he had hoped to give Mitchell information on this and had planned to convey details and discuss it. However, Roger Wolff had contracted [sic] pneumonia and had not been available. He said that immediately upon confirmation of the plans he will communicate to Mitchell. Mitchell asked when this might be. Parker said he was loathe to commit not knowing the state of health of Wolff but estimated a week. Mitchell asked what this material would cover. Parker said the mechanism for proceeding with divestment. Mitchell asked whether the University intended to proceed with legislation. Parker said that this would obviously be necessary in order to divest. Mitchell commented the Legislature would set up a new body statutorily. Parker said there would have to be a whole mechanism for developing a format and to formulate a plan. There would be a need for a detailed plan and there would be public exposure. Mitchell commented there would be the need to negotiate a plan but with whom. Parker said the University is responsible for the Conservatory and in order to divest it must set up a new form of administration. Mitchell said there would not be a new Board until there was legislation and that he was confused about how this was going to work. Mitchell commented with respect to Frederick Harris that Parker was saying that he would not negotiate with the union but with the new body. Parker said that he had not said it would be negotiated but that it would be dealt with. Mitchell said the conclusion is the University will do it by itself. Parker said the University thinks it has the right. He said at the table we were negotiating a collective agreement dealing with working conditions. Mitchell said that it directly affected their position if there was a unilateral transfer of the music company with a negative impact. Therefore it must be negotiated. Parker said that we were here to negotiate matters related to a collective agreement. He said that McMaster Hail had been raised as it had to do with security of employment, student relationships and relationships of the faculty of music and he understood their concern on this matter. However, he did not think the same concerns were expressed with respect to transfer of assets. Mitchell asked that the position be reconsidered. He said that the union's position was that the University intended to unilaterally sell the Conservatory with not an asset but a financial burden and that the faculty are the ones that will suffer. He said that he could answer that concern if it could be demonstrated through the disclosed information that it may not be a problem. Parker said it was a question of to whom it was disclosed and when, for example to the new governing body of the Conservatory. Mitchell said that that was circular and that it meant that the University was going to do it in its own way. Mitchell said that he did not accept that the University did not want to discuss the matter here and that he did not want to make an issue of it, and perhaps it was academic as it will at some time be public. He asked that the University tell the Association the story and get them onside as this creates suspicion. Parker said that at an appropriate time the University will need to report on all these matters and noted that it could not amend legislation without a full examination of these issues. Mitchell asked that

Parker relay to his principals two concerns: 1) express the union's view on what is negotiable and 2) if it is not a problem, there should be disclosure and therefore an issue would not be created. Parker said that these matters will be disclosed, however it was a matter of going through the Governing Council structure. Mitchell said he was not satisfied by the refusal to disclose (there was a little bit of discussion here that I did not catch). Parker said that matters of assets were not negotiable. He said the University has considered it and responded on those matters raised with respect to employment and working conditions and that more information will be transmitted at the appropriate times. Mitchell said the appropriate time is not now? Parker said we are not negotiating divestment but a collective labour agreement and that he had yet to see proposals with respect to a collective agreement. Mitchell said that he understood that Parker did not have any proposals. Parker said that he did not certify. Mitchell said that he was not prepared to wait while the University developed their proposals.

9. Parker said that this related to divestment and was not negotiable. Mitchell asked how this was seen as being funded. Parker said that this will need to be determined. Mitchell said and not negotiated with us. Parker said it is a matter for the Administration and Governing Council to work out and will go to Governing Council. Mitchell asked if there will be a process of discussion and consultation or whether everything would be done behind closed doors and in the fullness of time. Parker gave a general outline describing in general an Implementation Comittee [sic] and the Governing Council committees. I did not copy the details of this. Parker said he was trying to describe the process which was a difficult one. He said that some things were not available in the process of collective bargaining at this time and he was not trying to be awkward. Mitchell said that what was being said was that these items were not going to be negotiated, so what was the process of decision-making and what was the involvement of the University community and faculty going to be. He said he needed to know this. Parker said the matter was before the Governing Council and was not private. He said that the Faculty Association has communicated with Governing Council and the Chairman has communicated with the Association and that he was not at liberty to negotiate divestment. Mitchell said that he was hearing that Governing Council was going to decide matter. The Administration would recommend to Governing Council and its committees and that the Faculty Association could approach these. Parker said representations are allowed and encouraged. Mitchell asked prior to that if there would be any consultation. Parker said that is part of question #9 regarding implementation. He said that Mitchell also knew that Governing Council had heard representations from staff on issues and said that we would make the Association aware of developments. Mitchell asked whether the Administration would discuss before recommending. Parker said he could not answer that. Mitchell asked if there would be discussions with the Faculty Association. Parker said he could not answer, however he could say there would be an Implementation Committee and meetings held with respect to that. Mitchell asked when. Parker said he could not specifically tell Mitchell it was unfortunate that Roger Wolff was ill. He had hoped to have a better understanding of the earlier *process.* He said that he took it that the Association wanted to be informed of times, dates, meetings, etc. Mitchell said yes and he said they intended to negotiate at this table whether it was thought appropriate or not. Parker restated that divestment was a matter for the University. Mitchell again asked for documents....

4. Such extensive dialogue hardly denotes a refusal to discuss the 9 point programme. On the

contrary it shows that the 9 points were extensively discussed; it also shows quite clearly that the University simply was unwilling to concede to the Union's demands - which even the majority agrees it has a legal right to do. Note too that the University's spokesman Parker several times during the discussion identified where the issues raised could involve matters relating to security of and other conditions of employment, thus making it clear to the Union that in those aspects the University was prepared to come to some accommodation. Note too the several occasions where Parker agreed to obtain for the Union the answers to detailed questions raised in the discussion, answers which were not readily available at the time. The minutes of the next following meeting record Parker's answers to all of the Union's questions except those on which the University itself still had not worked out the details or on which the University was unwilling to supply the information requested.

5. Again, such wide-ranging dialogue and willingness to come back later with further information for the Union, is clear evidence of the fact that the University did discuss with the Union its 9 points - contrary to the assertion by the majority that the University refused such discussion. Not only did the University discuss those demands, it made a counter-proposal to include the Union's president on the Implementation Committee being established by the University to oversee the separation of the Conservatory from the University - a subtle end-run offer the Union accepted without prejudice. Thus there was a demand from the Union followed by a counter-offer from the employer - not an offer the Union liked but an offer nonetheless. It is difficult to understand how an objective observer could characterize such conduct as a refusal to bargain; proposal and counter-proposal are the essence of bargaining.

6. The flaw in the majority's position becomes even clearer if one considers the practical effect of its ordered remedy to the alleged violation - a direction to the University to bargain in good faith. Despite the innovativeness of most collective bargainers there are only so many ways an employer can say "no" to a union demand. In this case the University has made it very clear that its answer to the Union's demand for a veto over the divestment decision (the Union "... will support the separation of the two institutions if, and only if, the following conditions are met...") is "no". It has offered to keep the Union involved in the ongoing process, to communicate regularly with it and to seek its views, but it has refused to concede the management prerogatives demanded by the Union. Other bargainers might have used different words than were used here to convey the message, but the message was clear. Even silence can send a loud signal between experienced bargainers.

7. What more can the University say about the Union's 9 points than it has already said? Should it just go through the motions of more talk? Engage in "surface bargaining"? Prolong the discussion and risk misleading the Union into believing that it might yet win its demand if only it can get the University with the help of this Board to talk long enough? In this case both the Union's and the University's bargainers are experienced labor relations practitioners. They don't have to paint elaborate word pictures for each other in order to get their positions across. Their experience is such that they needn't engage in theoretical or academic exercises. Yet that is what the majority's decision will force them into. Instead of being a help to the parties to bring them closer to a collective agreement, this Board's decision will at best delay the real bargaining that will take place after the Union's 9 points are disposed of, and at worst may well prevent any peacefully arrived at agreement at all. Either result is a high price to make the parties pay for the sake of symmetry with Board precedents none of which, as argued by the Union itself and admitted by the majority, apply to the unique facts of this case: "The scope of the duty to bargain.., has not been dealt with quite so directly by the Board previously" (para. 30). It is thus unfortunate that the Board, when presented with an opportunity to be pragmatic and helpful, chooses instead to take an academic and theoretical approach to the key issue raised before it.

8. I agree with the majority that the parties are free to include in their collective agreement

whatever suits them, and therefore that each is free to table any matter for discussion. Where I disagree with the majority is in its conclusion that no matter how ludicrous a demand might be, or how far removed from terms and conditions of employment, it must be dignified by negotiations and lengthy discussion. Then, if the author of the demand isn't satisfied by the outcome of the discussion this Board will determine whether or not it was adequate! That role for the Board is inevitable given its reluctance to decide that certain demands are beyond the pale of good faith bargaining. So it concentrates upon the process rather than the content of bargaining and concludes that the latter must mean that everything is bargainable. If the Conservatory was seen in the industrial setting as being simply one branch plant of a multi-location enterprise which the employer had decided to divest, the Union's 9 point programme would amount to a demand for a veto over the sale. While the University could, if it wished, concede such a power to the Union it is under no legal obligation to do so. Once the University has said "no" to the demand, the Union has no legal right to enforce it (although it is free to attempt to do so by strike action). The Union's certification as bargaining agent for the employees does not give it ownership rights in the employer's property.

9. The issue for this Board then becomes one of determining whether or not the University's bargaining "process" in refusing the demand has been adequate to meet some unspecified criterion of the majority. On such a clear cut issue as whether or not the University should abdicate its management rights and concede a veto power to the Union over the divestment, how much more discussion is required?

10. If, as the majority claims, the demand is simply about the management rights clause eventually to be included in the collective agreement, the University has made its position clear - it is not going to bargain away its lawful, traditional and innate rights to manage. Instead, it has made a counter-proposal, short of what the Union wants - but it is not up to this Board to judge it in the absence of any claim that the University's position is designed to be destructive of the Union or to thwart achievement of a collective agreement. None of the evidence before this Board could support such a charge.

11. If the University had demanded a change in the Union's dues structure "without which there will be no agreement," or had demanded that the Union change its political affiliation or law firm, or that the University be granted the power to veto a Union decision to join the Ontario Federation of Labor or the C. L. C., how much time does one imagine the Union's bargainers would take in saying "no"? The Union's answer I expect would be curt and to the point, that it was not going to bargain about its internal affairs, and that would be the end of it. Except if the University were then to charge the Union before this Board with refusing to bargain those demands. Would this Board then order the Union to return to the bargaining table and, in good faith, bargain about such demands? For consistency with its decision here, the answer would have to be "yes", although clearly the correct answer should be "no".

12. The ethereal and impractical view of collective bargaining taken by the Majority in this case is further illustrated by its decision that the University also erred in bringing bargaining to a halt until the Union's complaint on the 9 points had been settled by this Board. An experienced bargainer would not, nor should he be expected to, make a substantive offer of settlement until he is sure he knows the parameters of the Union's position. That is why a typical offer is usually a "package offer" or "global response" designed to narrow the issues in dispute and form the basis of settlement. The offer has the effect of putting the employer's cards on the table, or at least of tipping his hand. No experienced bargainer does that until he is reasonably certain the other side has delineated its position. To expect the University to continue meaningful bargaining without knowing the parameters of the accommodations it might have to make on the 9 points is to force it into an unrealistic and untenable bargaining process in which form becomes more important than substance. The majority

argues that bargaining should continue at least on other items, presumably those of a non-monetary nature. Yet the Union itself argued during negotiations (when the University was pressing the Union to delineate its other demands beyond the 9 points) that it would be futile to bargain until the issue of the 9 points had been resolved. Here is an extract from the Union's own minutes of the April 17th bargaining meeting:

> ……..John Parker said that there was one question. He said that they were here to negotiate a collective agreement. He noted that the Faculty Association's agenda included details around separation. But he had questions about the rest of the proposals that would normally come. He said that before he could proceed, they would need the rest of the proposals. He requested the Faculty Association's total package of proposals and noted that this was not an unusual request.
>
> Michael [Mitchell, the Union's spokesman] asked: "Are you refusing to proceed?" Parker said, "No, but before we sit down to negotiate a collective agreement, we want to see the total proposals."
>
> Michael said that all other matters sort of pale in comparison to the importance of the issues raised here regarding separation. In the ordinary situation it might make sense to talk about the other issues, but it was more difficult to negotiate sensibly when, as here, we didn't know what the future would be of the institution. Michael gave, as an example, the grievance procedure. We didn't know whether it was going to be a grievance procedure for a university or for another kind of institution, and what was the point of negotiating a grievance procedure if you didn't know what kind of institution it was supposed to be suitable for. Michael said the University has said that "We're getting rid of you as of July 1, 1986" but you still want the rest of our proposals.
>
> Parker said that he was here to negotiate all facets of a collective agreement. He would raise the issues of separation with his principles [sic] and a policy would be developed which would be communicated to the Faculty Association, but obviously there were other demands that would have to be dealt with.
>
> Michael asked Parker to explain why the University was anxious to negotiate the other matters given that the ultimate responsibility could rest with a new and independent body.
>
> Parker said that he respected that the Faculty Association had these proposals but he wanted the Faculty Association to put its entire position forward and it was unusual if he didn't want that. Michael said, "You're asking for the rest of the proposals?" Parker said "yes". Michael said, "Why now?" Parker said "You're raising issues of the future, I must raise questions of the relationship between the Faculty Association and the Conservatory." Michael said, "But is this in the context of the University or another body?"
>
> Parker said that the Faculty Association was currently dealing with the body it was certified to deal with. He indicated that they 'would negotiate all of these proposals....

13. Almost two months later the Union changed its position and did submit the balance of its proposals to the University but by that time had already threatened that it was considering legal action

against the University. So the inference can be drawn that its change of position was prompted at least as much by its desire to tidy up its own house prior to charging the University with refusing to bargain and with delaying bargaining than by any desire to facilitate the collective bargaining process.

14. But the Union's position during that April bargaining meeting clearly illustrates the impracticality of expecting the parties to continue fruitful negotiations while the issue of the 9 points is hanging over the bargainers' heads. Even a non-monetary contract clause such as a grievance procedure can't be resolved. The 9 point program contains issues with such implications for the parties that no responsible negotiator on either side should be expected to continue bargaining until that Damocles sword has been removed from the bargaining table.

15. The argument of the majority, that allowing a party against whom allegations of bad faith bargaining have been raised to suspend negotiations until the charges have been dealt with risks rewarding a guilty party, is a position of this Board which is generally supportable but which like any policy must be rationally applied to the unique circumstances of each case. The Board's position has been developed primarily through cases where the Board had grounds to suspect an anti-union motive behind the suspension of bargaining. No such motive has even been alleged here. The suspension of bargaining was simply a pragmatic response by the University to the unwillingness of the Union to modify or drop its 9 point program demand until it could present its case to this Board. The Board's virtually automatic guilty verdict ignores the unique facts of this case. The University made the only practicable collective bargaining decision available to it in the circumstances. That should hardly be seen as a violation of section 15 of the Act.

16. I agree with the majority that the University acted quite properly in refusing the Union's fishing expedition demands for information, and that no violation of the Act can be inferred from the delays experienced in bargaining between these parties to date. At least on those two issues the majority hit the right note.

<u>ADDENDUM</u> (OF THE MAJORITY)

1. With respect to the scope of the duty to bargain, Board Member Gallivan concluded on the facts that the university had bargained about the 9 point programme but had said "no" to the union s proposals; the dissent sets out a lengthy excerpt from one negotiating meeting in support of this factual finding. With respect, the majority disagrees. The majority has concluded on the totality of the evidence, including the excerpt noted in the dissent and the submissions of the respondent, that the university's position was that the 9 points were "off limits" for discussion, i.e., the programme need not be bargained at all, in part, because the union was purportedly acting on behalf of the Conservatory as an "institution" and not behalf of the employees in the bargaining unit. The majority has already commented on those arguments in its decision. With respect to the dissent, however, the majority wishes to note that the majority found the *reason* for saying "no" was contrary to section 15 of the Act. This is not a subtle or academic difference but one which goes to the heart of collective bargaining. As the majority decision makes clear, the university is not required to *agree* to the union's proposals. But, the university is required to respond, to state its position with an explanation. One party cannot unilaterally declare some items (in this case, the 9 point programme) entirely "off-limits" for discussion. In the majority's opinion, the dissent has ignored the reasons given by the respondent for its refusal to bargain concerning the 9 point programme and ascribed other reasons. Moreover, the majority also strongly disagrees with the factual finding that the invitation to the union president to sit on the implementation committee was a "counter-offer". It is clear from the university's position that the invitation was entirely outside the realm of bargaining. Again, with respect, the dissent has ascribed a character to the invitation expressly denied by the university.

2. The majority also takes serious issue with the dissent's concept of good faith bargaining. In paragraph 7 of the dissent, it is stated that the Board's decision will "delay the real bargaining that will take place after the union's 9 points are disposed of . . .". And, in the next paragraph, it is asserted that an interventionist role for the Board is ensured "given its reluctance to decide that certain demands are beyond the pale of good faith bargaining". The majority is expressly *not* taking a interventionist role in bargaining by refusing to assess the *content* of the demands. It is not for the Board to comment on the wisdom of proposals or priorities of the parties, to characterize some as "ludicrous" or "beyond the pale" except where the demands are illegal or the content reveals an intention not to conclude a collective agreement. The Board is not proceeding down the American path and rejects the mandatory-directory analysis for the reasons stated earlier. The majority agrees with the comment in paragraph 8 of the dissent that the university has no legal obligation to concede to the union s requested "veto" over divestment. However, the dissent's recognition that the union has the right to resort to economic sanctions, in the majority's opinion, underscores the majority's position that, in the absence of improper motive, the disposition of the 9 point programme is for the *parties,* not the Board, to determine.

3. The majority also has some comments about the analysis in the dissent of the refusal to bargain pending the disposition of the complaint by the Board. It is true that the union stressed the importance of the 9 point programme. It is also true that the complete package of union proposals was delivered in June. The dissent recognizes that "allowing a party against whom allegations of bad faith bargaining have been raised to suspend negotiations until the charges have been dealt with risks rewarding a guilty party is a position of the Board which is generally supportable". The dissent, however, distinguishes between suspension of negotiations where an improper motive is suspected for the suspension and the suspension in the instant case which is characterized as a "pragmatic response by the university to the unwillingness of the union to modify or drop its 9 point programme demand until it could present its case to this Board". If the dissent is implying there should be allegations of unfair labour practices in addition to section 15 before suspension would be improper, the majority does not agree. With respect, such a position will only encourage multiple allegations of unfair labour practices. If the suspension of negotiations is to be characterized as improper or not only *after* the Board has disposed of the merits of the other allegations, this does nothing to encourage the parties to continue negotiations. If the implication is that an express finding of anti-union animus is required before suspending negotiations is improper, the majority rejects the imposition of that additional element which can only be determined *after* the entire matter is dealt with by the Board. It will *always* be "pragmatic" to stop negotiations until the Board issues its decision. The dissent ignores the facts of this case that the union's emphasis on the 9 point was *followed* by an express desire to continue negotiations on other matters and by Parker's stated position that discussions could continue. It is true that Parker's principals thought otherwise. The majority, for the reasons stated, rejects that stance. Again, as noted, the parties are represented by experienced negotiators whom the Board need not instruct on mechanisms to maintain flexibility pending the outcome of this complaint. The majority's position on this issue was stated as a matter of general principle for sound labour relations reasons, namely, that a party should not benefit from his or her wrongdoing regardless of the "degree" of that wrongdoing, or whether or not there is a finding of anti-union animus in addition to violations of "non-motive" sections of the Act.

Saskatchewan (Re)

Saskatchewan Labour Relations Board Decisions

Saskatchewan Labour Relations Board

D.P. Ball, Q.C., (Chair), J. Forsyth and B. McDonald (Members)

Decision: August 31, 1989.

LRB File Nos. 245-87 and 246-87

[1989] S.L.R.B.D. No. 52 | 5 C.L.R.B.R. (2d) 254

Between Government of Saskatchewan, and Saskatchewan Government Employees' Union

(34 paras.)

Appearances

D. Bogdasavich, for employer.

G. Gray, for union.

DECISION OF THE BOARD

1 These reasons for decision deal with two applications filed by the Union [Saskatchewan Government Employees Union ("SGEU")]. Both applications allege that the Government of Saskatchewan violated s. 11(1)(a) [rep. & sub. 1983, c. 81, s. 6(1)] [Editor's note: Text in brackets is struck out in the original.] and s. 11(1)(c) of the Trade Union Act, *R.S.S. 1978, c. T-17*, by refusing to provide the Union with adequate information pertaining to plans to reorganize government services. Both applications were heard and considered by the Board at the same time.

2 The first application (LRB File No. 245-87) was referred to by the parties as the "main table" application. It alleges that the Government improperly refused to disclose information requested by the Union concerning the implementation of changes affecting employees in the largest civil service bargaining unit, which consists of approximately 8,500 employees in the executive branch of Government who are subject to the Public Service Act, R.S.S. 1978, c. P-42. A collective bargaining agreement covering the employees expired on September 30, 1986 and a notice to revise was served on August 6, 1986 in accordance with s. 33(4) of the Trade Union Act. At all material times to these applications, the Union and the Government were engaged in bargaining collectively with a view to revising the agreement.

3 The second application (LRB File No. 246-87) was referred to by the parties as the "SIAST application". It specifically alleges that the Government failed to make adequate disclosure of its intentions with respect to the transfer of approximately 1,200 employees to the Saskatchewan Institute of Applied Science and Technology ("SIAST"). SIAST was created by the Institute Act, R.S.S. 1978, c.I-9.1, to replace a number of other institutions which had been providing secondary education in the province. The Institute Act, which took effect on January 1, 1988, transferred the employees of those institutions to SIAST, terminated SGEU's bargaining rights, and created two new bargaining units. (The Board gave more detailed consideration to the provisions of the Institute Act in Sask. Institute of Applied Science & Technology and S.G.E.U. (LRB File No. 131-88), April 12, 1989).

4 Although the Union led evidence concerning a number of other changes made by the employer which affected employees without consultation with the Union, the Union stressed that those changes were not an issue in these proceedings.

5 Both of the applications focused on a letter written by the Union to the respondent on November 17, 1987 requesting certain information. The letter was written after the Minister of Education introduced the Institute Act as Bill 46 of 1986-87 in the Legislature of the Province of Saskatchewan on September 30, 1987. The letter and the employer's response dated November 19, 1987 were as follows:

> November 17, 1987
>
> "HAND DELIVERED"
>
> Mr. John McPhail
>
> Assistant Chairman
>
> Public Service Commission
>
> 3211 Albert Street
>
> REGINA, Saskatchewan
>
> S4S 5W6
>
> Dear Mr. McPhail:
>
> RE: Disclosure of Information
>
> As you are aware, SGEU is the exclusive representative for all employees of the Executive Branch of the Government of Saskatchewan and all employees who are subject to the Public Service Act with those exceptions as noted in our certification order.
>
> As such representative we are formally requesting the following information:
>
> 1. A list of all employees currently employed by the four technical institutes who are affected by Bill 46. We would request further:
>
>   (1) Information on how the transfer of these employees will take place;
>
>   (2) Who will be offered employment and on what terms;
>
>   (3) Which units currently described by Bill 46 as "academic" and "other", the affected employees will be placed in.
>
> We would like the above information in writing on or before November 19, 1987.
>
> 2. All information relating to re-organization of the Department of Justice and in particular, the Corrections Division, which will affect any member(s) of SGEU.
>
> 3. All information relating to the re-organization of the Department of Social Services which will affect any member(s) of SGEU.
>
> 4. Any and all information or initiatives by the employer that would impact on the bargaining unit, i.e. privatizations; contracting out; new legislative initiatives altering departments, agencies or crowns; creation of new departments, agencies, crowns, boards, etc; legislative changes affecting the Union's current certification order and scope clause.
>
> This information is required to enable us to fulfil our statutory obligation to bargain in good faith and reach informed decisions at this table.
>
> As the employer, the Public Service Commission has an obligation to negotiate any changes in the terms and conditions of employment of the members we represent with SGEU.

Yours sincerely,

Ralph Ermel,	Herb Lowe,
Chief Executive Officer	Chairperson, PS/GE

RE/HL/im

c.c. Negotiating Committee

B. Belof

P. Gallagher

November 19, 1987

Mr. Ralph Ermel

Chief Executive Officer

Saskatchewan Government

Employees' Union

1440 Broadway Avenue

REGINA, Saskatchewan

S4P 1E2

Dear Mr. Ermel:

RE: Request for Information - November 17, 1987

On November 17, 1987, I received a letter from you and Herb Lowe outlining a request for information concerning the formation of the Saskatchewan Institute of Applied Science and Technology (SIAST) and any information regarding any plans of the government that would have any impact on the SGEU public service bargaining unit.

I will deal with your requests in the order in which they were presented.

Request 1 A list of all employees currently employed by the four technical institutes who are affected by Bill 46.

As you are aware, you do not represent all of the employees employed by the four technical institutes and therefore are not entitled to the list requested. If you desire only a list of those employees who are members of the SGEU, such a list can be compiled by you from your own membership records. In short you are asking us to make a list for you which is available from your own records. We do not believe we have an obligation to incur the time and expense in performing this service for you.

Information on how the transfer of these employees will take place.

Request 1(1) The manner in which employees will be transferred to SIAST is described in Section 35(1)(b) of The Institute Act. Presumably each employee will be advised of the intent of SIAST to request his transfer on or before the Act is proclaimed. The Department of Education might be able to provide you with further information in this regard.

Request 1(2) Who will be offered employment and on what terms.

SIAST will be an independent corporation and its employees will not be subject to The Public Service Act. Accordingly, the Public Service Commission is not responsible for negotiating collective agreements on SIAST's behalf. We are neither able nor empowered to answer this question and we therefore suggest you contact the officials responsible for the formation of SIAST.

Request 1(3) Which units, currently described in Bill 46 as "academic" and "other", the affected employees will be placed in.

The determination of which employees fall in either the "academic" or "other" bargaining units of SIAST is dealt with in Section 14(3) of The Institute Act. Only the board of directors of SIAST will have the legal authority to make the designations as per subsection 14(5) of the Act.

Requests 2, 3, 4 (All dealing with any plans for reorganization of agencies, legislative changes, plans for contracting out or privatization of services.)

We have no knowledge of the information requested. As you can appreciate, any organizational changes of the government would be announced by the Minister responsible or his officials in the usual manner. In any event we do not believe that either management policies or the government's legislative agenda are matters that must be negotiated with the SGEU.

Naturally, changes to the PSC/SGEU collective agreement as already proposed to you by the Public Service Commission are within your purview and are a matter of interest to you. We stand ready to discuss those matters with you.

Yours truly,

John McPhail

Assistant Chairman

6 No further communications took place between the parties after the Union received the respondent's letter dated November 19, 1987. The Union filed both of these applications on December 1, 1987. On December 31, 1987, the respondent provided the Union with the list of employees requested in para. 1 of the Union's letter dated November 17, 1987.

7 The Union alleges that the employer's reply dated November 19, 1987 amounted to a violation of s. 11(1)(a) and (c) of the Trade Union Act, which provide:

11.(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:

(a) to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating with his employees;

. . . . .

(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit

8 Section 2(b) of the Act defines "bargaining collectively" in part as:

> negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement.

9 The Union submits that the duty to bargain in good faith obligates employers during bargaining to disclose, on their own initiative, any final decisions that significantly affect the bargaining unit and to disclose, when asked by the union, any plans under consideration that will significantly affect the unit. With respect to the "main table" application (LRB File No. 245-87), the Union complains that the employer did not respond adequately to its request for information in paras. 2, 3 and 4 of its letter dated November 17, 1987. With respect to the SIAST application (LRB File No. 246-87), the Union says that the Government failed to provide adequate information as requested in para. 1 of the Union's letter dated November 17, 1987. The Union asserts that the employer's failure or refusal to provide such information constituted an unfair labour practice under s. 11(1)(a) of the Trade Union Act because it interfered with the employees' right to be properly represented by the Union. It submits that the employer's refusal to provide the information was also a breach of its duty to negotiate in good faith, contrary to s. 11(1)(c) of the Trade Union Act.

10 The employer acknowledges that it has a duty to disclose certain information to the Union in certain circumstances, but denies that it breached its duty in the circumstances of this case. It says that it answered the questions it was required to answer, that it had no obligation to answer questions concerning decisions within the jurisdiction of the legislative branch of Government, and that it was entitled to refuse to discuss certain specific issues. In reply to the "main table" application, the employer notes the sweeping nature of the Union's demand for information and says that it is under no obligation to provide information in response to a request that amounts to a fishing expedition. It also distinguishes between the executive branch and legislative branch of Government, arguing that the latter is not the employer, has no duty to bargain collectively with the Union and is under no obligation to consult with the Union while contemplating, formulating, revising or introducing legislation. On the other hand, the employer acknowledges that the executive branch of Government is the employer of the employees represented by the Union and has the same duty as any other employer to make disclosure to the Union.

11 With respect to the SIAST application, the respondent replies that Bill 46 was an initiative of the legislative branch and that it was neither obliged nor authorized to provide the SGEU with a list of employees to be affected by the transfer unless and until Bill 46 was proclaimed. It says it could not assume the Act would ever be proclaimed, or would ever be proclaimed in the form in which it was introduced to the Legislature. It further says it had no obligation to provide the Union with a list of the employees in the four institutes because the Union was perfectly capable of preparing that list itself and the respondent is not obliged to do the Union's work for it.

12 Labour relations boards have frequently commented on the extent to which an employer is bound to disclose decisions and/or plans that will significantly affect the bargaining unit. They have considered whether the obligation exists only during negotiations for a new or revised collective agreement or whether it also exists during the term of an existing agreement. They have also considered the difference between the duty to disclose final decisions and the duty to disclose plans and the duty to negotiate them with the union.

13 In this case the parties were engaged in bargaining collectively with a view to revising a collective bargaining agreement and the Board will confine its comments to that situation. The Board would simply note in passing that the obligation to make disclosure during the term of a collective agreement may well be different in Saskatchewan than it is in other jurisdictions in view of specific requirements of s. 43 of the Trade Union Act respecting technological change.

14 One of the most generally accepted decisions concerning an employer's duty to make disclosure during collective bargaining is Westinghouse Canada Ltd. and U.E., Local 504, *[1980] 2 Can LRBR 469*, *80 CLLC paragraph 16,053* at p. 785 , a case in which the Ontario Labour Relations Board considered the duty to bargain collectively imposed by s. 14 of the Ontario Labour Relations Act, R.S.O. 1970, c. 232. It decided that although an employer is under an obligation to inform the union during collective bargaining of decisions already made which may have a major impact on the bargaining unit, and while the employer is required to respond honestly when asked in bargaining if he is contemplating any initiatives of this type, there is no obligation on the employer to reveal, on his own initiative, plans which at that point have not become at least defacto decisions. The Board stated at pp. 487-489 Can LRBR, p. 800 CLLC:

> 39 ... . Once an agreement is reached, however, the parties are bound to it for its stipulated term and are prohibited from engaging in economic sanctions during its term regardless of changing economic conditions or management initiatives. ... Having regard to the importance of the exercise, the requirement for full and open discussion, the scope of matters open to bargaining and the statutory framework which binds the parties to the terms of their agreement for its full term, can there be any doubt that the section 14 duty requires an employer to respond honestly when asked in bargaining if he is contemplating any initiatives of the type which have a real likelihood of significantly impacting on the bargaining unit. Similarly, can there be any doubt that an employer is under a section 14 obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of the trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of the bargain.
>
> 40. The more difficult question is whether there is an obligation on an employer to reveal on his own initiative plans which are not finalized at the time of bargaining but which, if implemented during the term of the collective agreement, would have a significant impact on the economic lives of bargaining unit employees. On one side the Board must be concerned with potential distortion of the bargaining process by the imposition of an obligation which requires the employer to advise the union on his own initiative of plans which may never become decisions. On the other side, however, the Board must be sensitive to the purpose of the collective bargaining process and to the role of the trade union as exclusive bargaining representative of the employees who might be affected if these plans resulted in decisions being made by the company.
>
> 41. The competitive nature of our economy and the ongoing requirement of competent management to be responsive to the forces at play in the marketplace result in ongoing management consideration of a spectrum of initiatives which may (have) impact on the bargaining unit. More often than not, however, these considerations do not manifest themselves in hard decisions. For one reason or another, plans are often discarded in the conceptual stage or are later abandoned because of changing environmental factors. The company's initiation of an open-ended discussion of such imprecise matters at the bargaining table could have serious industrial relations consequences. The employer would be required to decide in every bargaining situation at what point in his planning process he must make an announcement to the trade union in order to comply with section 14. Because the announcement would be employer initiated and because plans are often not transformed into decisions, the possibility of the union viewing the employer's announcement as a threat (with attendant litigation) would be created. If not seen as a threat the possibility of employee overreaction to a company initiated announcement would exist. A company initiated announcement, as distinct from a company response to a union inquiry may carry with it an unjustified perception of certainty. The collective bargaining process thrusts the parties into a delicate and often difficult interface. Given the requirement upon the company to respond honestly at the bargaining table to union inquiries with respect to company plans which may have a significant impact on the bargaining unit, the effect of requiring the employer to initiate discussion on matters which are not yet decided within his organization would be of marginal benefit to the trade union and could same to distort the bargaining process and create the potential for additional litigation between the parties. The section 14 duty, therefore, does not require an employer to reveal on his own initiative plans which have not become at least de facto decisions.

15 There are a multiplicity of other decisions dealing with the employer's duty to make disclosure during negotiations for a collective bargaining agreement: see, for example, Inglis Ltd. and U.S.W.A., Local 4487, *[1977] 1 Can LRBR 408*, *[1977] OLRB Rep. March 128*; Consolidated Bathurst Packaging Ltd. and I.W.A., Local 2-69 *(1983), 4 C.L.R.B.R. (NS) 178* (Ont.); Canada Post Corp. and P.S.A.C. (1985), *63 di 136*; Gainers Inc. and U.F.C.W., Local 280-P *(1986), 16 C.L.R.B.R. (NS) 189* (Alta.); Noranda Metal Industries Ltd. and C.A.I.M.A.W., *[1975] 1 Can LRBR 145* (B.C.); DeVilbiss (Canada) Ltd. and U.E., *[1976] 2 Can. LRBR 101* (Ont.); and Royal Conservatory of Music Faculty Association and University of Toronto Governing Council, *[1985] OLRB Rep. Nov. 1652*. The decisions are difficult to reconcile and, for the purposes of this decision at least, add little to the comments in the Westinghouse decision. They could be perceived as enunciating different rules for different factual situations, but the Board prefers a much less complicated interpretation; that is, each decision simply illustrates a different facet of the basic duty to negotiate in good faith. That duty is imposed by s. 11(1)(c) of the Trade Union Act and its legislative counterpart in every other jurisdiction. It requires the union and the employer to make every reasonable effort to conclude a collective bargaining agreement, and to that end to engage in rational, informed discussion, to answer honestly and to avoid misrepresentation. More specifically, it is generally accepted that when asked an employer is obligated:

(a) to disclose information with respect to existing terms and conditions of employment, particularly during negotiations for a first collective bargaining agreement;

(b) to disclose pertinent information needed by a union to adequately comprehend a proposal or employer response at the bargaining table;

(c) to inform the union during negotiations of decisions already made which will be implemented during the term of a proposed agreement and which may have a significant impact on the bargaining unit; and

(d) to answer honestly whether it will probably implement changes during the term of a proposed agreement that may significantly impact on the bargaining unit. This obligation is limited to plans likely to be implemented so that the employer maintains a degree of confidentiality in planning, and because premature disclosure of plans that may not materialize could have an adverse effect on the employer, the union and the employees.

16 Section 2(g) of the Trade Union Act specifically includes "Her Majesty in the right of the Province of Saskatchewan" within the definition of "employer". The respondent in this case is therefore subject to all of the provisions of the Act applicable to other employers, including the duty to bargain collectively. Although nothing in the Act suggests that the Government is to be treated differently from other employers, the Board is given ample discretion throughout the legislation to recognize and give effect to its special characteristics.

17 Counsel for the respondent points out the distinction between the legislative branch and the executive branch of Government, arguing that the former is not the employer of employees represented by the SGEU and that it has no duty to bargain collectively, consult or even communicate with the Union. The distinction is a valid one, and one that is reflected in the order certifying the SGEU. The order encompasses only employees in the executive branch who are subject to the Public Service Act.

18 The legislative branch of Government is obliged to conduct its business in the Legislature and the propriety of introducing, debating, amending and enacting legislation in the Legislature, and only in the Legislature, has long been accepted. By its very nature, the legislative process mandates notice, study and debate and it may well be that when legislation impacts upon employees in a bargaining unit, the union has no right to receive information about it before it is introduced.

19 On the other hand, many decisions that impact upon the bargaining unit represented by the SGEU are made by the executive branch. Those decisions may include the subcontracting of work and/or the sale, transfer, lease or other disposition of governmental operations. If the executive branch proposes initiatives of that kind that will impact upon the unit, it has the same obligation as any other employer to disclose them to the union.

20 As a practical matter, the foregoing guidelines respecting the respondent's obligation to make disclosure during future negotiations may be of more value to both parties than any determination as to whether the respondent did or did not commit an unfair labour practice in the circumstances of this case. However, it is incumbent on the Board to determine whether the respondent complied with its obligation to negotiate in good faith in its letter to the Union dated November 19, 1987.

21 The complaint on the "main table" application (LRB File No. 245-87) is that the employer responded inadequately to the requests in paras. 2, 3 and 4 of the Union's letter dated November 17, 1987. The Union acknowledges that the quality of the employer's responses must be measured by the quality of the questions asked, and that the Union's questions were wide-ranging, but says that they were the result of frustration over previous Government initiatives implemented without sufficient or any prior consultation.

22 In his reply of November 19, 1987, the Chairman of the Public Service Commission, representing the employer, essentially stated, first, that he had no knowledge of the information requested; second, that any organizational changes would be announced "in the usual manner"; and third, that neither management policies nor the Government's legislative agenda had to be negotiated with the Union. With respect to those responses, the Board finds;

1. That a failure by the respondent employer to give information to its agent could not affect the respondent's duty to provide the Union with information it was entitled to receive.
2. That there was no "usual way" for making announcements. The evidence indicated that some governmental organizations have been dealt with through the process of collective bargaining, with recognition being given to the role of the union as exclusive representative of the employees. Other organizational changes have been dealt with in a more unilateral fashion, or at least in a way that the union complains has ignored its status as bargaining representative. Those situations are not the subject of this complaint to the Board, and will not be the subject of further comment, but they do indicate that there was no "usual" or "accepted" method of announcing organizational changes.
3. Clearly, the Government's legislative agenda is not a matter that must be negotiated with the SGEU. Equally clearly, the employer is under no obligation to negotiate its management policies with the Union. There is a significant difference, however, between negotiating management policies, on the one hand and, on the other, disclosing management decisions or plans which, when implemented, will have a significant impact on the bargaining unit.

23 In the Board's view, the employer's response dated November 19, 1987 amounted to a practical refusal to provide the Union with any information at all. It did not disclose whether any decision had or had not been made that would significantly impact on the bargaining unit during the term of a collective agreement. It did not claim any confidentiality in planning, nor suggest that premature disclosure might have an adverse impact on the employer/employee relationship. In the Board's view, the response did not meet the standard of good faith expected of the parties at the bargaining table which includes an obligation to answer honestly when asked. The Board therefore finds that the respondent violated s. 11(1)(c) of the Trade Union Act.

24 In making that finding, the Board must also comment about the Union's approach to the matter. The Union is as obliged as the employer to make reasonable efforts to solve problems at the bargaining table and in this case the Union appears to have been quick to come to the Board with an unfair labour practice complaint. In the future, the Board may decline to find that an unfair labour practice has occurred unless it is satisfied that the complainant has first made a genuine attempt to elicit the information from the employer at the bargaining table.

25 With respect to LRB File No. 246-87 (the SIAST application), the Union complains that the respondent did not provide it with adequate information in response to para. 1 of the Union's letter dated November 17, 1987. The Union had requested the following: first, a list of all employees then employed by the four technical institutes affected by Bill 46; second, information about how the transfer of those employees would take place; third, information about which employees would be offered employment and on what terms; and fourth, advice as to which employees would be placed in each of the two bargaining units created by the Institute Act.

26 With respect to the first request, the Union had represented the employees in question for many years. The legislation was introduced on September 30, 1987, when negotiations were under way. The legislation itself made it apparent that all employees of the four institutes in question (Wascana Institute of Applied Arts & Science, Kelsey Institute of Applied Arts & Science, Saskatchewan Technical Institute and Northern Institute of Technology) would be transferred to SIAST. All of the employees were either obligated to join the Union pursuant to the Union security provisions of the relevant collective bargaining agreement, or at least obligated to pay periodic dues and assessments to the Union. It follows that the list of employees requested by the Union was, or should have been, already within its knowledge. It ought to have been a relatively straightforward task for the Union to consult its records and prepare the list requested from the employer. In the circumstances, the Board is of the view that the respondent had no obligation to provide the list to the Union even though it did so on December 31, 1987.

27 With respect to the second request, the respondent says that it was not obligated to give the Union information about which employees would be offered employment, what the terms and conditions of the employment would be, or how the transfer to SIAST would, take place because it could not assume the Institute Act would ever be proclaimed, or at least proclaimed in the form it was introduced in the Legislature.

28 Bill 46 was introduced in the Legislature on September 30, 1987. It received third reading on October 30, 1987 and an order-in-council dated December 16, 1987 proclaimed that the Institute Act would take effect on January 1, 1988. However, in April 1987, the Minister of Education announced the proposed reorganization of the various educational institutions affected by Bill 46. Thereafter, a series of ten newsletters entitled "Updates" were sent directly to the employees. The newletters contained relatively detailed information about the terms and conditions of employment that the respondent believed would apply to each employee after the transfer to SIAST.

29 Counsel for the respondent submits that these communications were justified because they dealt with terms and conditions of employment that would be applicable after January 1, 1988 when the employees would be employed by SIAST rather than by the respondent and when they would no longer be represented by the SGEU. The Board does not accept the respondent's submission in that regard. If the respondent could not assume that the Institute Act would ever be proclaimed, or at least proclaimed in the form in which it was introduced in the Legislature, then it could not assume that the employees would be transferred to SIAST after January 1, 1988 or that the SGEU would no longer represent them.

30 The Board is satisfied that the executive branch of Government had detailed knowledge of the manner in which Bill 46 would affect employees in the bargaining unit represented by the SGEU before the legislation was introduced, since it was able to provide the employees with detailed information by means of the series of "Updates". All of its communications with the employees prior to December 31, 1987 were based on the assumption that the Institute Act would in fact be introduced in the Legislature and become law in the same, or substantially the same, form in which it was introduced. Having assumed for the purposes of its communications with bargaining-unit employees that a particular state of affairs would exist on January 1, 1988, the respondent could not refuse to make the same assumption for the purposes of its communications with the Union. Quite simply, the requirement that it act in good faith does not allow it to make an assumption for one purpose and conveniently deny it for another.

31 There is another inexplicable event related to whether or not the respondent could and did anticipate the enactment of the Institute Act. The legislation called for the creation of an interim governing council of SIAST. Since the legislation did not take effect until January 1, 1988, the interim governing council of SIAST had no authority and indeed, from a legal standpoint, did not even exist until that date. Nevertheless, the members of the council assumed de facto authority to prepare for the impending transfer. There is no question they knew which employees would be affected by the transfer, which ones would be offered employment, and what terms and conditions of employment would be offered to them after January 1, 1988.

32 The SGEU was the exclusive bargaining representative of the employees at the four technical institutes until December 31, 1988. It was entitled to receive at least as much information about the proposed reorganization and its effect on the employees as the employees received and it was entitled to receive the information as soon [as] or sooner than the employees received it. The respondent failed or refused to deal with the Union in that manner, contrary to s. 11(1)(c) of the Act.

33 The Union's final request in para. 1 of its letter dated November 17, 1987 was for information concerning which employees would be transferred into which of the two new bargaining units to be created by the Institute Act. The employer justified its refusal to provide the information by saying that only the Board of Directors of SIAST would "have the legal authority to make the designations". As already indicated, the Board is not impressed with the proposition that a lack of technical authority can be overlooked in some situations and relied upon in others. Nevertheless, the Board is of the opinion that the information requested need not have been provided because it did not fall within the parameters respecting employer disclosure outlined above. More particularly, it was unrelated to existing terms and conditions of employment, it was not required to adequately comprehend a proposal or response at the bargaining table, and it was not something that could significantly impact upon the existing unit. It is entirely possible that the Union simply wanted this information to assist it in a proposed organizing campaign, since it realized that the Institute Act eliminated its bargaining rights.

34 For the reasons indicated, the Board finds on both of the applications that the respondent violated s. 11(1)(c) of the Trade Union Act. An order will issue accordingly.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc. | 2008 SCC 8, 2008 CarswellBC 411, 2008 CarswellBC 412, [2008] 4 W.W.R. 1, 252 B.C.A.C. 1, 422 W.A.C. 1, 75 B.C.L.R. (4th) 1, [2008] 1 S.C.R. 157, [2008] B.C.W.L.D. 1749, [2008] B.C.W.L.D. 1750, [2008] B.C.W.L.D. 1767, 290 D.L.R. (4th) 193, J.E. 2008-501, 50 C.P.C. (6th) 207, 164 A.C.W.S. (3d) 765, [2008] S.C.J. No. 8, 372 N.R. 95 | (S.C.C., Mar 6, 2008)

1989 CarswellAlta 198
Supreme Court of Canada

Edmonton Journal (The) v. Alberta (Attorney General)

1989 CarswellAlta 198, 1989 CarswellAlta 623, [1989] 2 S.C.R. 1326, [1989] S.C.J. No. 124, [1990] 1 W.W.R. 577, 102 N.R. 321, 103 A.R. 321, 18 A.C.W.S. (3d) 894, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 64 D.L.R. (4th) 577, 71 Alta. L.R. (2d) 273, J.E. 90-47, EYB 1989-66926

EDMONTON JOURNAL (A DIVISION OF SOUTHAM INC.) v. ATTORNEY GENERAL FOR ALBERTA, ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL FOR ONTARIO

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

Heard: March 3, 1989
Judgment: December 21, 1989
Docket: No. 20608

Counsel: *A. Lefever* and *F. Kozak*, for appellant.
N.D. Steed, for respondent the Attorney General for Alberta.
D. Lepofsky and *T. Macklem*, for intervener.

Subject: Civil Practice and Procedure; Family
Related Abridgment Classifications
Civil practice and procedure
XX Trials
XX.4 Conduct of trial
XX.4.e Restrictions or bans on publication
XX.4.e.i Charter of Rights and Freedoms
Constitutional law
XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.b Freedom of expression
XI.3.b.vi Miscellaneous
Constitutional law
XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.h Equality rights
XI.3.h.i General principles
Family law
I Constitutional issues
I.2 Effect of Charter of Rights and Freedoms

Headnote

Family Law --- Divorce — Effect of Charter of Rights and Freedoms

Practice --- Trials — Conduct of trial — Restrictions on publication — Charter of Rights and Freedoms

Civil liberties and human rights — Freedom of expression — Alberta Judicature Act restricting publication of certain information obtained in matrimonial proceedings and obtained at pre-trial stages of civil actions — Section infringing s. 2(b) of Charter and not justifiable under s. 1 — Means chosen to obtain objective of legislation not being proportionate to ends.

Constitutional law — Constitution Act, 1982 — Charter of Rights and Freedoms — Validity of legislation — Alberta Judicature Act restricting publication of certain information obtained in matrimonial proceedings and obtained at pre-trial stages of actions — Section infringing s. 2(b) of Charter and not justifiable under s. 1 — Means chosen to obtain objective of legislation not being proportionate to ends.

A newspaper publisher applied for a declaration that s. 30 of the Alberta Judicature Act was invalid in that it denied freedom of expression and discriminated against the publisher in contravention of ss. 2(*b*) and 15 of the Charter of Rights and Freedoms. Section 30(1) restricts the publication of certain information related to matrimonial proceedings, while s. 30(2) restricts the publication of certain information obtained in the pre-trial stages of civil actions. The application was dismissed and the Court of Appeal dismissed the publisher's appeal. The publisher appealed further.

Held:

Appeal allowed.

Per Cory J. (Dickson C.J.C. and Lamer J. concurring):

Section 30(1) and (2) of the Judicature Act contravened s. 2(*b*) of the Charter. The rights enshrined in s. 2(*b*) were set forth in absolute terms and should be restricted only in the clearest circumstances. Freedom of expression was of vital importance. The press had to be free to comment on court proceedings to ensure that the courts were seen by all to operate openly in the penetrating light of public scrutiny. Freedom of expression protected listeners as well as speakers. Discussion of cases and constructive criticism of court proceedings depended on the public's receipt of information as to what transpired in court. Practically speaking, this information could only be obtained from the media. Section 30(1) in effect prohibited publication of matters pertaining to custody, maintenance, access and division of property, which were matters of public interest. Furthermore, since comments of counsel and the presiding judge were not publishable, inappropriate remarks were hidden from public view. Section 30(2) created an almost total restriction on providing information relating to documents filed in proceedings before they had been heard. Administrative or constitutional law cases might have an impact on the lives of all Albertans, yet they were prevented from learning the particular allegations of those cases.

The limits imposed by s. 30(1) and (2) were not justifiable under s. 1 of the Charter. To meet the test of s. 1, the objective of the impugned legislation had to be of sufficient importance to override a constitutionally protected right, the objective had to be of a pressing and substantial nature, and the means chosen to obtain the objective had to be proportionate to the ends. In the case of s. 30(1), the respondent had stated three objectives. Of these, one objective, that of protecting individuals' privacy, did relate to a pressing and substantial concern sufficient to permit overriding the right to freedom of expression. In the case of s. 30(2), the objectives of ensuring the right to a fair trial and protecting privacy constituted pressing and substantial objectives. However, neither of the impugned provisions satisfied the proportionality test. They did not impair the right to freedom of expression as little as possible and went much further than necessary to protect privacy. The restrictive ban on publication imposed by s. 30 resulted in substantial interference with freedom of expression and significant reduction in the openness of the courts. Any need to protect privacy or ensure a fair trial could be met through less sweeping measures.

It was not necessary to deal with the arguments based on s. 15 of the Charter.

Per Wilson J. (concurring in the result):

A right or freedom could have different meanings in different contexts. The value to be attached to it in different contexts for the purposes of balancing under s. 1 of the Charter could also be different. The importance of the right or freedom should therefore be assessed in context rather than in the abstract and its purpose ascertained in context. The right or freedom should then be generously interpreted.

Section 30(1) of the Judicature Act clearly infringed s. 2(*b*) of the Charter. In considering whether s. 30(1) could be justified under s. 1 of the Charter, it was appropriate to identify, using a contextual approach, what aspect of privacy was engaged by the impugned legislation. The purpose of s. 30(1) was to afford protection against the anguish, embarrassment and loss of dignity that could result from publication of the details of one's private life. The concern addressed by s. 30(1) did not impact uniformly on all litigants in matrimonial disputes, but more particularly on some. Where matrimonial litigation involved allegations of cruel, immoral and aberrant behaviour which adversely impacted on the children of the marriage, legislation seeking to address that concern should to do so specifically or through the grant of judicial discretion and should be strictly confined to that narrow range of cases.

Protection of privacy was a legitimate legislative objective and the impugned legislation was rationally connected to it. However, the proportionality test was not met and s. 30(1) was not justifiable under s. 1 of the Charter.

Section 30(2) contravened s. 2(*b*) of the Charter and was not defensible under s. 1.

It was not necessary to deal with the arguments under s. 15 of the Charter.

Per La Forest J. (dissenting in part) (L'Heureux-Dubé and Sopinka JJ. concurring):

Section 30(1) extended only to the particulars of the evidence in matrimonial and similar proceedings where individuals were required to divulge some of the most private aspects of their lives. The provision attempted to balance the public's right to know with the rights of the individual, even in the open forums of the courts, to shield certain aspects of his or her existence from public scrutiny. The protection from intrusion on the privacy of the individual, family and witnesses afforded a sufficiently compelling objective to warrant curtailment of the freedom of the press in this context. However, s. 30(1) was also intended to prevent obstacles to access to the courts, an important interest in a democratic society. Section 30(1) met the proportionality test. It was rationally connected to the objectives and imposed only minimal limits on the freedom of the press. It did not prohibit reporting about the conduct of judges or counsel. The principle of open courts was respected.

Section 30(2) infringed s. 2(*b*) of the Charter and was not justifiable under s. 1.

Section 30 did not infringe s. 15 of the Charter, which did not apply to corporations. Moreover, the appellant faced serious problems of standing. In any event, the distinctions of which the appellant complained did not fall within the ambit of s. 15.

Table of Authorities

Cases considered:

Considered by Cory J.:

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A.G.N.S. v. MacIntyre, [1982] 1 S.C.R. 175, 26 C.R. (3d) 193, 65 C.C.C. (2d) 129, 132 D.L.R. (3d) 385, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181 — *considered*

Can. Newspapers Co. v. Can. (A.G.), [1988] 2 S.C.R. 122, 65 C.R. (3d) 50, 43 C.C.C. (3d) 24, 52 D.L.R. (4th) 690, 38 C.R.R. 72, 32 O.A.C. 259, 87 N.R. 163 — *distinguished*

Ford v. Que. (A.G.), [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, 36 C.R.R. 1, 10 C.H.R.R. D/5559, *(*sub nom. *Chaussure Brown's Inc. v. Que. (P.G.))* 19 Q.A.C. 59, 90 N.R. 84 — *considered*

Gannett Co. v. DePasquale, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979) — *referred to*

Hunter v. Southam Inc., [1984] 2 S.C.R. 145, *(*sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 84 D.T.C. 6467, 55 A.R. 291, 55 N.R. 241 — *referred to*

Irwin Toy Ltd. v. Que. (A.G.), [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 39 C.R.R. 193, 25 C.P.R. (3d) 417, 24 Q.A.C. 2, 94 N.R. 167 — *referred to*

Nixon v. Warner Communications Inc., 435 U.S. 589, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978) — *referred to*

R. v. Amway Corp., [1989] 1 S.C.R. 21, *(*sub nom. *Can. v. Amway of Can. Ltd.)* 68 C.R. (3d) 97, 33 C.P.C. (2d) 163, 56 D.L.R. (4th) 309, 37 C.R.R. 235, 18 C.E.R. 305, [1989] 1 C.T.C. 255, [1989] 1 T.S.T. 2058, 2 T.C.T. 4074, 91 N.R. 18 [Fed.] — *referred to*

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 85 C.L.L.C. 14,023, 60 A.R. 161, 58 N.R. 81 — *referred to*

R. v. Dyment, [1988] 2 S.C.R. 417, 66 C.R. (3d) 348, 10 M.V.R. (2d) 1, 45 C.C.C. (3d) 244, 55 D.L.R. (4th) 503, 38 C.R.R. 301, 73 Nfld. & P.E.I.R. 13, 229 A.P.R. 13, 89 N.R. 249 [P.E.I.] — *referred to*

R. v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713, *(*sub nom. *R. v. Videoflicks Ltd.)* 55 C.R. (3d) 193, *(*sub nom. *Edwards Books & Art Ltd. v. R.; R. v. Nortown Foods Ltd.)* 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1, 28 C.R.R. 1, 87 C.L.L.C. 14,001, 19 O.A.C. 239, 71 N.R. 161 — *referred to*

R. v. Oakes, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87 — *applied*

R. v. Whyte, [1988] 2 S.C.R. 3, [1988] 5 W.W.R. 26, 29 B.C.L.R. (2d) 273, 64 C.R. (3d) 123, 6 M.V.R. (2d) 138, 42 C.C.C. (3d) 97, 51 D.L.R. (4th) 481, 35 C.R.R. 1, 86 N.R. 328*applied*

R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 33 D.L.R. (4th) 174, 25 C.R.R. 321, 87 C.L.L.C. 14,002, 71 N.R. 83 — *considered*

Sunday Times v. U.K. (1979), 2 E.H.R.R. 245 (E.H.C.R.) — *applied*

Considered by Wilson J.:

A.G.N.S. v. MacIntyre, [1982] 1 S.C.R. 175, 26 C.R. (3d) 193, 65 C.C.C. (2d) 129, 132 D.L.R. (3d) 385, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181 — *considered*

Can. Newspapers Co. v. Can. (A.G.), [1988] 2 S.C.R. 122, 65 C.R. (3d) 50, 43 C.C.C. (3d) 24, 52 D.L.R. (4th) 690, 38 C.R.R. 72, 32 O.A.C. 259, 87 N.R. 163 — *referred to*

Gannett Co. v. DePasquale, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979) — *considered*

Hunter v. Southam Inc., [1984] 2 S.C.R. 145, *(*sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 84 D.T.C. 6467, 55 A.R. 291, 55 N.R. 241 — *referred to*

McPherson v. McPherson, [1936] A.C. 177, [1936] 1 W.W.R. 33, [1936] 1 D.L.R. 321 (P.C.) [Alta.] — *applied*

Press-Enterprise Co. v. Superior Ct. of California, 478 U.S. 1, 92 L. Ed. 2d 1, 106 S. Ct. 2735 (1986) — *referred to*

R. v. Beare; R. v. Higgins, [1988] 2 S.C.R. 387, [1989] 1 W.W.R. 97, 66 C.R. (3d) 97, 45 C.C.C. (3d) 57, 55 D.L.R. (4th) 481, 36 C.R.R. 90, 71 Sask. R. 1, 88 N.R. 205 — *referred to*

R. v. Dyment, [1988] 2 S.C.R. 417, 66 C.R. (3d) 348, 10 M.V.R. (2d) 1, 45 C.C.C. (3d) 244, 55 D.L.R. (4th) 503, 38 C.R.R. 301, 73 Nfld. & P.E.I.R. 13, 229 A.P.R. 13, 89 N.R. 249 [P.E.I.] — *referred to*

R. v. Genest, [1989] 1 S.C.R. 59, 67 C.R. (3d) 224, 45 C.C.C. (3d) 385, 37 C.R.R. 252, 19 Q.A.C. 163, 91 N.R. 161 — *referred to*

R. v. Morgentaler, [1988] 1 S.C.R. 30, 62 C.R. (3d) 1, 37 C.C.C. (3d) 449, 44 D.L.R. (4th) 385, 31 C.R.R. 1, 26 O.A.C. 1, 82 N.R. 1 — *referred to*

R. v. Oakes, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87 — *referred to*

R. v. Simmons, [1988] 2 S.C.R. 495, 66 C.R. (3d) 297, 45 C.C.C. (3d) 296, 55 D.L.R. (4th) 673, 38 C.R.R. 252, 18 C.E.R. 227, 2 T.C.T. 4102, 30 O.A.C. 241, 89 N.R. 1 — *referred to*

Ref. re Pub. Service Employee Rel. Act (Alta.), [1987] 1 S.C.R. 313, [1987] 3 W.W.R. 577, 51 Alta. L.R. (2d) 97, 38 D.L.R. (4th) 161, *(*sub nom. *A.U.P.E. v. Alta. (A.G.))* 28 C.R.R. 305, 87 C.L.L.C. 14,021, *(*sub nom. *Ref. re Compulsory Arb.)* 78 A.R. 1, 74 N.R. 99 — *considered*

Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980) — *considered*

Scott v. Scott, [1913] A.C. 417 (H.L.) — *referred to*

Considered by La Forest J. (dissenting in part):

Aluminum Co. of Can. v. Ont. (1986), 55 O.R. (2d) 522, *(*sub nom. *Aluminum Co. of Can. v. Ont. (Min. of the Environment)* 19 Admin. L.R. 192), 1 C.E.L.R. (N.S.) 1, 29 D.L.R. (4th) 583, 25 C.R.R. 50, 16 O.A.C. 14, leave to appeal to Ont. C.A. refused 19 Admin. L.R. xliii*referred to*

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

Can. Newspapers Co. v. Can. (A.G.), [1988] 2 S.C.R. 122, 65 C.R. (3d) 50, 43 C.C.C. (3d) 24, 52 D.L.R. (4th) 690, 38 C.R.R. 72, 32 O.A.C. 259, 87 N.R. 163 — *referred to*

Fraser v. P.S.S.R.B., [1985] 2 S.C.R. 455, 18 Admin. L.R. 72, 9 C.C.E.L. 233, 23 D.L.R. (4th) 122, 19 C.R.R. 152, 86 C.L.L.C. 14,003, 63 N.R. 161 [Fed.] — *referred to*

Global Communications Ltd. and A.G. Can., Re (1984), 44 O.R. (2d) 609, *(*sub nom. *Re Smith; Global Communications Ltd. v. California)* 38 C.R. (3d) 209, 10 C.C.C. (3d) 97, 5 D.L.R. (4th) 634, 7 C.R.R. 22, 2 O.A.C. 21 (C.A.) — *referred to*

Heydon's Case (1584), 3 Co. Rep. 7a, 76 E.R. 637 — *referred to*

Hunter v. Southam Inc., [1984] 2 S.C.R. 145, (sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 84 D.T.C. 6467, 55 A.R. 291, 55 N.R. 241 — *considered*

Irwin Toy Ltd. v. Que. (A.G.), [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 39 C.R.R. 193, 25 C.P.R. (3d) 417, 24 Q.A.C. 2, 94 N.R. 167 — *referred to*

Milk Bd. v. Clearview Dairy Farm Inc., [1987] 4 W.W.R. 279, 12 B.C.L.R. (2d) 116, leave to appeal to S.C.C. refused [1987] 1 S.C.R. vii, [1987] 4 W.W.R. lxvi, 81 N.R. 240 — *referred to*

Nissho Corp. v. Bank of B.C.; Nichiban Co. v. Bank of B.C. (1987), 39 D.L.R. (4th) 453 (Alta. Q.B.) — *referred to*

Parkdale Hotel Ltd. v. Can. (A.G.), [1986] 2 F.C. 514, 27 D.L.R. (4th) 19, 1 F.T.R. 190 (T.D.) — *referred to*

R. v. Beare; R. v. Higgins, [1988] 2 S.C.R. 387, [1989] 1 W.W.R. 97, 66 C.R. (3d) 97, 45 C.C.C. (3d) 57, 55 D.L.R. (4th) 481, 36 C.R.R. 90, 71 Sask. R. 1, 88 N.R. 205 — *referred to*

R. v. Dyment, [1988] 2 S.C.R. 417, 66 C.R. (3d) 348, 10 M.V.R. (2d) 1, 45 C.C.C. (3d) 244, 55 D.L.R. (4th) 503, 38 C.R.R. 301, 73 Nfld. & P.E.I.R. 13, 229 A.P.R. 13, 89 N.R. 249 [P.E.I.] — *considered*

R. v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713, (sub nom. *R. v. Videoflicks Ltd.)* 55 C.R. (3d) 193, (sub nom. *Edwards Books & Art Ltd. v. R.; R. v. Nortown Foods Ltd.)* 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1, 28 C.R.R. 1, 87 C.L.L.C. 14,001, 19 O.A.C. 239, 71 N.R. 161 — *referred to*

R. v. Oakes, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87 — *applied*

R. v. Turpin, [1989] 1 S.C.R. 1296, 69 C.R. (3d) 97, 48 C.C.C. (3d) 8, 39 C.R.R. 306, 34 O.A.C. 115, 96 N.R. 115 — *referred to*

Ref. re Alta. Statutes, [1938] S.C.R. 100, [1938] 2 D.L.R. 81 [affirmed [1939] A.C. 117, [1938] 3 W.W.R. (sub nom. *Ref. re Alta. Bills; A.G. Alta. v. A.G. Can.*), [1938] 4 D.L.R. 433 (P.C.)] — *considered*

Ref. re Wkrs.' Comp. Act, 1983 (Nfld.), [1989] 1 S.C.R. 922, 56 D.L.R. (4th) 765, (sub nom. *Ref. re Ss. 32 & 34 of Wkrs.' Comp. Act (Nfld.))* 76 Nfld. & P.E.I.R. 181, 235 A.P.R. 181, 96 N.R. 227 — *referred to*

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, 26 C.C.E.L. 85, 59 D.L.R. (4th) 416, 89 C.L.L.C. 14,031, 93 N.R. 183 [Fed.]*considered*

U.S. v. Cotroni; U.S. v. El Zein, [1989] 1 S.C.R. 1469, 48 C.C.C. (3d) 193, 23 Q.A.C. 182, 96 N.R. 321 — *referred to*

Statutes considered:

Canadian Charter of Rights and Freedoms

s. 1

s. 2(b)

s. 8

s. 15

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

s. 166

Family Law Act 1975, S. Aust. 1975, No. 53

s. 121(1)

Family Proceedings Act 1980, S.N.Z. 1980, No. 94

s. 169(1), (2)

Judicature Act, R.S.A. 1980, c. J-1

s. 30

s. 31

Authorities considered:

Bentham, Pationale of Judicial Evidence (1827), vol. 1, p. 522.

Bentham, Treatise on Judicial Evidence (1825), p. 68. 69.

Blackstone, Commentaries on the Laws of England (1768), Book III, p. 373.

Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964), 39 N.Y.U.L. Rev. 962

Cohen, "Access to Pretrial Documents Under the First Amendment" (1984), 84 Colum. L. Rev. 1813, p. 1827.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1950), arts. 8, 10(2).

Fried, "Privacy" (1968), 77 Yale L.J. 3475, pp. 477, 486.

Gross, "The Concept of Privacy" (1967), 42 N.Y.U.L. Rev. 34.

Howland et al., "Reports on the Administration of Justice in Ontarion on the Opening of the Courts for 1988" (1989), 23 L. Soc. Gaz. 4, p. 24.

International Covenant on Civil and Political Rights. G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), arts. 17, 19(3).

Prosser, "Privacy" (1960), 48 Calif. L. Rev. 383.

Royal Commission on Divorce and Matrimonial Causes, Report (1912) (U.K.), Pt. XVII.

Schiff, Evidence in the Litigation Process, 3rd ed. (1988), vol. 2, p. 1015.

Select Committee on Matrimonial Causes, Report and Special Report from the Select Committee on Matrimonial Causes (Regulation of Reports) Bill (1923), p. iv.

Statistics Canada, Divorce: Law and the Family in Canada (1983).

Statistics Canada, Marriages and Divorces: Vital Statistics 1985 (1986), p. 2.

Stoljar, "A Re-examination of Privacy" (1984), 4 Legal Studies 67.

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948), art. 12.

Warren and Brandeis, "The Right to Privacy" (1890), 4 Har. L. Rev. 193, p. 214.

Wigmore on Evidence, vol. 6, Chadbourn rev. (1976), para. 1384, pp. 435-36, 348; para. 1835, pp. 449-50.

Words and phrases considered:

OR IN RELATION TO A MARRIAGE

The term "or in relation to a marriage" [found in s. 30(1) of the *Judicature Act*, R.S.A. 1980, c. J-1] is a broad one. It encompasses matters pertaining to custody of children, access to children, division of property and the payment of maintenance.

Appeal from judgment of Alberta Court of Appeal, [1987] 5 W.W.R. 385, 53 Alta. L.R. (2d) 193, 41 D.L.R. (4th) 502, 34 C.R.R. 111, 78 A.R. 375, dismissing appeal from judgment of Foster J., [1986] 1 W.W.R. 453, 40 Alta. L.R. (2d) 326, 22 D.L.R. (4th) 446, 23 C.R.R. 356, 63 A.R. 114, dismissing application for declaration that s. 30 of Alberta Judicature Act offends Charter of Rights and Freedoms.

***Wilson J.* (concurring in the result):**

1 I have had the benefit of reading the reasons of my colleagues Justice La Forest and Justice Cory and I am in agreement with the result they reach with respect to s. 30(2) of the Alberta Judicature Act, R.S.A. 1980, c. J-1 [appeal from [1987] 5 W.W.R. 385, 53 Alta. L.R. (2d) 193, 41 D.L.R. (4th) 502, 34 C.R.R. 111, 78 A.R. 375, affirming [1986] 1 W.W.R. 453, 40 Alta. L.R. (2d) 326, 22 D.L.R. (4th) 446, 23 C.R.R. 356, 63 A.R. 114]. With respect to s. 30(1) of that Act, I have reached the same conclusion as Cory J., although for somewhat different reasons.

1. Methodology of Charter Application

2 In my view, this case raises an important issue regarding the proper method of application of the Canadian Charter of Rights and Freedoms to individual cases and, because my reasons for finding s. 30(1) of the Alberta Judicature Act unconstitutional reflect one of two possible approaches to the Charter's application, I thought it might be appropriate at the outset to say a word or two about the different approaches.

3 Of the two possible approaches to the Charter's application, one might be described as the abstract approach and the other the contextual approach. While the mechanics of application, i.e., the proper analytical steps to be taken, are the same under each, which one is adopted may tend to affect the result of the balancing process called for under s. 1.

4 Under each approach it is necessary to ascertain the underlying value which the right alleged to be violated was designed to protect. This is achieved through a purposive interpretation of Charter rights. It is also necessary under each approach to ascertain the legislative objective sought to be advanced by the impugned legislation. This is done by ascer taining the intention of the legislator in enacting the particular piece of legislation. When both the underlying value and the legislative objective have been identified, and it becomes clear that the legislative objective cannot be achieved without some infringement of the right, it must then be determined whether the impugned legislation constitutes a reasonable limit on the right which can be demonstrably justified in a free and democratic society.

5 It seems to me that under the abstract approach the underlying value sought to be protected by s. 2(*b*) of the Charter is determined at large as my colleague Cory J. has done. He finds freedom of expression to have been fundamental to the historical development of our political, social and educational institutions in Canada. He emphasizes the seriousness of restricting the free exchange of ideas and opinions in a democratic form of society and concludes that it is difficult to imagine a more important right in a democracy than freedom of expression.

6 I do not disagree with my colleague that freedom of expression plays that vital role in a political democracy. The problem is that the values in conflict in the context of this particular case are the right of litigants to the protection of their privacy in matrimonial disputes and the right of the public to an open court process. Both cannot be fully respected. One must yield to the exigencies of the other. I ask myself therefore whether a contextual approach in balancing the right to privacy against freedom of the press under s. 1 is not more appropriate than an approach which assesses the relative importance of the competing values in the abstract or at large.

7 It is of interest to note in this connection that La Forest J. completely agrees with Cory J. about the importance of freedom of expression in the abstract. He acknowledges that it is fundamental in a democratic society. He sees the issue in the case, however, as being whether an open court process should prevail over the litigant's right to privacy. In other words, while not disputing the values which are protected by s. 2(*b*) as identified by Cory J., he takes a contextual approach to the definition of the conflict in this particular case. Notwithstanding the enormous importance of freedom of expression in a political context, he finds that it must yield in the context of this case to the litigant's right to privacy. The impugned legislation is accordingly, in

his view, a reasonable limit on freedom of the press. Cory J. reaches the converse conclusion and the concern raised is whether the difference in result may be conditioned by the methodology adopted in assessing the importance of the values in conflict.

8 One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to prejudge the issue by placing more weight on the value developed at large than is appropriate in the context of the case. Nor should one, it seems to me, balance a private interest, i.e., litigant X's interest in his privacy, against a public one, the public's interest in an open court process. Both interests must be seen as public interests, in this case the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process.

9 It seems to me that the majority and minority decisions in *Ref. re Pub. Service Employee Rel. Act (Alta.)*, [1987] 1 S.C.R. 313, [1987] 3 W.W.R. 577, 51 Alta. L.R. (2d) 97, 38 D.L.R. (4th) 161, *(*sub nom. *A.U.P.E. v. Alta. A.G.))* 28 C.R.R. 305, 87 C.L.L.C. 14,021, *(*sub nom. *Ref. re Compulsory Arb.))* 78 A.R. 1, 74 N.R. 99, were largely influenced by the different approaches taken by the members of the court to freedom of association under s. 2(*d*) of the Charter. Chief Justice Dickson in his dissent clearly applied a combined purposive and contextual approach to the issue in that case. He asked himself what the purpose of freedom of association was *in the context of labour relations*. Why did workers associate to form unions? What was the aim and object? He stated at pp. 365-66:

> Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.

10 And again at p. 368:

> The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions.

The Chief Justice concluded that the collective bargaining process was within the constitutional protection of s. 2(*d*).

11 The issue for the majority, however, was whether associational activities generally were constitutionally protected by s. 2(*d*), not whether the special kind of associational activities forming the subject of the dispute before the court were protected by the section. Quoting from Le Dain J. at pp. 390-91:

> In considering the meaning that must be given to freedom of association in s. 2(*d*) of the *Charter* it is essential to keep in mind that this concept must be applied to a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activity by which the objects may be pursued. It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be, that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.

Since the activities of a golf or curling club were clearly not deserving of constitutional protection, the answer to the question the majority posed for themselves was clearly no. Associational activities generally were not protected. The collective bargaining process engaged in by unions was likewise not protected.

12 One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political

context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.

13 It is my view that a right or freedom may have different meanings in different contexts. Security of the person, for example, might mean one thing when addressed to the issue of over-crowding in prisons and something quite different when addressed to the issue of noxious fumes from industrial smoke-stacks. It seems entirely probable that the value to be attached to it in different contexts for the purpose of the balancing under s. 1 might also be different. It is for this reason that I believe that the importance of the right or freedom must be assessed in context rather than in the abstract and that its purpose must be ascertained in context. This having been done, the right or freedom must then, in accordance with the dictates of this court, be given a generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee.

2. The Legislation

14 I turn now to the impugned legislation and reproduce it here for convenience:

> 30 (1) No person shall within Alberta *print or publish* or cause or procure to be printed or published *in relation to a judicial proceeding* in a court of civil jurisdiction in Alberta for dissolution of marriage or nullity of marriage or for judicial separation or for restitution of conjugal rights or *in relation to a marriage* or an order, judgment or decree in respect of a marriage, *any matter or detail* the publication of which is prohibited by this section, *or any other particulars* except
>
> (*a*) the names, addresses and occupations of the parties and witnesses,
>
> (*b*) a concise statement of the charges, defences and countercharges in support of which evidence has been given,
>
> (*c*) submissions on a point of law arising in the course of the proceedings and the decision of the court thereon, and
>
> (*d*) the summing up of the judge and the finding of the jury, if any, and the judgment of the court and observations made by the judge in giving judgment.
>
> (3) Nothing in this section applies
>
> (*a*) to the printing of a pleading, transcript of evidence or other document for use in connection with a judicial proceeding,
>
> (*b*) to the communication of a pleading, transcript of evidence or other document for use in connection with a judicial proceeding to persons concerned in the proceeding,
>
> (*c*) to the printing or publishing of a notice or report pursuant to an order or direction given by a court competent to so order or direct, or
>
> (*d*) to the printing or publishing of a matter
>
> (i) in a separate volume or part of a bona fide series of law reports that does not form part of another publication and that consists solely of reports of proceedings in courts of law, or
>
> (ii) in a publication of a technical character bona fide intended for circulation among members of the legal or medical professions. [emphasis added]

15 I note at the outset that my colleagues have reached different conclusions about the effect of these provisions. Cory J. construes them as preventing the publication of any evidence called in a matrimonial cause as well as the comments of counsel and the presiding judge. La Forest J., on the other hand, states [at p. 294] that "s. 30(1) extends only to the particulars of the evidence in matrimonial and similar proceedings where individuals are required to divulge some of the most private aspects of their lives". I agree with Cory J.'s interpretation. I think that the legislation has placed quite serious limits on the publication

of what goes on in a courtroom. Section 30(1)(*b*) and (*c*) prohibits the press from publishing the details of evidence adduced in the course of a trial and s. 30(1)(*d*) prevents the press from reporting any remarks that the presiding judge may make other than his or her "summing up".

3. The Open Court Process

16 There can be little doubt that restricting the freedom of the press to report cases before the courts goes against the traditional emphasis which has been placed in our justice system upon an open court process. Several reasons have been advanced in support of the importance of such a process. The one most frequently advanced, and certainly the one with the deepest roots in the history of our law, stresses the importance of an open trial for the evidentiary process. As Cory J. notes, Blackstone stressed that the open examination of witnesses "in the presence of all mankind" was more conducive to ascertaining the truth than secret examinations: see Blackstone's Commentaries on the Laws of England (1768), Book III, c. 23, at p. 373. Subsequently, in his Rationale of Judicial Evidence (1827), vol. 1, Jeremy Bentham explained at p. 522 that:

> The advantages of publicity are neither inconsiderable nor unobvious. In the character of a security, it operates in the first place upon the deponent, and, in a way not less important ... upon the judge.

Dean Wigmore wrote extensively on the requirement that judicial proceedings be open to the public (Wigmore, Evidence, vol. 6, Chadbourn rev. (1976), para. 1834) and noted at pp. 435-36 that:

> Its operation in tending to *improve the quality of testimony* is two-fold. Subjectively, it produces in the witness' mind a disinclination to falsify; first, by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to hear of the testimony from others present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information.
>
> The operation of this latter reason was not uncommonly exemplified in earlier days in England, when *attendance at court* was a common mode of passing the time for all classes of persons ... The same advantage is gained, and much relied on, in more modern times, when the publicity given by newspaper reports of trials is often the means of securing useful testimony. [emphasis in original]

17 More recently the Supreme Court of the United States has addressed these considerations in a series of cases dealing with criminal trials. For example, in *Gannett Co. v. DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979), Blackmun J. provides an extensive review of the history underlying the requirement that trials be held in open court and observes that there is strong evidence that the public trial, which developed before other procedural rights now routinely afforded the accused, was perceived as serving important social interests relating to the integrity of the trial process that existed quite apart from the interests of the litigants. He emphasizes at p. 427 that there is no reason to think that the requirement is not equally important today:

> The courts and the scholars of the common law perceived the public-trial tradition as one serving to protect the integrity of the trial and to guard against partiality on the part of the court. The same concerns are generally served by the public trial today.

18 In *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980), the Supreme Court of the United States again emphasized the importance of publicity in preserving the integrity of the evidentiary process. Holding that the press's interest in being able to report what takes place in court is constitutionally protected by the First and Fourteenth Amendments of the United States Constitution, Chief Justice Burger went on to point out at pp. 572-73 that:

> Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense this validates the media claim of functioning as

> surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard.

This is an important point and serves to remind us that any harm that may flow from limiting the press's ability to recount what takes place in court cannot readily be rationalized or minimized by saying that, although the press is constrained, the public is still free to attend. The media are, as Chief Justice Burger so truly observed, "surrogates for the public".

19 Another reason for allowing the press to provide complete accounts of what goes on in the courtroom is that an open trial is more likely to ensure that the judge and jury conduct themselves properly so as to in spire confidence in the litigants that the procedures followed and the results reached are fair. In a criminal law setting the importance of an impartial judge and jury is obvious and the role of an open trial in compelling judge and jury to act responsibly has repeatedly been noted: see *Gannett v. DePasquale*, at p. 380, per Stewart J.; *Richmond Newspapers*, at p. 593, per Brennan and Marshall JJ.; and *Press-Enterprise Co. v. Superior Ct. of California*, 478 U.S. 1 at 8-9, 92 L. Ed. 2d 1, 106 S. Ct. 2735 (1986), per Burger C.J. This concern is obviously not confined to criminal trials. We are all aware that judges presiding in matrimonial causes from time to time disclose outmoded attitudes to the marriage relationship which might well affect their decisions. It is crucial that the press be able to report any statements of this nature made by a judge in the course of the proceedings. Only in this way can the public be assured that the judiciary is capable of overcoming its own social biases and reflecting through their office the values of the community.

20 Thus, not only is an open trial more likely to *be* a fair trial but it is also *seen to be* a fair trial and thereby contributes in a meaningful way to public confidence in the operation of the courts. As Bentham observed in his Treatise on Judicial Evidence (1825), at p. 69:

> The effects of publicity are at their *maximum* of importance, when considered in relation to the judges; whether as insuring their integrity, or as producing public confidence in their judgments.

21 It is also worth noting that there is an important educational aspect to an open court process. It provides an opportunity for the members of the community to acquire an understanding of how the courts work and how what goes on there affects them. Bentham recognized the importance of publicity in fostering public discussion of judicial matters, Treatise on Judicial Evidence, op. cit., at p. 68, and Wigmore pointed out in Evidence, op. cit., para. 1834, at p. 438, that:

> The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy ...

Dickson J., as he then was, reminded us of the importance of this when, writing for the majority in *A.G.N.S. v. MacIntyre*, [1982] 1 S.C.R. 175 at 185, 26 C.R. (3d) 193, 65 C.C.C. (2d) 129, 132 D.L.R. (3d) 385, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, he stated:

> Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. *As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings*. [emphasis added]

22 In summary, the public interest in open trials and in the ability of the press to provide complete reports of what takes place in the courtroom is rooted in the need 1) to maintain an effective evidentiary process; 2) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society; 3) to promote a shared sense that our courts operate with integrity and dispense justice; and 4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them.

23 But in addition to the interest of the public at large in an open court process, there may be compelling arguments in its favour related to the interests of litigants generally. Many may feel vindicated by the public airing of the injustices they feel they have suffered alone and without any support in the community. Indeed, this may be the first time that a spouse is able to speak openly about events that have taken place in the privacy of the home. They may welcome the public endorsement of the

system for what they have suffered in private ignominy. I do not mean to suggest, of course, that in every marriage that runs into difficulty there will be a party anxious to tell his or her side of the story to the public. But we cannot ignore the fact that for every litigant concerned about the adverse impact of publicity upon his or her image in the community there may be another equally concerned about public vindication and community support.

24 For all of these reasons it seems to me that there would have to be very powerful considerations in order to justify inroads into the open court process. The arguments in favour of the right of the press to report the details of judicial proceedings are strong. Restrictions on that right clearly infringe s. 2(*b*) of the Charter. It is necessary therefore to determine whether s. 30(1) can be justified as a reasonable limit under s. 1.

4. The Right to Privacy

25 I agree with La Forest J. that the purpose of the legislation is to provide some measure of protection for a litigant's privacy. But it is, in my view, important to identify what aspect of the broad concept of privacy is actually engaged by the impugned legislation. Again, a contextual approach would seem to be appropriate.

26 Privacy as a value deserving of protection by the law is not, of course, new. It has traditionally been protected by the law of torts through causes of action such as trespass, assault and defamation. Some have suggested that underlying these seemingly distinct torts is a unified concept of a relationship between privacy and human dignity: see S.D. Warren and L.D. Brandeis, "The Right to Privacy" (1890), 4 Harv. L. Rev. 193; E.J. Bloustein, "Privacy as an Aspect of Human Dignity" (1964), 39 N.Y.U. L. Rev. 962; and S. Stoljar, "A Re-examination of Privacy: An Answer to Dean Prosser" (1984), 4 Legal Studies 67. Not everyone agrees: see W.L. Prosser, "Privacy" (1960), 48 Calif. L. Rev. 383. Legal and political philosophers have engaged in extensive discussions about the value of privacy. Charles Fried, for example, thought that the ability to control the nature of information imparted to others about oneself is "related to ends and relations of the most fundamental sort: respect, love, friendship and trust": see C. Fried, "Privacy" (1968), 77 Yale L. J. 475, at p. 477; and for a similar point of view, see H. Gross, "The Concept of Privacy" (1967), 42 N.Y.U. L. Rev. 34. It is worth noting, however, that even the most ardent exponents of the importance of a right to privacy do not suggest that it is an unqualified right. Indeed, Warren and Brandeis accepted that privacy might on some occasions have to yield to the demands of "the public welfare or of private justice" (see Warren and Brandeis, loc. cit., at p. 214), and Fried states that "in concrete situations and actual societies, control over information about oneself, like control over one's bodily security or property, can only be relative and qualified": see Fried, loc. cit., at p. 486.

27 This court has recently considered the right to privacy in cases involving the search of a person's property without his or her consent (see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, (sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 84 D.T.C. 6467, 55 A.R. 291, 55 N.R. 241, and *R. v. Genest*, [1989] 1 S.C.R. 59, 67 C.R. (3d) 224, 45 C.C.C. (3d) 385, 37 C.R.R. 252, 19 Q.A.C. 163, 91 N.R. 161) and the search of a person's body without his or her consent (see *R. v. Beare; R. v. Higgins*, [1988] 2 S.C.R. 387, [1989] 1 W.W.R. 97, 66 C.R. (3d) 97, 45 C.C.C. (3d) 57, 55 D.L.R. (4th) 481, 36 C.R.R. 90, 71 Sask. R. 1, 88 N.R. 205; *R. v. Dyment*, [1988] 2 S.C.R. 417, 66 C.R. (3d) 348, 10 M.V.R. (2d) 1, 45 C.C.C. (3d) 244, 55 D.L.R. (4th) 503, 38 C.R.R. 301, 73 Nfld. & P.E.I.R. 13, 229 A.P.R. 13, 89 N.R. 249 [P.E.I.]; and *R. v. Simmons*, [1988] 2 S.C.R. 495, 66 C.R. (3d) 297, 45 C.C.C. (3d) 296, 55 D.L.R. (4th) 673, 38 C.R.R. 252, 18 C.E.R. 227, 2 T.C.T. 4102, 30 O.A.C. 241, 89 N.R. 1). While the court in these cases has recognized the need to protect privacy, it has also consistently stressed that "Claims to privacy must, of course, be balanced against other societal needs, and in particular law enforcement": see *R. v. Dyment*, at p. 428, per La Forest J.; *Hunter v. Southam Inc.*, at p. 159; *R. v. Simmons*, at p. 526.

28 This case addresses a somewhat different aspect of privacy, one more closely related to the protection of one's dignity. It seems to me that the purpose of s. 30(1) of the Alberta Judicature Act is to afford some protection against the embarrassment or grief or loss of face that may flow from the publication of the particulars of one's intimate private life disclosed in the courtroom. This court has already discussed in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 57 and 60, 62 C.R. (3d) 1, 37 C.C.C. (3d) 449, 44 D.L.R. (4th) 385, 31 C.R.R. 1, 26 O.A.C. 1, 82 N.R. 1, the psychological stress or trauma that can arise from violations of a person's emotional or physical integrity and it has adverted to the fact in *Can. Newspapers Co. v. Can. (A.G.)*, [1988] 2 S.C.R. 122 at 130, 65 C.R. (3d) 50, 43 C.C.C. (3d) 24, 52 D.L.R. (4th) 690, 38 C.R.R. 72, 32 O.A.C. 259, 87 N.R. 163, that such

trauma can be the result of widespread publication of matters that are embarrassing or humiliating. In my view, this legislation addresses a similar concern, namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers.

29 Two points are worth noting at this stage of the analysis. First, the interest that the press might have in publishing evidence about a person's private life and the degree of embarrassment or humiliation that that person may suffer as a consequence is likely to depend on who that person is. Clearly, it is not everyone's matrimonial disputes that are of consuming interest to the public and therefore to the media. Nor does everyone involved in matrimonial litigation have a public persona the preservation of which is of paramount concern to him or her. Second, the interest that the press might have in publishing details of a person's private life will also, no doubt, depend on the nature of the allegations made about such person's conduct. As Cory J. points out, the "run of the mill" divorce proceeding is less likely to be of public interest than one that involves allegations of particularly immoral or aberrant behaviour. I make these points, not to suggest that matrimonial disputes are not extremely upsetting and painful for all those involved in them as well as for members of their families, but to point out that the concern addressed by the impugned legislation does not impact uniformly on all litigants in matrimonial disputes but more particularly on some.

30 The right to privacy was asserted unsuccessfully in *McPherson v. McPherson*, [1936] A.C. 177, [1936] 1 W.W.R. 33, [1936] 1 D.L.R. 321 (P.C.) [Alta.], which concerned a petition for divorce filed by Alberta's Minister of Public Works. The action was tried in the judge's library which had the word "Private" on the door. It was not the intention to exclude the public from the hearing. The Judicial Committee of the Privy Council referred to Lord Halsbury's observation in *Scott v. Scott*, [1913] A.C. 417 at 440 (H.L.), that "every Court of justice is open to every subject of the King." It was held that this was not a trial in "open court". Lord Blanesburgh discussed the importance of the open court principle at pp. 200-202:

> To this rule, there are, it need hardly be stated, certain strictly defined exceptions. Applications properly made in chambers, and infant cases, may be particularized. *But publicity is the authentic hall-mark of judicial as distinct from administrative procedure, and it can be safely hazarded that the trial of a divorce suit, a suit not entertained by the old Ecclesiastical Courts at all, is not within any exception ...*
>
> And their Lordships, in reaching the conclusion that the public must be treated as having been excluded from the library on this occasion, have not been uninfluenced by the fact that the cause then being tried was an undefended divorce case. *To no class of civil action is Lord Halsbury's statement more appropriate. In no class of case is the privilege more likely to be denied unless every tendency in a contrary direction, whenever manifested, is definitely checked ...*
>
> And there is, perhaps, no available way to correct these tendencies more effectively than to require that the trial of these cases shall always take place, and in the fullest sense, in open court. *This requirement must be insisted upon because there is no class of case in which the desire of parties to avoid publicity is more widespread. There is no class of case in which in particular circumstances, it can be so clearly demonstrated even to a judge that privacy in that instance would be both harmless and merciful ...*
>
> These are some of the considerations which have led their Lordships to take a more serious view of the absence of the public from the trial of this divorce action than has obtained in the Courts below. Influenced by them, their Lordships have felt impelled to regard the inroad upon the rule of publicity made in this instance — unconscious though it was — as one not to be justified, and now that it has been disclosed, as one that must be condemned so that it shall not again be permitted. [emphasis added]

Lord Blanesburgh's remarks, in my view, provide a stern reminder of the importance of not allowing one's compassion for that limited group of people who are of particular interest to the public (because of who they are or what they are alleged to have done) to undermine a principle which is fundamentally sound in its general application.

31 In his discussion of exceptions to the general rule in favour of publicity Wigmore was quick to warn of the dangers of legislation that makes certain exceptions compulsory rather than giving the trial judge a discretion to deal with individual cases: see Wigmore, op. cit., para. 1835, at pp. 449-50. Perhaps as a consequence, the range of circumstances in which statutory

provisions have been deemed necessary to protect the welfare of parties to litigation has been closely circumscribed. As far as the relationship of marriage is concerned, it is of some interest to note that the rules of evidence that formerly placed restrictions on the compellability of the spouse of a party to litigation and on the admissibility of the spouse's evidence have now been relaxed by legislation in most jurisdictions in Canada: see S. Schiff, Evidence in the Litigation Process, 3rd ed. (1988), vol. 2, at p. 1015. I think this is an expression of the growing acceptance of the proposition that the evidence of every person who can contribute to the ascertainment of the facts is needed and should be exposed to public scrutiny. It is also of interest to note that evidence adduced in criminal trials, e.g., for sexual offences, and in civil trials, e.g., for bankruptcy, which also expose to public view details of individuals' personal lives and conduct, i.e., the accused or the bankrupt, which they would no doubt prefer to keep private, often gives rise to great, if not greater, potential for embarrassment, grief, humiliation and loss of public esteem as the evidence in matrimonial litigation. While matrimonial litigation may well involve allegations of cruel, immoral and aberrant behaviour which may, as La Forest J. points out, adversely impact on the children of the marriage, I think that legislation seeking to address that concern should do so specifically or through the grant of judicial discretion and should be strictly confined to that narrow range of cases.

5. Section 1 of the Charter

32 In this case the values in conflict are the right of the public to an open court process, which includes the right of the press to publish what goes on in the courtroom, and the right of litigants to the protection of their privacy in matrimonial disputes. It is clear that both values cannot be fully respected given the context in which they come into conflict in this case. The question is whether s. 30(1) of the Alberta Judicature Act constitutes a reasonable limit on the freedom of the press which can be justified under s. 1 of the Charter. My colleague La Forest J. concludes that it is a reasonable limit and my colleague Cory J. that it is not.

33 I would respectfully agree with Cory J. that it is not a reasonable limit. I agree with him that the first two requirements laid down in *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87, are met. The protection of privacy is a legitimate government objective and the impugned legislation is rationally connected to it. I also agree with him that it lacks the required degree of proportionality. I believe it is important to keep in perspective the proportion of matrimonial cases in which publication of the evidence would cause such severe emotional and psychological trauma and public humiliation for the parties and/or their children as to warrant a ban on publication. There are unquestionably some cases where this is so, but s. 30(1) of Alberta's Judicature Act is not restricted to such cases. It encompasses all matrimonial causes, presumably on the assumption that they are all inevitably attended by such consequences. While this assumption may have been valid at one time, I think it is wholly unrealistic to make this assumption today. Many allegations that might once have been acutely embarrassing and painful are today a routine feature of matrimonial causes to which little, if any, public stigma attaches. While some "high profile" litigants may have reputations that will be harmed by revelations about their matrimonial behaviour, I do not think this warrants legislation as all-encompassing as s. 30(1) of Alberta's Judicature Act. Legislation seeking to place restrictions on freedom of the press in this area would, in my view, have to be much more carefully tailored.

6. Section 15 of the Charter

34 In light of my conclusion with respect to ss. 2(*b*) and 1 of the Charter, it is not necessary to deal with the appellant's contention that the impugned legislation violates s. 15 of the Charter.

7. Disposition

35 I would allow the appeal with costs and would answer the constitutional questions raised in this appeal as follows:

1. Does s. 30 of the *Judicature Act*, R.S.A. 1980, c. J-1, infringe or deny the right of freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

36 Answer: Yes.

2. If the answer to question 1 is yes, is s. 30 of the *Judicature Act* justified under s. 1 of the *Charter*?

37 Answer: No.

3. Does s. 30 of the *Judicature Act* infringe or deny the right to equality guaranteed by s. 15 of the *Charter*?

38 Answer: This question need not be answered.

4. If the answer to question 3 is yes, is s. 30 of the *Judicature Act* justified under s. 1 of the *Charter*?

39 Answer: This question need not be answered.

La Forest J. **(dissenting in part) (*****L'Heureux-Dubé*** **and** ***Sopinka JJ.*** **concurring)::**

40 The principal point in this case involves the balancing of the freedom of the press and the individual's right to privacy under the Canadian Charter of Rights and Freedoms. It also raises the application of s. 15 of the Charter to corporations.

Facts

41 The Edmonton Journal seeks a declaration that s. 30 of the Alberta Judicature Act, R.S.A. 1980, c. J-1, is inconsistent with s. 2(*b*) and s. 15 of the Charter, which respectively guarantee freedom of the press and legal equality. Both the trial judge, Foster J., [1986] 1 W.W.R. 453, 40 Alta. L.R. (2d) 326, 22 D.L.R. (4th) 446, 23 C.R.R. 356, 63 A.R. 114, and the Alberta Court of Appeal, [1987] 5 W.W.R. 385, 53 Alta. L.R. (2d) 193, 41 D.L.R. (4th) 502, 34 C.R.R. 111, 78 A.R. 375, refused to make that declaration on the ground that the provision constituted a reasonable limit to s. 2(*b*) under s. 1 of the Charter and that it did not violate s. 15. In this court, the Attorney General for Alberta conceded that s. 30 contravened s. 2(*b*) of the Charter so that the sole question on that aspect of the case is whether s. 30 constitutes a reasonable limit to the freedom of the press.

Section 30(2)

42 My colleague, Justice Cory, has concluded that s. 30 does not constitute such a reasonable limit. I agree with him that s. 30(2), which prohibits the publication before trial of anything contained in any pleading (except the names of the parties and the general nature of the claim or defence), is simply too broad a restriction without adequate justification to afford a defence under s. 1, and I shall say no more about it. With respect, however, I do not share his view regarding the remainder of the section.

Section 30(1) and (3)

43 Section 30(1) and (3) of the Alberta Judicature Act reads as follows:

30(1) No person shall within Alberta print or publish or cause or procure to be printed or published in relation to a judicial proceeding in a court of civil jurisdiction in Alberta for dissolution of marriage or nullity of marriage or for judicial separation or for restitution of conjugal rights or in relation to a marriage or an order, judgment or decree in respect of a marriage, any matter or detail the publication of which is prohibited by this section, or any other particulars except

(*a*) the names, addresses and occupations of the parties and witnesses,

(*b*) a concise statement of the charges, defences and countercharges in support of which evidence has been given,

(*c*) submissions on a point of law arising in the course of the proceedings and the decision of the court thereon, and

(*d*) the summing up of the judge and the finding of the jury, if any, and the judgment of the court and observations made by the judge in giving judgment.

(3) Nothing in this section applies

(*a*) to the printing of a pleading, transcript of evidence or other document for use in connection with a judicial proceeding, (*b*) to the communication of a pleading, transcript of evidence or other document for use in connection with a judicial proceeding to persons concerned in the proceeding,

(*c*) to the printing or publishing of a notice or report pursuant to an order or direction given by a court competent to so order or direct, or

(*d*) to the printing or publishing of a matter

(i) in a separate volume or part of a bona fide series of law reports that does not form part of another publication and that consists solely of reports of proceedings in courts of law, or

(ii) in a publication of a technical character bona fide intended for circulation among members of the legal or medical professions.

44 In essence, the interdiction in s. 30(1) extends only to the particulars of the evidence in matrimonial and similar proceedings where individuals are required to divulge some of the most private aspects of their lives (a mortification perhaps equalled only by the interest people take in the intimate secrets of others). The provision attempts to balance the public's right to know with the right of the individual, even in the open forums of the courts, to shield certain aspects of his or her existence from public scrutiny. It also affords a modicum of protection to those who are drawn into matrimonial proceedings by "ricochet". As noted by Kerans J.A. in the Court of Appeal, "concern for the effect on children, witnesses and the victims of false allegations remains valid today" (p. 206).

45 This approach to the provision is reinforced by the considerable latitude provided for the reporting of matrimonial proceedings: the parties and witnesses may be named, charges and defences may be summarized, and legal submissions, the summing up of the judge and the decision may be published without restriction. As well, the principle of open court (about which I share my colleague's sentiments) is maintained and nothing is wholly excluded from publication. Section 30(3) provides for various types of publication so as to balance the various social interests sought to be accommodated and in addition to the listed forms in which publication may take place, publication of other material may be allowed pursuant to an order of the court.

46 The reading I have given to the provision as being confined to the broad publication of details of particulars of the evidence is fortified by an examination of its purpose. The provision was taken from a similar one in England, which was incidentally later adopted in the Criminal Code, R.S.C. 1985, c. C-46, s. 166, as well as in various other parts of the Commonwealth; see Family Law Act 1975, S. Aust. 1975, No. 53, s. 121(1); Family Proceedings Act 1980, S.N.Z. 1980, No. 94, s. 169(1), (2). The English provision originated from the recommendations of a Royal Commission on Divorce and Matrimonial Causes set up to consider concerns that had arisen out of the extensive and sensational press coverage of divorce trials; see Report of the Royal Commission on Divorce and Matrimonial Causes (1912), Pt. XVII. This was followed by the establishment of a select committee of the British House of Commons which examined proposed legislation; see Report and Special Report from the Select Committee on the Matrimonial Causes (Regulation of Reports) Bill (1923). The concerns expressed in these reports may thus be summarized:

47 (1) The privacy of the parties involved in the proceedings and innocent third parties (including the children of the parties) was being violated.

48 (2) Citizens were being discouraged from participating as witnesses or parties in the judicial process because of the threat of publicity.

49 (3) The morals of society and in particular the youth of society were being adversely affected.

50 The debates in the British House of Commons are replete with statements of these concerns and were mirrored in those leading to the adoption of the provincial statute. These concerns were those relied upon by the Attorney General for Alberta in arguing that the impugned provisions constitute a reasonable limit to the freedom of the press. I should add that the Royal Commission was fully mindful of the delicate balance that needs to be achieved between the rights sought to be protected and

the requirements of a free press in playing its part in the interchange of information and ideas in a democratic society. At para. 494 of its report, for example, it stated:

> With the evidence before us, we take it as established that the evils of excessive publication are real and serious. When we come, however, to consider the remedies, we are confronted with a great variety of opinions. On the one hand, it is admitted that the liberty of the Press should be exercised for the public benefit, and is not so exercised when it is used to disseminate among the masses of the people literature of a demoralising tendency; on the other hand, there is a genuine anxiety lest, in seeking to cure this abuse, we should obstruct the free play of a healthy public opinion.

The Values in Conflict

51 I am, of course, in agreement with the general sentiments of my colleague regarding the importance in a free and democratic society of freedom of expression as well as the concept of open courts. I share with Duff C.J.C. the view that the "right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions"; see *Ref. re Alta. Statutes*, [1938] S.C.R. 100 at 133, [1938] 2 D.L.R. 81. Equally, public scrutiny of the judicial branch of government is essential to a free society. In all of this, I recognize as well the critical role of the press and other media in the broad dissemination of information and ideas in a complex modern society. The Charter indeed expressly includes "freedom of the press and other media of communication" in its guarantee of freedom of expression.

52 The freedom of the press and media, however, is not absolute. Like other rights and freedoms guaranteed by the Charter, it is subject under s. 1 of the Charter to such limits prescribed by law as can be demonstrably justified in a free and democratic society. The necessity for this balancing has always been recognized in Canada. Thus Duff C.J.C., in the course of the discussion in *Ref. re Alta. Statutes* from which I have just cited, had this to say, at p. 133:

> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James v. Commonwealth* [[1936] A.C. 578], "freedom governed by law."

See also *Fraser v. P.S.S.R.B.*, [1985] 2 S.C.R. 455 at 462-63, 18 Admin. L.R. 72, 9 C.C.E.L. 233, 23 D.L.R. (4th) 122, 19 C.R.R. 152, 86 C.L.L.C. 14,003, 63 N.R. 161 [Fed.].

53 This court has in recent cases recognized that freedom of expression, including the freedom of the press and other media, remains subject to restrictions since the enactment of the Charter so long as these conform to the exigencies of s. 1: see *Can. Newspapers Co. v. Can. (A.G.)*, [1988] 2 S.C.R. 122, 65 C.R. (3d) 50, 43 C.C.C. (3d) 24, 52 D.L.R. (4th) 690, 38 C.R.R. 72, 32 O.A.C. 259, 87 N.R. 163; *Irwin Toy Ltd. v. Que. (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 39 C.R.R. 193, 25 C.P.R. (3d) 417, 24 Q.A.C. 2, 94 N.R. 167; see also *Re Global Communications Ltd. and A.G. Can.* (1984), 44 O.R. (2d) 609, (sub nom. *Re Smith; Global Communications Ltd. v. California)* 38 C.R. (3d) 209, 10 C.C.C. (3d) 97, 5 D.L.R. (4th) 634, 7 C.R.R. 22, 2 O.A.C. 21 (C.A.). This is consistent with the approach of the leading international instruments for the protection of human rights. Thus art. 19(3) of the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), recognizes that the right to freedom of expression carries with it special duties and responsibilities and may, therefore, be subjected to certain restrictions; see also European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1950), art. 10(2).

54 The question, then, becomes one of balancing the values sought to be protected by the Charter guarantee against the values of a free and democratic society sought to be fostered by the proposed law. The criteria to be taken into account in effecting this task have been frequently stated and I do not propose to itemize them here; see *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87. I shall, however, refer to them as I go along. Here I should simply mention that the onus of establishing a reasonable limit to a guaranteed right is on those supporting the law, an onus the Attorney General for Alberta sought to establish on the grounds already mentioned.

55 An important step in this process of balancing must of course involve an examination of the extent of the interference with a guaranteed right or freedom and an appreciation of the extent to which the interference affects the underlying purpose of the right or freedom; see *U.S. v. Cotroni; U.S. v. El Zein*, [1989] 1 S.C.R. 1469, 48 C.C.C. (3d) 193, 23 Q.A.C. 182, 96 N.R. 321. Here the interference with the freedom is nar rowly defined and carefully tailored. It is limited to the details and particularities of the case in specific proceedings that deal with personal and family matters, often of a particularly private, and sometimes of an intimate character. I share Kerans J.A.'s skepticism of the significance of the negative impact of the legislation on the freedom of the press and media and the public right to be informed of matters of public interest. As earlier noted, the principle of open courts is respected, publication for those having serious interest in court proceedings or family law is permitted, and all the general information about the nature of the case may be published by the mass media. I find it difficult to take seriously the contention that the general public would learn very much about what their rights are or how their problems might be dealt with in court by permitting the revelation by the media of specific details of particular cases dealing with marital questions. A general discussion of the kinds of evidence would not be caught by the prohibition, and there is sufficient information in the types of publications permitted to allow newspapers and other mass media to inform the general public of the nature of such evidence. Kerans J.A. observes that while the appellant has published a newspaper in Alberta throughout the last 50 years, no evidence was presented of a single instance where the impugned provision forbade it from reporting something of which the public should have been informed. Kerans J.A. concluded that the interference with the public's right to know how justice is administered is more apparent than real.

56 If the legislation prohibited reporting about the conduct of judges and counsel, I would share the concerns of my colleague about the legislation. But I do not think the legislation is directed to these matters. It is aimed rather at the details and particularities of the case. As long ago as *Heydon's Case* (1584), 3 Co. Rep. 7a at 7b, 76 E.R. 637 at 638, we were instructed that legislation should be read in accordance with its purpose. And what both the terms of the legislation itself and the problems identified by preparatory documents clearly reveal is that what the statute was intended to prohibit was not discussion of how courts go about their business, but reports of the details of people's lives that are routinely divulged in the proceedings referred to in the legislation. To read the legislation in the literal way proposed would require that the names of the judges and lawyers involved not be revealed since they are not expressly named in the exceptions to the prohibition. Such a construction is, I suggest, obviously unreasonable.

57 As I see it, then, the contravention objected to is of a quite limited character. As against the value infringed by such contravention must be weighed the other values of a free and democratic society sought to be promoted by the legislature, namely personal privacy, access to the courts and public morals. The Attorney General for Alberta concedes that the order of importance of these values has significantly altered since the legislation was originally enacted, but suggests their continued validity, some of greater, some of lesser weight than at that time.

58 Today there is no question that the individual's interest in personal privacy is the most pressing of the justifications advanced. That interest has been recognized by this court as having constitutional significance. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, (sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 84 D.T.C. 6467, 55 A.R. 291, 55 N.R. 241, it was held to underlie the protection against unreasonable search and seizure enshrined in s. 8 of the Charter. Speaking on this point on behalf of the court in *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427-28, 66 C.R. (3d) 348, 10 M.V.R. (2d) 1, 45 C.C.C. (3d) 244, 55 D.L.R. (4th) 503, 38 C.R.R. 301, 73 Nfld. & P.E.I.R. 13, 229 A.P.R. 13, 89 N.R. 249 [P.E.I.], I had this to say of the approach adopted in *Hunter v. Southam Inc.*:

> The foregoing approach is altogether fitting for a constitutional document enshrined at the time when, Westin tells us, society has come to realize that privacy is at the heart of liberty in a modern state; see Alan F. Westin, *Privacy and Freedom* (1970), pp. 349-50. Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

These considerations may well indicate that, in some contexts at least, privacy interests may well be invoked as an aspect of the liberty and security of the person guaranteed by s. 7 of the Charter; see *R. v. Beare; R. v. Higgins*, [1988] 2 S.C.R. 387 at 412, [1989] 1 W.W.R. 97, 66 C.R. (3d) 97, 45 C.C.C. (3d) 57, 55 D.L.R. (4th) 481, 36 C.R.R. 90, 71 Sask. R. 1, 88 N.R. 205. However that may be, there can be no doubt that, in this modern age, it ranks high in the hierarchy of values meriting protection in a free and democratic society.

59 The right to personal privacy, including the privacy of one's family and home, has also been recognized by leading international documents aimed at the protection of human rights. The International Covenant on Civil and Political Rights (art. 17), the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) (art. 12), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 8) all contain provisions to ensure respect for the private and family life of the individual.

60 The right or interest in privacy extends, of course, to informational privacy. In *R. v. Dyment*, at pp. 429-30, I thus commented on this aspect of privacy:

> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force [on Privacy and Computers] put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the *Privacy Act*, S.C. 1980-81-82-83, c. 111.

61 That case and the instances there referred to had reference to governmental interferences with privacy. But in our society, the privacy of the individual is as often threatened by other powerful or influential entities against which the individual is powerless. It should come as no great revelation that the divulgation of personal information about an individual by the mass media can do incalculable harm to that individual and his or her family. Small wonder, then, that the international documents I have just cited expressly underline that freedom of expression carries with it special duties and responsibilities and recognize the need for restrictions; see International Covenant on Civil and Political Rights, art. 19(3); Universal Declaration of Human Rights, art. 12; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10(2). I should observe interstitially that recent cases in this court recognize that in considering issues of this kind, the relative power of those whose activities are restricted and those for whose benefit the restriction is made is a relevant factor to weigh in the equation; see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 26 C.C.E.L. 85, 59 D.L.R. (4th) 416, 89 C.L.L.C. 14,031, 93 N.R. 183 [Fed.]; *Irwin Toy*, supra.

62 In matrimonial cases, the individual is forced to reveal many aspects of his or her private life in order to comply with the demands of the state in ordering his or her life. This necessary intrusion on family privacy, we saw, may have a serious impact not only on the litigants themselves but on witnesses and, even more important, children. There has, no doubt, been a change in emphasis in the nature of evidence in matrimonial causes since the enactment of the Act but it remains true that much is revealed that can, if publicized, seriously affect the autonomy and privacy of the individual and members of his or her family, general publication of which serves little or no public interest. As Kerans J.A. put it (at p. 206): "While one hears less today in divorce court about 'what the housemaid saw', one hears much more about the financial dealings of a family and other very private matters, like psychological assessments of the parties in terms of fitness as parents."

63 The protection from intrusion on the privacy of the individual, the family and witnesses, in my view, in itself affords a sufficiently compelling objective to warrant some curtailment of the freedom of the press in the present context. But privacy is not the only value sought to be protected; the provision was intended to prevent obstacles to access to the courts, an interest that is also clearly of great importance in a free and democratic society; see *Can. Newspapers Co. v. Can. (A.G.)*, supra, where

this court upheld the restriction imposed by s. 442(3) of the Criminal Code [R.S.C. 1970, c. C-34], which enables the victim of sexual assault to require the issuance of a court order prohibiting the media from revealing the identity of the complainant or any information that could disclose that identity. Similarly, it was argued, unrestrained publicity of the details of familial activities would very likely discourage some people from seeking relief in matrimonial causes. That certainly appears to have been so when the original English legislation was enacted. The number of matrimonial causes rose dramatically immediately afterwards. While I am prepared to concede that this inhibitory effect of publicity would not be as strong today, I am satisfied that it continues to be a relevant factor. The prospect of divulging personal information in a court of law is one that many a litigant and witness approaches with considerable trepidation. It must be remembered that, in many cases, the parties are undergoing one of the most painful experiences of their lives. To be told in addition that one risks broad public exposure through the media would significantly increase this feeling. I agree with Kerans J.A. that it would be a great wrong if those in need of redress shrank from seeking it because their intimate affairs would needlessly become publicly known.

64 The Attorney General for Alberta attached little weight to the third justification, the protection of public morals, and I agree that in this day and age this ground is only of residual interest in the existing context. But the other two grounds constitute sufficient legislative objectives to warrant a reasonable limitation on publication of the details of matrimonial disputes. It is significant that similar objectives have been pursued in other countries. I have mentioned the Commonwealth countries that have a similar Act. The Royal Commission on the matter noted that foreign observers had expressed surprise at the lack of such provisions in Great Britain before the enactment of the predecessor of the impugned provision.

65 I thus have no doubt of the rationality of the legislative response. Moreover, given the very limited character of the restriction as compared with the serious deleterious effects on the important values sought to be protected by the legislation, I am also of the view that it meets the test of proportionality.

66 The question, then, is whether the restriction is excessive to achieve its purposes or, as it is ordinarily put, whether the constitutional right is limited "as little as possible". What will be "as little as possible" will vary depending on the legislative objective, the nature of the freedom or the right infringed, the extent of the infringement and the means available to the legislature to effect its objectives. I have already referred to the limited nature of the restriction. Only details and particularities of the case are prohibited from publication, and the prohibition is confined to matrimonial disputes where matters of a peculiarly private and sensitive nature often arise. The areas are sufficiently clear and rationally based. The legislature must be afforded reasonable leeway in "line drawing"; see *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713, (sub nom. *R. v. Videoflicks Ltd.)* 55 C.R. (3d) 193, (sub nom. *Edwards Books & Art Ltd. v. R.; R. v. Nortown Foods Ltd.)* 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1, 28 C.R.R. 1, 87 C.L.L.C. 14,001, 19 O.A.C. 239, 71 N.R. 161; *Irwin Toy*, supra. It must also be given adequate scope as to the choice of response to problems. There may, as was argued, be other ways to achieve the legislative purpose, for example, the protection of anonymity. But there are difficulties with this too. Public knowledge of divorce is necessary and attempts at securing anonymity may easily fail or be suspect by the litigant or witnesses. At all events, the exceptions from the prohibition are extensive.

67 The most serious attack on the provision, however, was the automatic character of the prohibition. It was argued that a discretionary power in the judge to prohibit publication would be enough. The trouble with this argument, as Kerans J.A. pointed out, is that it had been tried and proved ineffective. The Select Committee of the British House of Commons had this to say about it (at p. iv):

> It has sometimes been suggested that a simple solution can be found by empowering Judges, at their discretion to forbid publication of any evidence or other part of the proceedings which they held to be injurious to public morals, under penalty of contempt of court; but apart from the likelihood of different judges taking different views, Your Committee are satisfied from personal knowledge that this course is not in fact practicable, and that even if the power were granted, its exercise would prove precarious and spasmodic.

68 The validity of the rule was also questioned on the basis of its absolute character but, as the Court of Appeal observed, the experience of 50 years, to which I alluded earlier, does not support the view that the law is too restrictive. A law must be approached at the practical, not the theoretical, level and, as I earlier noted, the restriction is minimal, more apparent than real. On the other hand, the problems to be resolved are, in the words of the Royal Commission,"real and serious". I am, in any

event, by no means sure that the rule is as absolute as has been supposed. Given the obvious intention of the Act, as it appears both in its terms and the preparatory documents, to sensitively balance the public's right to know with the individual's right to privacy, it is my view that a court, in its discretion, could by order under s. 30(3)(*c*) permit the reporting of matters otherwise prohibited in those rare cases where the interest of the public in the publication of details overrode the right to privacy. But I do not attach too much importance to this. All in all, I am of the view that s. 30(1), as modified by s. 30(3), constitutes a reasonable limitation to the freedom of the media in a free and democratic society. It restricts that freedom as little as reasonably possible. The underlying purpose of the freedom is hardly affected, if at all.

Section 15

69 The appellant also submitted that the impugned legislation infringes on its s. 15 Charter rights by imposing an interdiction not found in other jurisdictions in Canada, and by discriminating against print media and between newspapers in general circulation and professional journals. Since s. 15 is limited to individuals, it does not apply to corporations like the appellant: see, inter alia, *Aluminum Co. of Can. v. Ont.* (1986), 55 O.R. (2d) 522, *(*sub nom. *Aluminum Co. of Can. v. Ont. (Min. of the Environment)))* 19 Admin. L.R. 192, 1 C.E.L.R. (N.S.) 1, 29 D.L.R. (4th) 583, 25 C.R.R. 50, 16 O.A.C. 14 (Div. Ct.), leave to appeal to Ont. C.A. refused 2nd September 1986 [19 Admin. L.R. xliii]; *Parkdale Hotel Ltd. v. Can. (A.G.)*, [1986] 2 F.C. 514, 27 D.L.R. (4th) 19, 1 F.T.R. 190 (T.D.); *Milk Bd. v. Clearview Dairy Farm Inc.*, [1987] 4 W.W.R. 279, 12 B.C.L.R. (2d) 116 (C.A.), leave to appeal to this court refused [1987] 1 S.C.R. vii, [1987] 4 W.W.R. lxvi, 81 N.R. 240; *Nissho Corp. v. Bank of B.C.; Nichiban Co. v. Bank of B.C.* (1987), 39 D.L.R. (4th) 453 (Alta. Q.B.). Moreover, though the appellant may have an interest in the matter, it is not directly affected and the issue may come to the courts in other ways, so the appellant faces serious problems of standing. I need not, however, dwell on these matters because the distinctions about which it complains do not fall within the ambit of s. 15 under the principles enunciated in *Andrews v. Law Soc. of B.C.*, [1989] 1 S.C.R. 143, [1989] 2 W.W.R. 289, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, 56 D.L.R. (4th) 1, 36 C.R.R. 193, 10 C.H.R.R. D/5719, 91 N.R. 255. None of these distinctions are in any way analogous to the enumerated grounds in that provision: see also *Ref. re Wkrs.' Comp. Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922, 56 D.L.R. (4th) 765, *(*sub nom. *Ref. re Ss. 32 & 34 of Wkrs.' Comp. Act (Nfld.))* 76 Nfld. & P.E.I.R. 181, 235 A.P.R. 181, 96 N.R. 227; *R. v. Turpin*, [1989] 1 S.C.R. 1296, 69 C.R. (3d) 97, 48 C.C.C. (3d) 8, 39 C.R.R. 306, 34 O.A.C. 115, 96 N.R. 115.

Disposition

70 I would allow the appeal as it relates to s. 30(2) of the Alberta Judicature Act and dismiss it as it relates to the rest of the section. I would answer the constitutional questions as follows:

1. Does s. 30 of the *Judicature Act*, R.S.A. 1980, c. J-1, infringe or deny the right of freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

71 Yes.

2. If the answer to question 1 is yes, is s. 30 of the *Judicature Act* justified under s. 1 of the *Charter*?

72 No as to s. 30(2); yes as to the rest of s. 30.

3. Does s. 30 of the *Judicature Act* infringe or deny the right to equality guaranteed by s. 15 of the *Charter*?

73 No.

4. If the answer to question 3 is yes, is s. 30 of the *Judicature Act* justified under s. 1 of the *Charter*?

74 This question need not be answered.

***Cory J.* (*Dickson C.J.C.* and *Lamer J.* concurring):**

75 On this appeal [from [1987] 5 W.W.R. 385, 53 Alta. L.R. (2d) 193, 41 D.L.R. (4th) 502, 34 C.R.R. 111, 78 A.R. 375, affirming [1986] 1 W.W.R. 453, 40 Alta. L.R. (2d) 326, 22 D.L.R. (4th) 446, 23 C.R.R. 356, 63 A.R. 114] the appellant has challenged the validity of s. 30 of the Alberta Judicature Act, R.S.A. 1980, c. J-1, on the grounds that it contravenes s. 2(*b*) of the Canadian Charter of Rights and Freedoms and that the section does not constitute a reasonable limit upon that right so as to come within s. 1 of the Charter. The Attorney General for Alberta has conceded that the impugned section contravenes s. 2(*b*) of the Charter but contends that it constitutes a reasonable limit and thus comes within the scope of s. 1 of the Charter.

76 It may be convenient here to set out s. 30 and the enforcement provision of s. 31. Those sections provide:

> 30 (1) No person shall within Alberta print or publish or cause or procure to be printed or published in relation to a judicial proceeding in a court of civil jurisdiction in Alberta for dissolution of marriage or nullity of marriage or for judicial separation or for restitution of conjugal rights or in relation to a marriage or an order, judgment or decree in respect of a marriage, any matter or detail the publication of which is prohibited by this section, or any other particulars except
>
> (*a*) the names, addresses and occupations of the parties and witnesses,
>
> (*b*) a concise statement of the charges, defences and countercharges in support of which evidence has been given,
>
> (*c*) submissions on a point of law arising in the course of the proceedings and the decision of the court thereon, and
>
> (*d*) the summing up of the judge and the finding of the jury, if any, and the judgment of the court and observations made by the judge in giving judgment.
>
> (2) No person shall, before the trial of any proceedings had in a court of civil jurisdiction in Alberta or, if there is no trial, before the determination of the proceedings within Alberta, print or publish or cause to be printed or published anything contained in a statement of claim, statement of defence or other pleading, examination for discovery or in an affidavit or other document other than
>
> (*a*) the names and addresses of the parties and their solicitors, and
>
> (*b*) a concise statement of the nature of the claim or of the defence, as the case may be, in general words such as, "the claim is for the price of goods sold and delivered", or "the claim is for damages for personal injuries caused by the negligent operation of an automobile", or as the case may be.
>
> (3) Nothing in this section applies
>
> (*a*) to the printing of a pleading, transcript of evidence or other document for use in connection with a judicial proceeding,
>
> (*b*) to the communication of a pleading, transcript of evidence or other document for use in connection with a judicial proceeding to persons concerned in the proceeding,
>
> (*c*) to the printing or publishing of a notice or report pursuant to an order or direction given by a court competent to so order or direct, or
>
> (*d*) to the printing or publishing of a matter
>
> (i) in a separate volume or part of a bona fide series of law reports that does not form part of another publication and that consists solely of reports of proceedings in courts of law, or
>
> (ii) in a publication of a technical character bona fide intended for circulation among members of the legal or medical professions.
>
> 31(1) A person who contravenes section 30 is guilty of an offence and, in respect of each offence, liable

(*a*) if a natural person to a fine of not more than $1,000 and in default of payment to imprisonment for a term of not more than one year, and

(*b*) if a corporation to a fine of not more than $5,000.

(2) When the offence consists in the printing and publication of a matter, detail or thing in a newspaper, circular or other publication printed and published in Alberta, the proprietor of the newspaper, the editor of the newspaper and the publisher are each guilty of the offence.

(3) When the offence consists of the publication in Alberta of a matter or thing contained in a newspaper, circular or other publication that is printed outside Alberta and that continually or repeatedly publishes writings or articles that are obscene, immoral or otherwise injurious to public morals, every person within Alberta is guilty of an offence who

(*a*) receives that newspaper, circular or other publication, and

(*b*) is engaged in the public distribution of it or does an act or thing for the purpose of the public distribution of it.

(4) In a prosecution with respect to an offence under subsection (3), the fact that the accused was in possession of more than 6 copies of a newspaper, circular or other publication referred to in subsection (3) is prima facie proof that the accused was engaged in the public distribution of it.

(5) No prosecution for an offence under subsection (3) may be commenced by any person without the consent of the Attorney General.

77 The issues raised require consideration of ss. 1 and 2(*b*) of the Charter. These sections provide:

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

2. Everyone has the following fundamental freedoms:

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

Importance of s. 2(b) of the Charter and the Reporting of Court Proceedings

78 It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(*b*) in absolute terms which distinguishes it, for example, from s. 8 of the Charter, which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(*b*) should therefore only be restricted in the clearest of circumstances.

79 The vital and fundamental importance of freedom of expression has been recognized in decisions of this court. In *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 583, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 33 D.L.R. (4th) 174, 25 C.R.R. 321, 87 C.L.L.C. 14,002, 71 N.R. 83, McIntyre J., speaking for the majority, put the position in this way:

Freedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

The importance of freedom of expression has been recognized since early times: see John Milton, *Areopagitica; A Speech for the Liberty of Unlicenc'd Printing to the Parliament of England* (1644), and as well John Stuart Mill, "On Liberty" in *On Liberty and Considerations on Representative Government* (Oxford, 1946), at p. 14:

> If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

And, after stating that "All silencing of discussion is an assumption of infallibility", he said, at p. 16:

> Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.

Nothing in the vast literature on this subject reduces the importance of Mill's words. The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy.

80 There can be no doubt that the courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens, but for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts. As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public.

81 The importance of the concept that justice be done openly has been known to our law for centuries. In Blackstone's Commentaries on the Laws of England (1768), Book III, c. 23, at p. 373, the following observation appears:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk ...

82 This principle has been recognized by the United States Supreme Court in *Gannett Co. v. DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979). Stewart J., writing for the majority, said this (at p. 386, n. 15):

> As early as 1685, Sir John Hawles commented that open proceedings were necessary so "that truth may be discovered in civil *and* criminal matters".

In the United States this principle is not restricted to hearings. The principle embraces the recognition of the existence of a common law right "to inspect and copy public records and documents, including judicial records and documents": see *Nixon v. Warner Communications Inc.*, 435 U.S. 589 at 597, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978).

83 In Canada this court has emphasized the importance of the public scrutiny of the courts. It was put in this way by Dickson J., as he then was, writing for the majority in *A.G.N.S. v. MacIntyre*, [1982] 1 S.C.R. 175 at 185, 26 C.R. (3d) 193, 65 C.C.C. (2d) 129, 132 D.L.R. (3d) 385, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181 :

> Many times it has been urged that the "privacy" of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Laurence J. in *R. v. Wright*, 8 T.R. 293, are apposite and were cited with approval by Duff J. in *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339 at p. 359:
>
> > Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general

> advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

He then went on to discuss the application of that same principle to court records. He observed that Canadian law differs somewhat from the law of England, which appears to take a more restrictive approach towards the publicity of documents. He said this at p. 189:

> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.
>
> I am not unaware that the foregoing may seem a departure from English practice, as I understand it, but it is in my view more consonant with the openness of judicial proceedings which English case law would seem to espouse.

84 It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

85 There is another aspect to freedom of expression which was recognized by this court in *Ford v. Que. (A.G.)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, 36 C.R.R. 1, 10 C.H.R.R. D/5559, *(*sub nom. *Chaussure Brown's Inc. v. Que. (P.G.))* 19 Q.A.C. 59, 90 N.R. 84. There at p. 767 it was observed that freedom of expression "protects listeners as well as speakers". That is to say, as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings — the nature of the evidence that was called, the arguments presented, the comments made by the trial judge — in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.

86 It is equally important for the press to be able to report upon and for the citizen to receive information pertaining to court documents. It was put in this way by Anne Elizabeth Cohen in her article "Access to Pretrial Documents Under the First Amendment" (1984), 84 Colum. L. Rev. 1813, at p. 1827:

> Access to pretrial documents furthers the same societal needs served by open trials and pretrial civil and criminal proceedings. Court officials can be better evaluated when their actions are seen by informed, rather than merely curious, spectators.

It is against this background, which recognizes the crucial importance of both the freedom of expression and the openness of courts, that s. 30 of the Alberta Judicature Act must be considered.

The Effect of the Prohibitions Contained in s. 30 of the Alberta Legislation

87 It will be recalled that s. 30(1) prohibits printing and publishing"in relation to a judicial proceeding in a court of civil jurisdiction in Alberta for dissolution of marriage or nullity of marriage or for judicial separation or for restitution of conjugal rights or in relation to a marriage or an order, judgment or decree in respect of a marriage, any matter or detail the publication of which is prohibited by this section". The section then goes on to set out the exceptions: a) the names, addresses and occupations of the parties and witnesses; b) a concise statement of the charges, defences and countercharges in support of which evidence has been given; c) submissions on a point of law arising in the course of the proceedings and the decision of the court thereon;

and d) the summing up of the judge and the findings of the jury, if any, and the judgment of the court and the observations made by the judge in giving judgment.

88 The sweeping effect of the prohibition can be readily seen. The term "or in relation to a marriage" is a broad one. It encompasses matters pertaining to custody of children, access to children, division of property and the payment of maintenance. All are matters of public interest yet the evidence given on any of these issues cannot be published. The dangers of this type of restriction are obvious. Members of the public are prevented from learning what evidence is likely to be called in a matrimonial cause, what might be expected by way of division of property and how that evidence is to be put forward. Neither would they be aware of what questioning might be expected. These are matters of great importance to those concerned with the application of family law. It is information people might wish to have before they even consider consulting a lawyer. The very people who would seem to have the greatest need to know of family court proceedings are prevented from obtaining important information by the provisions of s. 30.

89 As well, the comments of counsel and the presiding judge are excluded from publication. How then is the community to know if judges conduct themselves properly? How will it know whether remarks might have been made, for example, that a wife should submit to acts of violence from her husband or that a wife should endure the verbal abuse or blows of her husband? The community has a right to know if such remarks are made, yet if there is no right to publish, the judge's comments may be hidden from public view. Thus it can be seen that the effect of s. 30(1) is to repress the publication of important aspects of court proceedings. The prohibitions are unnecessarily extensive.

90 With regard to s. 30(2), it creates an almost total restriction on providing information pertaining to pleadings or documents filed in any civil proceedings before they have been heard. Thus cases involving matters of administrative law or constitutional law are affected by the prohibition. People are prevented from learning the particular allegations made in these cases although they may have a vital impact on the lives of all the residents of the province. The restriction set out in s. 30(2) is unique to the province of Alberta.

Contraventions of s. 2(b)

91 There can be no doubt that the provisions of s. 30(1) and (2) of the Alberta Judicature Act contravene s. 2(*b*) of the Charter. This was recognized by the Alberta Court of Appeal and conceded by the Attorney General for Alberta before this court. The legislation then can only be saved if the province of Alberta has satisfied the onus which it must bear to show that the section constitutes a reasonable limitation that comes within the purview of s. 1 of the Charter.

Consideration of s. 1 of the Charter

92 In order to constitute a reasonable limitation contemplated by s. 1 of the Charter, the impugned section must meet the criteria set forth in*R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87. There Chief Justice Dickson, speaking for the majority, indicated that the legislation in question has to satisfy two sets of conditions if it is to meet the test under s. 1. The first is that the objective of the impugned legislation which sought to impose a limit on a Charter right must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (p. 138). Quoting *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 85 C.L.L.C. 14,023, 60 A.R. 161, 58 N.R. 81, he observed that the standard must be high in order to ensure that objectives of a trivial nature did not gain s. 1 protection. The objective must be of a pressing and a substantial nature before it can be characterized as sufficiently important to override a Charter right. Second, "the means chosen to attain those objectives must be proportional or appropriate to the ends": *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 at 768, *(*sub nom. *R. v. Videoflicks Ltd.)* 55 C.R. (3d) 193, *(*sub nom. *Edwards Books & Art Ltd. v. R.; R. v. Nortown Foods Ltd.)* 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1, 28 C.R.R. 1, 87 C.L.L.C. 14,001, 19 O.A.C. 239, 71 N.R. 161.

93 Considering that first condition, what then are the objectives of this legislation? There were three put forward by the Attorney General for Alberta. First, it was said that the aim of the legislation, particularly s. 30(1), was to safeguard public morals. Undoubtedly this was the primary basis for the enactment of the legislation in 1935. However, it must be reviewed

by current standards and it cannot be accepted that this objective remains pertinent in today's society. Although allegations of adultery and the misconduct of the parties may have been the height of scandal at the time of the passage of the legislation, they can hardly raise an eyebrow today. Television in day-time soap operas and prime time programs, the movies and magazines, all deal in considerable and colourful detail with every possible permutation and combination of human relationships. That is now the staple fare of society. By comparison the evidence of a matrimonial case is very tame fare indeed. The problems before the court in matrimonial causes could not conceivably be said to so affect public morals that the public should be shielded from the proceedings.

94 The Attorney General for Alberta submitted that a second purpose of the legislation was to ensure access to the courts by people who might wish to litigate matrimonial matters. It was said that if people had knowledge that their case would be the subject of printed reports, they might not seek to achieve their rights in court. But no evidence was introduced to support the contention that, in the absence of s. 30(1), potential litigants would be dissuaded from going to court. Indeed, what statistical evidence there is suggests the opposite. The Statistics Canada Report, Marrying and Divorcing: A Status Report for Canada (1988), indicates that in the period from 1984 to 1986, no less than 28 per cent of all marriages ended in divorce compared with 19 per cent in the period 1970 to 1972. This amounts to almost one-third of marriages and the rate of divorce is far higher with younger couples. Furthermore, the Report concludes at p. 11 that "Canadians marry, divorce and remarry at uniform rates from one end of the country to the other". A historical comparison is enlightening. In 1984, the divorce rate was some 20 times higher than in 1935, and some 40 times higher than in 1920: see Statistics Canada, Divorce: Law and the Family in Canada (1983), at p. 48, and Marriages and Divorces: Vital Statistics 1985 (1986), at p. 2. The grounds alleged for these marriage breakdowns are revealing as well. The most recent unpublished Statistics Canada figures on grounds for divorce show that for the period of 1st December 1987 to 30th June 1988, 82.8 per cent of divorces were on grounds of one year of separation, 5.4 per cent for adultery, 6.4 per cent for physical cruelty and 5.4 per cent for mixed grounds. Indeed, in Ontario well over 90 per cent of the divorces that appeared on the trial list were undefended: see [W.G.C. Howland et al.] "Reports on the Administration of Justice in Ontario on the Opening of the Courts for 1988" (1989), 23 L. Soc. Gaz. 4, at p. 24.

95 The question of access to judicial proceedings must be judged against this background of modern family law which has developed new mechanisms for helping parties to resolve their problems. In particular, the statistics demonstrate that departure from the fault-based model of divorce has in large measure eliminated the legal stigma attached to marriage breakdown. In light of the statistics it is difficult to accept the submission that access to court proceedings is significantly impeded by fear of publicity in the press. One need only observe the large number of actions for divorce and corollary relief brought in every province to recognize that litigants are coming to court in large numbers in those provinces where there is no mandatory press ban in place. Thus there is no indication that people are not seeking to enforce their rights in matrimonial causes. As well, it is clear that adultery is not the predominant ground put forward as the basis for divorce.

96 Thirdly, it was alleged that the legislation was aimed at protecting the privacy of individuals. This aspect or aim of the legislation does indeed relate to a pressing and substantial concern in a free and democratic society. Our society has cherished and given protection to privacy. This court has on a number of occasions underlined the importance of the privacy interest in Canadian law: see *A.G.N.S. v. MacIntyre*, supra; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 159-60, (sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 84 D.T.C. 6467, 55 A.R. 291, 55 N.R. 241; *R. v. Amway Corp.*, [1989] 1 S.C.R. 21 at 40, (sub nom. *Can. v. Amway of Can. Ltd.)* 68 C.R. (3d) 97, 33 C.P.C. (2d) 163, 56 D.L.R. (4th) 309, 37 C.R.R. 235, 18 C.E.R. 305, [1989] 1 C.T.C. 255, [1989] 1 T.S.T. 2058, 2 T.C.T. 4074, 91 N.R. 18 [Fed]; and *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427-28, 66 C.R. (3d) 348, 10 M.V.R. (2d) 1, 45 C.C.C. (3d) 244, 55 D.L.R. (4th) 503, 38 C.R.R. 301, 73 Nfld. & P.E.I.R. 13, 229 A.P.R. 13, 89 N.R. 249 [P.E.I.]. It is of such importance that on this view it can be said that s. 30(1) has met the first of the two conditions enunciated in *R. v. Oakes*, supra.

97 With regard to s. 30(2), the Attorney General for Alberta submitted that its purpose was two-fold, to ensure the right to a fair trial and to protect reputation and privacy. I will assume, for the purposes of these reasons, that s. 30(2) as well meets that first test and that both the objectives, that of securing a fair trial and that of protecting the right to privacy with regard to

pre-trial documents, constitute pressing and substantial objectives sufficient to permit the overriding of the right to freedom of expression.

98 Once a sufficiently significant objective has been demonstrated then the party invoking s. 1 (here the province of Alberta) must show that the means chosen are reasonable and demonstrably justified in order to satisfy the proportionality test set forth in *Oakes*, supra.

99 In *R. v. Whyte*, [1988] 2 S.C.R. 3 at 20, [1988] 5 W.W.R. 26, 29 B.C.L.R. (2d) 273, 64 C.R. (3d) 123, 6 M.V.R. (2d) 138, 42 C.C.C. (3d) 97, 51 D.L.R. (4th) 481, 35 C.R.R. 1, 86 N.R. 328, Chief Justice Dickson noted that there are three components of the proportionality test:

> ... the measures must be carefully designed to achieve the objective of the legislation, with a rational connection to the objective. The second component is that the measure should impair the right or freedom as little as possible. Finally, there must be proportionality between the effects of the impugned measures on the protected right and the attainment of the objective.

100 Section 30 neither impairs the right of freedom of expression as little as possible nor is there the required proportionality between the effect of the impugned measure on the protected right and the attainment of the objective. Both s. 30(1) and s. 30(2) go much further than is necessary to protect the privacy of persons involved in proceedings. Their deleterious effect has been noted.

101 It can be seen that if, for example, a newspaper chose to publish a story which scrupulously avoided revealing the identity of parties or witnesses but discussed in general terms the kind of evidence introduced in matrimonial proceedings, the newspaper would be in contravention of s. 30(1) and subject to a fine even though no privacy interest had been affected. Similarly, if a newspaper chose to comment on the conduct or remarks of a judge or counsel during court proceedings, then although this would not be an invasion of privacy, the newspaper would be in contravention of the section. The exceptions provided in s. 30(1) do not permit a proper reporting of the proceedings and cannot be said to constitute a minimal interference with the right of freedom of expression.

102 Nor can it be said that there is the requisite proportionality between the overly restrictive provisions of s. 30(1) and the important right to report freely upon trial proceedings. In today's society it is the press reports of trials that make the courts truly open to the public. The principle that courts must function openly is fundamental to our system of justice. The public's need to know is undeniable. Section 30 by its restrictive ban on publication results in a very substantial interference with freedom of expression and significantly reduces the openness of the courts. Any need for the protection of privacy of witnesses or children could be readily accomplished by far less sweeping measures. For example, it could be accomplished by the exercise of discretion by the trial judge to prohibit publication or to hold in-camera hearings in those few circumstances where it would be necessary to do so in order to protect the privacy interest of parties, their children or witnesses.

103 The importance of freedom of expression and of public access to the courts through the press reports of the evidence, arguments and the conduct of judges and judicial officers is of such paramount importance that any interference with it must be of a minimal nature.

104 It cannot be said that s. 30(1) interferes as little as possible with the fundamentally important right to freedom of expression particularly as it applies to informing the public of court proceedings. Nor does it reflect that proportionality which is required between the effect of the measure and the attainment of the objectives.

105 Counsel for the Attorney General for Alberta took the position that the exceptions set out in s. 30(1) permitted the publication of sufficient details so that the ban on publication was minimal. In support of his position he placed great stress upon the decision of this court in *Can. Newspapers Co. v. Can. (A.G.)*, [1988] 2 S.C.R. 122, 65 C.R. (3d) 50, 43 C.C.C. (3d) 24, 52 D.L.R. (4th) 690, 38 C.R.R. 72, 32 O.A.C. 259, 87 N.R. 163, particularly that portion of the reasons by Lamer J., speaking for the court, as follows at p. 132:

> Obviously, since fear of publication is one of the factors that influences the reporting of sexual assault, certainty with respect to non-publication *at the time of deciding whether to report* plays a vital role in that decision. Therefore, a discretionary provision under which the judge retains the power to decide whether to grant or refuse the ban on publication would be counterproductive, since it would deprive the victim of that certainty. Assuming that there would be a lesser impairment of freedom of the press if the impugned provision were limited to a discretionary power, it is clear, in my view, that such a measure would not, however, achieve Parliament's objective, but rather defeats it. [emphasis in original]

However, Justice Lamer was careful to note that the ban in those circumstances was a minimal impairment of a freedom of expression. At p. 133 he stated:

> The section applies only to sexual offence cases, it restricts publication of facts disclosing the complainant's identity and it does not provide for a general ban but is limited to instances where the complainant or prosecutor requests the order or the court considers it necessary. Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public.

106 In the case at bar the restriction is much broader. As noted earlier, the publishing ban is wide and sweeping in its effect. In the circumstances the *Can. Newspapers* case is distinguishable and the reasoning is not applicable to s. 30 of the Judicature Act.

107 The Attorney General for the province of Alberta also observed that s. 30(1) of the Alberta legislation was in virtually the same wording as s. 166(1)(*b*) of the Criminal Code, R.S.C. 1985, c. C-46. He sought comfort in the fact that thus the two jurisdictions of the Dominion of Canada as well as the province had passed such legislation. However, it is interesting to note that there are no reported cases under that section of the Criminal Code. Nor do I think this supports his position. The lack of cases pertaining to this section of the Code may indicate that its provisions have fallen into disuse, or that it had never been necessary or appropriate to bring them into play. It may reflect no more than a wise manifestation of the exercise of prosecutorial discretion.

108 Counsel for the Attorney General for Alberta argued that s. 30(2) was necessary in order to ensure a fair trial of actions and to protect the privacy of individuals. It may well be that in certain situations those considerations will require the court to take measures to ensure that some portions of the documents filed in judicial proceedings are not published. Nevertheless, the provision is far too broad. The legislation would ban the publication of court documents that might have a wide public interest and would prevent the public from knowing about a great many issues in which discussion should be fostered. For example, all actions involving government agencies, administrative boards and tribunals would seem to have a far greater interest for the public than most private litigation. Even in private actions the public might have an interest in knowing the submissions put forward in claims such as those for wrongful dismissal or for personal damages. Yet the details of those actions could not be published. Section 30(2) is overly broad and repressive.

109 When it considered s. 30(2) the Alberta Court of Appeal relied on the decision of the House of Lords in the *Sunday Times* case [*A.G. v. Times Newspapers Ltd.*], which had a long litigious history. An injunction against publication had been granted by the judges of first instance, [1973] Q.B. 710, [1972] 3 W.L.R. 855, [1972] 3 All E.R. 1136 (Div. Ct.). It was removed by the Court of Appeal for the reasons given by Lord Denning M.R., [1973] Q.B. at 735, [1973] 2 W.L.R. 452, [1973] 1 All E.R. 815 (C.A.). The injunction was then restored by the House of Lords, [1974] A.C. 273, [1973] 3 W.L.R. 298, [1973] 3 All E.R. 54. The case was then taken to the European Court of Human Rights (judgment of 26th April 1979, Series A No. 30 [reported (sub nom. *Sunday Times v. U.K.*) (1979), 2 E.H.R.R. 245 (E.H.C.R.)]), which set aside the decision of the House of Lords. In the course of its reasons the majority of that court had this to say at pp. 41-42 [p. 281]:

> The thalidomide disaster was a matter of undisputed public concern. It posed the question whether the powerful company which had marketed the drug bore legal or moral responsibility towards hundreds of individuals experiencing an appalling personal tragedy or whether the victims could demand or hope for indemnification only from the community as a whole; fundamental issues concerning protection against and compensation for injuries resulting from scientific developments were raised and many facets of the existing law on these subjects were called in question.

> As the Court has already observed, Article 10 guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed ...
>
> In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared absolutely certain that its diffusion would have presented a threat to the "authority of the judiciary".

These words are apposite to a consideration of s. 30(2) and should govern the decision made pertaining to that subsection.

110 As well, it is not without significance that the ban prescribed by s. 30(2) of the Alberta legislation is unique to that province. No other jurisdiction in Canada has found it necessary to impose such a restriction.

111 Further, there can be no doubt that in order to ensure a fair trial and to protect privacy interests, the court can always use its supervisory power over its own record to grant restraining orders in appropriate cases.

112 For the foregoing reasons, I am led to the conclusion that s. 30(2) does not interfere as little as possible with the vitally important fundamental right of freedom of expression, particularly as it applies to informing the public as to pending court proceedings. Nor does it reflect that proportionality which is required between the effect of the measure and the attainment of the objectives.

Summary

113 I recognize that the limitation imposed by the legislation under attack need not be either the best possible limitation nor does it have to be the least intrusive legislation imaginable. Nevertheless, it must be a reasonable limit. The proportionality test must vary depending on the circumstances of each case presented to the court. Here the legislation in issue is not like legislation fixing the age of children at which advertising may be directed as in *Irwin Toy Ltd. v. Que. (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 39 C.R.R. 193, 25 C.P.R. (3d) 417, 24 Q.A.C. 2, 94 N.R. 167. Nor is it like legislation fixing the maximum number of employees a firm could have to be eligible for an exemption from Sunday closing rules as in *R. v. Edwards Books & Art Ltd.*, supra. Rather in this case the court must balance the interest of society as a whole in freedom of expression and the right of the public to know of court proceedings against the bans imposed on publication by s. 30(1) and (2) of the Alberta legislation. In my view it is apparent that the impugned legislation is not carefully designed to achieve the objective of protecting privacy, nor does it affect as little as possible the vitally important rights and freedoms in question. Neither s. 30(1) nor s. 30(2) can be upheld by reference to s. 1 of the Charter.

Re S. 15 of the Charter

114 The appellant argued that the legislation contravened s. 15 of the Charter as the press was singled out from all the news media and made subject to fines for printing and for publishing. Because, as is conceded, the legislation contravenes s. 2(*b*), and in light of the conclusion that it cannot be justified pursuant to s. 1 of the Charter, it is not necessary to deal with this argument.

Disposition

115 I would allow the appeal with costs and answer the constitutional questions as follows:

> 1. Does s. 30 of the *Judicature Act*, R.S.A. 1980, c. J-1, infringe or deny the right of freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

116 *Answer*: Yes.

> 2. If the answer to question 1 is yes, is s. 30 of the *Judicature Act* justified under s. 1 of the *Charter*?

117 *Answer*: No.

3. Does s. 30 of the *Judicature Act* infringe or deny the right to equality guaranteed by s. 15 of the *Charter*?

118 *Answer*: This question need not be answered.

4. If the answer to question 3 is yes, is s. 30 of the *Judicature Act* justified under s. 1 of the *Charter*?

119 *Answer*: This question need not be answered.

Appeal allowed.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Longueépée v. University of Waterloo | 2020 ONCA 830, 2020 CarswellOnt 18852 | (Ont. C.A., Dec 21, 2020)

2019 ONCA 1025
Ontario Court of Appeal

Canadian Broadcasting Corporation v. Ferrier

2019 CarswellOnt 21120, 2019 ONCA 1025, 148 O.R. (3d) 705, 313 A.C.W.S. (3d) 456, 441 D.L.R. (4th) 632, 63 Admin. L.R. (6th) 280

Canadian Broadcasting Corporation (Applicant / Appellant in Appeal) and Lee Ferrier, Q.C., Exercising powers and duties of the Thunder Bay Police Services Board (Respondents / Respondents in Appeal except the First Nation Public Complainants)

G.R. Strathy C.J.O., Doherty, Robert J. Sharpe JJ.A.

Heard: October 31, 2019
Judgment: December 27, 2019
Docket: CA C66995, C66998

Proceedings: reversing *Canadian Broadcasting Corporation v. Ferrier* (2019), 53 Admin. L.R. (6th) 236, 2019 CarswellOnt 64, 2019 ONSC 34, Aitken J., Mulligan J., Warkentin R.S.J. (Ont. Div. Ct.)

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Subject: Civil Practice and Procedure; Public
Related Abridgment Classifications
Administrative law
III Standard of review
III.1 Correctness
Administrative law
XII Practice and procedure
XII.2 Judicial review
XII.2.b Standing
Administrative law
XII Practice and procedure
XII.2 Judicial review
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I Police
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I.1.d.xiii Miscellaneous

Headnote

Administrative law --- Standard of review — Correctness

Case involved tragic death of Indigenous man and allegations that members of police service were guilty of misconduct in relation to their investigation of his death — Complaint that they were guilty of misconduct formed part of much larger pattern of concern regarding conduct of police service in relation to Indigenous community — Because it took longer than six months for Ontario Independent Police Review Director to report that there were reasonable grounds to believe that officers were guilty of misconduct, it was necessary to ask police services board for extension before disciplinary hearing could be commenced — Decision maker determined that hearing of extension application should be held in camera — Application by Canadian Broadcasting Corporation (CBC) for judicial review was dismissed — CBC and complainants appealed — Appeal allowed; matter remitted for reconsideration — Decision that Dagenais/Mentuck test did not apply was reviewable on correctness standard of review — If Canadian Charter of Rights and Freedoms rights are considered by administrative decision maker, standard of reasonableness will ordinarily apply — Refusal or failure to consider applicable Charter right should attract correctness standard of review.

Administrative law --- Practice and procedure — Judicial review — Miscellaneous

Case involved tragic death of Indigenous man and allegations that members of police service were guilty of misconduct in relation to their investigation of his death — Complaint that they were guilty of misconduct formed part of much larger pattern of concern regarding conduct of police service in relation to Indigenous community — Because it took longer than six months for Ontario Independent Police Review Director to report that there were reasonable grounds to believe that officers were guilty of misconduct, it was necessary to ask police services board for extension before disciplinary hearing could be commenced — Decision maker determined that hearing of extension application should be held in camera — Application by Canadian Broadcasting Corporation (CBC) for judicial review was dismissed — CBC and complainants appealed — Appeal allowed; matter remitted for reconsideration — Decision maker did not err when he found that Dagenais/Mentuck test did not apply to decision he had to make under s. 35(4) of Police Services Act — On state of law as it now stood, Dagenais/Mentuck test did not apply to this administrative hearing — However, presumption of open hearing under s. 35(3) of Act and s. 2(b) Canadian Charter of Rights and Freedoms right recognized in certain case law did apply.

Law enforcement agencies --- Police — Organization of police forces — Disciplinary proceedings — Miscellaneous

Case involved tragic death of Indigenous man and allegations that members of police service were guilty of misconduct in relation to their investigation of his death — Complaint that they were guilty of misconduct formed part of much larger pattern of concern regarding conduct of police service in relation to Indigenous community — Because it took longer than six months for Ontario Independent Police Review Director to report that there were reasonable grounds to believe that officers were guilty of misconduct, it was necessary to ask police services board for extension before disciplinary hearing could be commenced — Decision maker determined that hearing of extension application should be held in camera — Application by Canadian Broadcasting Corporation (CBC) for judicial review was dismissed — CBC and complainants appealed — Appeal allowed; matter remitted for reconsideration — Decision maker did not err when he found that Dagenais/Mentuck test did not apply to decision he had to make under s. 35(4) of Police Services Act — On state of law as it now stood, Dagenais/Mentuck test did not apply to this administrative hearing — However, presumption of open hearing under s. 35(3) of Act and s. 2(b) Canadian Charter of Rights and Freedoms right recognized in certain case law did apply.

Administrative law --- Practice and procedure — Appeal — Miscellaneous

Fresh evidence — Case involved tragic death of Indigenous man and allegations that members of police service were guilty of misconduct in relation to their investigation of his death — Complaint that they were guilty of misconduct formed part of much larger pattern of concern regarding conduct of police service in relation to Indigenous community — Because it took longer than six months for Ontario Independent Police Review Director to report that there were reasonable grounds to believe that officers were guilty of misconduct, it was necessary to ask police services board for extension before disciplinary hearing could be commenced — Decision maker determined that hearing of extension application should be held in camera — Application by Canadian Broadcasting Corporation (CBC) for judicial review was dismissed — CBC and complainants appealed — Complainants brought motion for introduction of fresh evidence — Motion dismissed — Fresh evidence was unnecessary for resolution of appeal.

Administrative law --- Practice and procedure — Judicial review — Standing

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s. 1 — considered

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Generally — referred to

s. 35 — considered

s. 35(3) — considered

s. 35(4) — considered

s. 35(4)(b) — considered

s. 37 — considered

s. 83(17) — considered

s. 95 — considered

Public Officers Act, R.S.O. 1990, c. P.45
s. 16 — referred to

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Generally — referred to

APPEAL by Canadian Broadcasting Corporation and complainants from decision reported at *Canadian Broadcasting Corporation v. Ferrier* (2019), 2019 ONSC 34, 2019 CarswellOnt 64, 53 Admin. L.R. (6th) 236 (Ont. Div. Ct.), dismissing application for judicial review of decision determining that certain hearing should be held in camera; MOTION by complainants for introduction of fresh evidence.

***Robert J. Sharpe J.A.*:**

1 This appeal raises an important issue regarding the openness of police board hearings. The case involves the tragic death of an Indigenous man and allegations that the members of the Thunder Bay Police Service (the "TBPS") were guilty of misconduct in relation to their investigation of his death. Within hours of the discovery of the body, they concluded that the death was not suspicious, and they failed to conduct any further investigation. The complaint that they were guilty of misconduct forms part of a much larger pattern of concern regarding the conduct of the TBPS in relation to the Indigenous community.

2 Because it took longer than six months for the Ontario Independent Police Review Director (the "OIPRD") to report that there were reasonable grounds to believe that the officers were guilty of misconduct, it was necessary to ask the TBPS Board for an extension before a disciplinary hearing could be commenced.

3 The *Police Services Act*, R.S.O. 1990, c. P.15, provides that subject to certain exceptions, police services board hearings are presumptively open to the public. The decision maker, a retired judge appointed to make the decision the TBPS Board would ordinary make, entertained submissions and ordered that hearing would be closed.

4 The Canadian Broadcasting Corporation (the "CBC") and the Complainants appeal the order of the Divisional Court refusing to interfere with the decision, arguing that both the Divisional Court and the decision maker failed to pay adequate attention to the s. 2(b) *Charter* right to freedom of expression by failing to require an open hearing.

5 For the following reasons, I would allow the appeal, set aside the judgment of the Divisional Court, quash the decision ordering a closed hearing and remit the matter for reconsideration in the light of these reasons.

A. BACKGROUND

6 The body of Stacy DeBungee, an Indigenous man, was discovered in the McIntyre River in Thunder Bay on October 19, 2015. Within hours, the TBPS advised that the death was not suspicious. The two Complainants, Brad DeBungee, Stacy's brother, and Chief Jim Leonard, Rainy River First Nations, asked the OIPRD to investigate allegations of misconduct against

the officers who had conducted the investigation and to undertake a systemic review of the relationship between First Nations peoples and the TBPS.

7 On April 22, 2016, the OIPRD decided to undertake an investigation into the handling of the DeBungee death. Under the *Police Services Act*, this is referred to as the day that the complaint was "retained" by the OIPRD. On November 3, 2016, the OIPRD announced terms of reference for a systemic review into the TBPS policing of First Nations peoples. The OIPRD report issued on February 15, 2018 found that there was sufficient evidence to believe, on reasonable grounds, that the officers had committed misconduct in their investigation of Stacy DeBungee's death.

8 Because more than six months had elapsed from the date the complaint was retained, no notice of hearing to consider the complaint and disciplinary action could be served unless the TBPS granted an extension on the ground that the delay in serving the notice was reasonable: *Police Services Act*, at s. 83(17). The OIPRD directed the Chief of the TBPS to bring an extension application to the TBPS Board.

9 On account of the ongoing OIPRD systemic review of the TBPS's relationship with the lndigenous community, the Board was concerned about potential bias allegations. Accordingly, it sought the appointment of a "disinterested person" under the *Public Officers Act*, R.S.O. 1990, c.P.45, s. 16, to hear the extension application in its place. The Superior Court appointed a retired judge, the Honourable Lee Ferrier, Q.C., to act as the substitute decision maker to consider and exercise the Board's powers in relation to the extension.

10 The parties at the extension application hearing included the Chief of Police, the OIPRD, the officers and the Complainants. The Complainants had standing to make and receive submissions.

11 The *Police Services Act*, at s. 35(3), provides that police board meetings and hearings are presumptively open:

> Meetings and hearings conducted by the board shall be open to the public, subject to subsection (4), and notice of them shall be published in the manner that the board determines.

12 Section 35(4) allows the board to hold a closed meeting and defines the circumstances when that may be done:

> (4) The board may exclude the public from all or part of a meeting or hearing if it is of the opinion that,
>
> > (a) matters involving public security may be disclosed and, having regard to the circumstances, the desirability of avoiding their disclosure in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public; or
> >
> > (b) intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public.

13 The decision maker sought the views of the parties as to whether the hearing of the extension application should be *in camera*. Counsel for the Chief of Police, the OIPRD and the officers asked that the hearing be closed. Counsel for the Complainants advised that his clients sought an open hearing. The decision maker asked for written submissions. Counsel for the Complainants notified the CBC, and the CBC advised the decision maker of its interest in being heard on the *in camera* issue. The decision maker allowed the CBC to make written submissions.

14 The CBC and the Complainants submitted that an open hearing was required by s. 2(b) of the *Charter*:

> Everyone has the following fundamental freedoms:
>
> > (b) freedom of thought, belief, opinion and expression including freedom of the press and other media of communication.

15 The CBC and the Complainants argued that principles enunciated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.) and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 (S.C.C.), (the "*Dagenais/Mentuck*" test) applied. This test applies to discretionary decisions limiting freedom of the press in relation to court proceedings. As restated in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 (S.C.C.), at para. 26, and explained by this court in *Canadian Broadcasting Corp. v. R.*, 2010 ONCA 726, 102 O.R. (3d) 673 (Ont. C.A.), at para. 20, the *Dagenais/Mentuck* principle, is as follows:

> Restrictions on the open court principle and freedom of the press in relation to judicial proceedings can only be ordered where the party seeking such a restriction establishes through convincing evidence that
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

B. DECISION ORDERING A CLOSED HEARING

16 The decision maker cited a Divisional Court decision for the proposition that the consideration of a request for an extension under s. 83(17) of the *Police Services Act* is administrative in nature and that procedural fairness and natural justice do not always require a police services board to hold a public hearing. He also noted that the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, does not apply to a Board meeting to consider an extension. The decision maker then cited a series of decisions and Board orders to support the proposition that employment and disciplinary matters qualify as "intimate . . . personal matters" under s. 35(4)(b) of the *Police Services Act*, noting that investigations of conduct undertaken by the OIPRD are confidential pursuant to s. 95. The decision maker found that if the investigative report completed by the OIPRD in this case was made public, it could taint the witnesses and result in negative stigma for the officers involved. He suggested that as the extension application hearing precedes the commencement of proceedings, it was akin to the swearing of an information or a *pre-enquete* in criminal proceedings, both of which are held *in camera*.

17 For two reasons, the decision maker rejected the submission that the *Dagenais/Mentuck* test applies. First, the proceeding to consider the reasonableness of the delay was administrative as opposed to judicial or quasi-judicial and the *Dagenais/Mentuck* test applies only to judicial or quasi-judicial proceedings. Second, s. 35(4) lays out a test for determining whether to conduct a public or closed proceeding and *Dagenais/Mentuck* did not supersede the prescribed statutory test. Finally, the decision maker concluded that, although the investigative report had been made public by the Complainants, the hearing should be held *in camera* in order to ensure the integrity of the proceedings.

C. DIVISIONAL COURT: INTERIM INJUNCTION DECISION (2018 ONSC 5872 (Ont. Div. Ct.))

18 The CBC sought an interim injunction to enjoin the decision maker from proceeding with the *in camera* hearing pending consideration of the CBC's application to the Divisional Court for judicial review.

19 The motion judge, who is based in Thunder Bay, granted the interim injunction. She found that there was a serious question to be tried as "it is important for the court to consider the extent to which the public can expect openness in administrative decision-making" (at para. 48). The question of whether the *Dagenais/Mentuck* test should apply in the context was an important issue that required the court's attention (at para. 43). The motion judge found that given the context in which the case arose — allegations of racist policing practices relating to Indigenous peoples — the need for transparency in the complaint procedure was heightened (at paras. 48-49). She also found that as the OIPRD report had already been made public, there was "no evidence that intimate financial or personal matters may be disclosed on an extension application" (at para. 40).

20 The motion judge found that the CBC and the First Nations community would suffer irreparable harm if a stay were not granted because, regardless of whether an extension is granted or not, an *in camera* hearing would deny the public their right to understand the process (at para. 60).

21 Finally, the motion judge held that "the balance of convenience favours transparency in the circumstances of this case where racist policing is alleged" (at para. 66).

D. DIVISIONAL COURT: JUDICIAL REVIEW (2019 ONSC 34, 53 Admin. L.R. (6th) 236 (Ont. Div. Ct.))

22 The Divisional Court identified the sole issue arising on the CBC's application for judicial review as whether the decision maker erred by not applying the *Dagenais/Mentuck* test to the question of whether the extension application should be heard *in camera* (at para. 23). The Complainants, the officers and the Chief of Police were added as respondents as they had taken part in the proceedings before the decision maker. As an interested party, the OIPRD was also added as a respondent

23 The court took note of the social context surrounding the dispute; namely, that there is a "very high level of distrust between the First Nations community and the TBPS, with many Indigenous peoples in the Thunder Bay area believing that the policing practices relating to them are racist" (at para. 25). However, the court held that, despite this context and the fact that the community "has a strong interest in the circumstances surrounding the death of Stacy DeBungee and in the TBPS's investigation of his death," it is important to "not lose sight of the reality that the extension application is being determined in the context of possible disciplinary proceedings against employees" (at paras. 29-33). The level of public concern should not change "the nature of the decision-making process or the nature of the role being undertaken by [the decision maker]" (at para. 33).

24 The court found that the applicable standard of review was reasonableness. The case law established that the function of the Board under s. 83(17) of the *Police Services Act* is not judicial or quasi-judicial but rather administrative and procedural in nature. The case law also established that the standard of review for the Board's decision on an extension application is reasonableness. The court found that the reasonableness standard was supported by the Supreme Court of Canada's decision in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.).

25 The Divisional Court held that neither the open court principle nor the *Dagenais/Mentuck* test applied because the extension hearing was not a judicial or quasi-judicial proceeding. The *Dagenais/Mentuck* test was also excluded as the *Police Services Act*, ss. 35(3) and (4) set out a specific statutory test for how to address the question of whether a hearing is to be open to the public. As the statute itself laid out the "balancing act to be undertaken and there is no ambiguity in the legislative provisions", there was no need for the *Dagenais/Mentuck* test to apply (at paras. 52-53).

26 The Divisional Court concluded that the decision was both reasonable and correct (at para. 60). He was transparent in his decision-making process, his reasons were clear and intelligible, he adequately justified his decision, and he considered the important public interest at play.

E. ISSUES

27 The following issues arise on the Complainants' and the CBC's appeal to this court:

1. What is the appropriate standard of review?

2. Does the decision ordering a closed hearing satisfy the applicable standard of review?

3. Should the Complainants' fresh evidence motion be granted?

4. If the appeal is allowed, what is the appropriate remedy?

F. ANALYSIS

(1) What is the appropriate standard of review?

28 As an appellate court hearing an appeal from a judgment refusing judicial review, the question for us to decide is "whether the court below identified the appropriate standard of review and applied it correctly": *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 N.R. 212 (F.C.A.), at para. 18.

29 This appeal had been argued and a complete draft of these reasons had been written before the Supreme Court released its decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.) modifying standard of review analysis. As I will explain, it is my view that *Vavilov* confirms that the appropriate standard of review is correctness. Moreover, even if the appropriate standard of review were reasonableness, *Vavilov* confirms that the decision to hold a closed hearing was unreasonable.

30 The decision to hold a closed hearing, as explained by the Divisional Court, would ordinarily attract the deferential "reasonableness" standard of review mandated by *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.).

31 I note that in oral argument, the Complainants withdrew the submission in their factum that the standard of review was altered by the fact that the decision was that of a substitute decision maker without the expertise of a police services board. In any event, *Vavilov*, at para. 30, holds that expertise is no longer a factor to be considered when determining the appropriate standard of review.

32 In my respectful view, the Divisional Court failed to recognize that the attack on the decision focussed on the refusal to apply the *Dagenais/Mentuck* test when concluding that the extension hearing should be closed. The challenged decision was not, as the Divisional Court suggested, a decision under s. 83(17) whether to grant an extension. Rather, it was a decision under s. 35(4) whether to hold a closed hearing. The appellants argued that that decision could only be made if the *Charter* rights to freedom of expression and freedom of the press were considered. They argued that the decision maker was wrong to conclude that the exercise of his discretion was governed solely by the terms of s. 35(4) and to refuse to take those *Charter* rights into accounts.

33 I agree with the appellants' submission that the decision that the *Dagenais/Mentuck* test does not apply is reviewable on a correctness standard of review.

34 If the *Charter* rights are considered by the administrative decision maker, the standard of reasonableness will ordinarily apply. In *Doré*, the Disciplinary Council of the Barreau du Québec considered and rejected the argument that the *Code of ethics of advocates* requirement that advocates conduct themselves with "objectivity, moderation and dignity" infringed the s. 2(b) *Charter* right to freedom of expression. Similarly, in *Episcopal Corp. of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry Commissioner*, 2007 ONCA 20, 278 D.L.R. (4th) 550 (Ont. C.A.), the commissioner of inquiry considered the *Dagenais/Mentuck* test and rejected the argument that he should issue a publication ban regarding an alleged wrong-doer. In both cases, a reasonableness standard of review was applied when the decisions were challenged.

35 On the other hand, the refusal or failure to consider an applicable *Charter* right should, in my opinion, attract a correctness standard of review. As the Supreme Court explained in *Dunsmuir*, at para. 60, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at para. 62: "where the question at issue is one of general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise' . . . uniform and consistent" answers are required. See also *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 (S.C.C.), at paras. 20-21. This is confirmed by *Vavilov*, at para. 17: "[T]he presumption of reasonableness review will be rebutted . . . where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies".

36 The s. 2(b) *Charter* right to freedom of expression and freedom of the press relied upon by the appellants is both a matter of central importance to the legal system and a constitutional question. As confirmed by *Vavilov*, at para. 53, the application of the correctness standard to "constitutional questions, general questions of law of central importance to the legal system as a

whole . . . respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary".

37 The issue before the decision maker was *whether* the *Dagenais/Mentuck* test had a bearing on the discretionary decision he had to make. That is not the same as the issue presented in *Doré* and *Episcopal* of *how* the s. 2(b) *Charter* right impacted or affected the discretionary decision he had to make. The decision maker did not reach the point of factoring the *Dagenais/Mentuck* test into his discretionary decision because he decided that it did not apply. A reasonableness standard assumes a range of possible outcomes all of which are defensible in law: see *Vavilov*, at para. 83. That standard is inappropriate here. The *Dagenais/Mentuck* test either applied or it did not.

38 I refer here to a passage in *Episcopal* which, in my view, has a direct bearing on this issue. In that case, the inquiry commissioner applied the *Dagenais/Mentuck* test when declining to order an *in camera* hearing. This court held that his decision was reviewable on a reasonableness standard because he did consider the impact of the *Charter* right on the decision he had to make. However, we noted, at para. 36, that in *Dagenais* itself, the judge who made the challenged decision did not have available the new test enunciated when the case went to the Supreme Court. That meant that his "failure to arrive at a result that could be supported under the new test . . . amount[ed] to an error of law", reviewable on a standard of correctness. The same applies here. As I will explain, the decision maker did not have the benefit the decision of this court in *Langenfeld v. Toronto Police Services Board*, 2019 ONCA 716, 437 D.L.R. (4th) 614 (Ont. C.A.), an authority that bears directly upon the discretionary decision he was asked to make.

(2) Does the decision ordering a closed hearing satisfy the applicable standard of review?

39 The appellants submit that the decision maker erred by concluding that the *Dagenais/Mentuck* test did not apply to the s. 35(4) decision whether to hold an open or closed extension hearing. They submit that*Dagenais*/*Mentuck* establishes a general standard that applies to all judicial, quasi-judicial and administrative decisions, and that it is not ousted by statutory provisions such as s. 35(4) that prescribe a specific test to determine whether a meeting should be open or closed. They urge us to take a contextual approach and to recognize the paramount importance of openness in the circumstances of this case. The issues surrounding allegations of racism and mistreatment on the part of the TBPS towards the Indigenous community have attracted wide attention and the appellants assert that it is of utmost importance that the s. 83(17) extension hearing be open.

40 The appellants also rely heavily on the recent decision of this court in *Langenfeld*, delivered after the decision ordering a closed hearing was made and after the Divisional Court dismissed the application for judicial review.

41 The respondents submit that *Dagenais/Mentuck* test only applies to judicial or quasi-judicial proceedings and that a s. 83(17) extension hearing is administrative in nature. Supported by the intervener, the Attorney General of Ontario, they also submit that as the appellants did not challenge the validity of s. 35(4), they cannot use the *Dagenais/Mentuck* test to, in effect, re-write that provision to alter the test applicable to a s. 83(17) extension hearing.

42 I turn first to the question of whether the *Dagenais/Mentuck* test applies to a s. 83(17) hearing.

43 *Dagenais* and *Mentuck* hold that the *Charter's* s. 2(b) guarantee of freedom of expression and freedom of the press fortifies the common law open court principle. "[T]he presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society". Closed proceedings can only be ordered upon "a convincing evidentiary basis" that such an order "is necessary in order to prevent a serious risk to the proper administration of justice": *Mentuck*, at paras. 39 and 32.

44 The respondents rely on a strong line of authority for the proposition that a s. 83(17) extension hearing is an administrative rather than judicial or quasi-judicial matter. They point out that while the procedural protections of the *Statutory Powers Procedure Act* apply when a police services board is conducting a disciplinary hearing, the Act is explicitly excluded when a board considers a request for s. 87(17) extension: *Police Services Act*, at s. 37.

45 In *Forestall v. Toronto Police Services Board* (2007), 228 O.A.C. 202 (Ont. Div. Ct.), the Divisional Court held, at para. 44, that as an extension hearing does not determine the merits of allegations or impose discipline, the decision is "administrative in nature", purely procedural, and, at para. 53, that while "some degree of procedural fairness is required", the Board is "not required to hold a judicial-type of hearing" and that only "minimal rights of procedural fairness", including notice, disclosure, and an opportunity to respond, apply. Similarly, in *Ackerman v. Ontario Provincial Police Service*, 2010 ONSC 910, 259 O.A.C. 163 (Ont. Div. Ct.), the court held that a decision to allow an extension is "clearly interlocutory" as all that has been decided is that it is "reasonable to delay service of the notice of hearing" (at para. 20). There has been no determination of the officer's rights. The Board is "exercising a procedural, administrative function in extending the time for service of the notice" (at para. 21). In its reasons, the Divisional Court cited a number of other decisions to the same effect: *Coombs v. Toronto (Metropolitan) Police Services Board*, [1997] O.J. No. 5260 (Ont. Gen. Div.); *Payne v. Peel (Regional Municipality) Police Services Board* (2003), 168 O.A.C. 69 (Ont. Div. Ct.); *Figueiras v. York Police Services Board*, 2013 ONSC 7419, 317 O.A.C. 179 (Ont. Div. Ct.).

46 The appellants do not suggest that these cases were wrongly decided or seriously challenge the characterization of a s. 83(17) extension hearing as being administrative and procedural in nature. However, the appellants urge us to hold that *Dagenais/Mentuck* applies to the meetings of all public institutions and therefore, even if the s. 83(17) extension hearing is characterized as administrative in nature, the TBPS Board cannot escape its reach.

47 In my view, to accept that submission would represent a significant expansion of the reach of the *Dagenais/Mentuck* test beyond judicial and quasi-judicial decisions, in a manner not supported by authority.

48 The *Dagenais/Mentuck* test evolved in relation to discretionary judicial decisions in criminal proceedings. As the Supreme Court stated in *Toronto Star Newspapers Ltd. v. Ontario*, at para. 7: the *Dagenais/Mentuck* test applies "to *all* discretionary *court orders* that limit freedom of expression and freedom of the press in *relation to legal proceedings*" (italics in original, underlining added). The test was extended to civil proceedings in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.), but civil proceedings are judicial in nature.

49 The CBC relies on the application of the *Dagenais/Mentuck* test in relation to a commission of inquiry: *Episcopal*. However, in *Episcopal*, the applicability of the *Dagenais/Mentuck* test was assumed by the inquiry commissioner and not challenged in this court. That is hardly surprising. The public hearing and fact-finding phase of a commission of inquiry "may well have an adverse effect upon a witness or a party to the inquiry" and although the findings of the commissioner do not result on penal or civil liability, "procedural fairness is essential": *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 (S.C.C.), at para. 55. The applicability of the *Dagenais/Mentuck* test in *Episcopal* also fits with case law finding commissions of inquiry to be quasi-judicial proceedings: *British Columbia (Attorney General) v. British Columbia (Information & Privacy Commissioner)*, 2004 BCSC 1597, 34 B.C.L.R. (4th) 298 (B.C. S.C.), at paras. 48-72.

50 The appellants also rely upon the application of *Dagenais/Mentuck* by some administrative tribunals and professional discipline bodies. In my view, those cases are also distinguishable as they deal with proceedings classified as quasi-judicial in nature. For example, *Lifford Wine Agencies Ltd. v. Ontario (Alcohol & Gaming Commission)* (2003), 179 O.A.C. 76 (Ont. Div. Ct.), dealt with quasi-judicial a proceeding to which the *Statutory Powers Procedure Act* applied. As I have noted, that Act does not apply to police services board meetings to consider s. 83(17) extension requests. *Southam Inc. v. Canada (Attorney General)* (1997), 36 O.R. (3d) 721 (Ont. Gen. Div.), and *Canadian Broadcasting Corp. v. Summerside (City)* (1999), 170 D.L.R. (4th) 731 (P.E.I. T.D.), dealt with police discipline proceedings at the stage of the actual hearing which, again, brings them into the quasi-judicial category.

51 The appellants also rely on *Toronto Star v. AG Ontario*, 2018 ONSC 2586, 421 D.L.R. (4th) 687 (Ont. S.C.J.), striking down as an infringement of s. 2(b) the application of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("FIPPA") to the adjudicative records of thirteen administrative tribunals. Those tribunals were subject to the *Statutory Powers Procedure Act* and exercised quasi-judicial powers. The adjudicative records included: documents by which proceedings were commenced, notices of hearing, interlocutory orders made by the tribunal, documentary evidence filed with the tribunal, transcripts of evidence and reasons for decision. The court held that the open court principle and the right to freedom of

expression guaranteed by s. 2(b) applied to these adjudicative records and that the restrictions imposed by FIPPA on access could not be justified as a reasonable limit under s. 1. While the case represents a strong statement on the need for openness in proceedings before quasi-judicial administrative tribunals, it does not apply here for the same reason I have distinguished the cases discussed above: it deals with quasi-judicial proceedings and the case before us does not.

52 I conclude that the decision maker did not err when he found that the *Dagenais/Mentuck* test did not apply to the decision he had to make under s. 35(4).

53 However, that does not end the matter. The *Dagenais/Mentuck* test does not exhaustively define the application of the s. 2(b) right to freedom of expression and freedom of the press in the context of this case. This court's decision in *Langenfeld* deals directly with the issue we must decide, namely, the application of 2(b) to administrative meetings of police services boards.

54 Regrettably, neither the decision maker nor the Divisional Court had the benefit of the *Langenfeld* decision.

55 In *Langenfeld*, this court allowed an appeal from the decision of the Superior Court (2018 ONSC 3447, 414 C.R.R. (2d) 85 (Ont. S.C.J.)), striking down a security protocol instituted by the Chief of Police requiring any person entering Toronto Police Headquarters to pass through a metal detector and wanding process designed to uncover dangerous items and weapons. The protocol was challenged by an individual who regularly attended police board meetings and who asserted that the protocol infringed his s. 2(b) right to freedom of expression.

56 While the court allowed the appeal on the ground that the security protocol was a reasonable limit on the s. 2(b) right to freedom of expression, at paras. 18-21, it agreed with and adopted Copeland J.'s conclusion the right to attend the police services board meeting was protected by s. 2(b).

57 In the portion of her reasons adopted by this court, Copeland J. stated, at paras. 50-52, as follows. The public meeting requirement of s. 35 of the *Police Services Act* "fosters the objective of public confidence in decision making through transparency and accessibility to the public". The rationale of openness to foster public confidence "is similar to the rationale for the open courts principle (it differs only in that the open courts principle has a further basis of ensuring that litigants are treated fairly)". Copeland J. identified the "two pillars" for the proposition that the right to attend court proceedings is protected expression. First, "public confidence in the courts, an important institution of democratic government, is fostered by transparency and accessibility", and second, "freedom of expression protects listeners as well as speakers, particularly in the context of members of the public receiving information about the activities of public institutions." She then applied those principles to the right to attend public meetings of police services boards:

> The *Police Services Act* makes public meetings the default for police services boards in order to foster public confidence in the decisions of the boards, by way of transparency and accessibility. Police services boards perform an important democratic function. Thus, I find that the right of members of the public to attend public meetings of police services boards is protected by s. 2(b) of the *Charter*.

58 If Mr. Langenfeld had a s. 2(b) *Charter* right to attend a regular and purely administrative meeting of the Toronto Police Services Board, it is difficult to see why, subject to the exclusions set out in s. 35(4), the CBC does not enjoy the same right to attend the s. 83(17) hearing.

59 On the state of the law as it now stands, the *Dagenais/Mentuck* test does not apply to this administrative hearing. However, the presumption of an open hearing under s. 35(3) of the *Police Services Act* and the s. 2(b) *Charter* right recognized in *Langenfeld* do apply.

60 While I reach that conclusion on a correctness standard, I add here that even if a reasonableness standard of review applies, I fail to see how a decision resulting from an unexplained refusal or failure to consider an applicable *Charter* right could be considered reasonable. This court's application of s. 2(b) in *Langenfeld* means that the decision ordering a closed hearing, through no fault of the decision maker, failed to consider an applicable right protected by the *Charter*. That decision cannot survive scrutiny under the *Vavilov* test for reasonableness. The reasonableness standard requires "an internally coherent and

rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker"; *Vavilov*, at para. 85. A decision that fails to consider an applicable *Charter* right cannot satisfy that standard or "the principle that the exercise of public power must be justified, intelligible and transparent": *Vavilov*, at para. 95.

61 For convenience, I repeat here s. 35(4), the test the legislature has prescribed for determining when a police services board may conduct a closed hearing:

> The board may exclude the public from all or part of a meeting or hearing if it is of the opinion that,
>
> > (a) matters involving public security may be disclosed and, having regard to the circumstances, the desirability of avoiding their disclosure in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public; or
> >
> > (b) intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public.

62 The question the decision maker had to decide was whether the desirability of avoiding disclosure or "intimate financial or personal matters . . . outweighs the desirability of adhering to the principle that proceedings be open to the public." In my view, that statutory test and not the *Dagenais/Mentuck* test governed the exercise of his discretion. However, the s. 2(b) right recognized in *Langenfeld* has a direct bearing on the exercise of that discretion. Through no fault of his own, the decision maker did not consider *Langenfeld*. The "principle that proceedings be open to the public", recognized by s. 35(4), is considerably fortified by the s. 2(b) *Charter* right recognized by *Langenfeld* in relation to police services board meetings.

63 *Doré*, at para. 56, explains that the administrative decision maker is "to ask how the *Charter* value at issue will best be protected in view of the statutory objectives" and that the core of this "proportionality exercise" will require the decision maker "to balance the severity of the interference of the *Charter* protection with the statutory objectives." As *Doré* explains, at para. 57, this proportionality exercise "calls for integrating the spirit of [the *Charter*'s s. 1 reasonable limits scrutiny] into judicial review".

64 As I will explain when discussing the issue of remedy, it will be for the decision maker to conduct that proportionality exercise. However, I propose to outline what seem to me to be some of the relevant considerations.

65 Section 35 reflects three relevant statutory objectives. The first objective is congruent with s. 2(b). Meetings of police services boards are presumptively open to the public. The second and third relevant statutory objectives are the protection of "intimate financial or personal matters" and the public interest in a fair and impartial hearing. Both factors require a proportional response, appropriately balancing the severity of interfering with the *Charter* right with the achievement of the statutory objectives.

66 For reasons I have explained, I do not think that the *Dagenais/Mentuck* test applies. On the other hand, the measuring of a proportional response in the context of an administrative hearing such as this is bound to take on a similar hue. As Morgan J. explained in *Toronto Star Newspapers Ltd. v. Ontario*, at para. 92: "The judicial considerations of the *Dagenais/Mentuck* test have tended to arise in the course of criminal prosecutions, which raise unique factors that may not apply to the regulatory contexts of most administrative tribunals". He added, at para. 93: "The particular institution and circumstances of the particular case may require the most stringent application of the *Dagenais/Mentuck* test or a modified and more relaxed version of the test. There is no 'one size fits all' application of the openness principle."

67 The administrative decision maker should, as required by the *Dagenais/Mentuck* test, consider reasonably alternative measures that could avoid the risk of impeding the statutory objective. Counsel for the decision maker argues that it was not open to the decision maker to consider as an alternate measure a limited publication ban that would preclude publication of the OIPRD report and the names of the officers in order to protect their interest and the public interest in a fair and impartial hearing. I disagree with that submission. Section 35(4) provides that "[t]he board may exclude the public from all *or part of* a meeting or hearing" (emphasis added). In my view, that language indicates that the Board is not required to make an "all or

nothing" order and that where an order less restrictive than a total ban will achieve the relevant statutory objectives, such an order can and should be made. It was therefore open to the decision maker to make an order banning further publication of the OIPRD investigative report and/or the names of the Respondent Officers.

68 Consideration of the s. 35(4) test in the light of s. 2(b) and freedom of the press is a highly contextual exercise and framing an appropriate order will very much depend upon the circumstances of each case. The decision maker identified the factors favouring an *in camera* hearing. Here are the factors that, in my respectful view, he should consider as favouring an open hearing.

69 The first contextual feature of the present case is that the extension hearing forms one small part of a much larger controversy. As the interim injunction judge noted, at paras. 14-15: the question of "whether there has been systemic racism in policing Indigenous cases" in Thunder Bay was a matter "of keen interest to members of the Thunder Bay community, including or perhaps especially its Indigenous citizens." At para. 48 of her reasons she observed: "Because of the complaint underlying this process — the policing practices related to Indigenous citizens in Thunder Bay are racist — it is even *more critical* that every step in the complaint procedure be dealt with transparently" (emphasis in original). Similarly, the Divisional Court observed, at para. 25, the context is important and "there is a very high level of distrust between the First Nations community and the TBPS, with many Indigenous peoples in the Thunder Bay area believing that the policing practices relating to them are racist." The racial tension between the Indigenous community and the TBPS, the distrust of the Indigenous community towards the TBPS and the current state of administration of criminal justice all point strongly to the need for openness and transparency.

70 The second contextual factor is that, as the decision maker noted, rightly or wrongly, the OIPRD investigative report has already been made public. The issues surrounding Stacy DeBungee's death and the details of the OIPRD report on the TBPS investigation have attracted significant media interest and were well-known in the Thunder Bay community and beyond.

71 The third contextual feature of this case is that the TBPS Board and the decision maker have structured the consideration of the request for a s. 83(17) extension as if it were a quasi-judicial decision. The Board appropriately applied quasi-judicial considerations when it decided that there could be a reasonable apprehension of bias if it were to consider the extension request in the ordinary course. Rather than appoint someone with a background in police services administration as a substitute decision maker, the Superior Court appointed a retired judge. The decision maker quite properly treated the issue of whether to order a closed hearing as requiring adversarial submissions for the interested parties, considered those submissions and then handed down a reasoned, judgment-like decision. I do not retreat from the characterization of the extension request as an administrative act. However, it seems to me that these steps were taken to lend a dimension of quasi-judicial legitimacy to the decision. It is arguable that the price to be paid for that added element of legitimacy is the kind of openness that quasi-judicial proceedings ordinarily attract.

72 The fourth contextual factor to consider is the interest of transparency in relation to police discipline. The purpose of the *Police Services Act* has been judicially described as being "to enhance public confidence in policing by ensuring a more transparent and independent process for dealing with complaints against the police": *Figueiras*, at para. 41. *Figueiras*, at para. 62, also described the statutory framework as being "designed to increase the transparency of and public accountability for the way in which the conduct of the police is dealt with." In his 2005 "Report On The Police Complaints System In Ontario", (Toronto: Ministry of the Attorney General of Ontario, 2005), the Honourable Patrick J. LeSage emphasized the importance of transparency. He suggested, for example, that "if the review of a decision not to order a hearing is transparent, there will be greater understanding and acceptance of the system" (at p. 75).

(3) Should the Complainants' fresh evidence motion be granted?

73 The Complainants move for the introduction of fresh evidence. First, they ask the court to admit two reports issued after the matter was heard by the Divisional Court: the OIPRD's systemic review "Broken Trust: Indigenous People and the Thunder Bay Police Service"; and Senator Murray Sinclair's Ontario Civilian Police Commission report "Thunder Bay Police Services Board Investigation: Final Report". Second, they ask us to consider a revised standard form letter sent by the OIPRD to the Complainants upon completion of an investigation. Third, they ask for the admission of two newspaper articles, the first reporting an incident of alleged police misconduct and the second reporting that the progress of the OIPRD and Sinclair reports.

74 I would not admit the fresh evidence as I believe it to be unnecessary for the resolution of this appeal. As I have pointed out, both the interim injunction judge and the Divisional Court were fully aware of the allegations of racism and the tension between the TBPS and the Indigenous community. While the reports explore those issues in considerable detail, I do not think we require that level of detail to decide this appeal.

75 The revised standard form letter and the newspaper articles have no relevance to the issues we must decide.

76 Accordingly, I would dismiss the fresh evidence motion.

(4) If the appeal is allowed, what is the appropriate remedy?

77 This brings me to the issue of the appropriate remedy. Ordinarily, where a court grants judicial review and quashes a decision, the appropriate remedy is to remit the matter to the decision maker for reconsideration in the light of the court's decision: *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, [1985] 2 S.C.R. 164 (S.C.C.), at p. 176. There is an exception to that rule where remitting the matter would be "pointless" as there is only one possible outcome in view of the court's decision: *Giguère c. Chambre des notaires du Québec*, 2004 SCC 1, [2004] 1 S.C.R. 3 (S.C.C.) at para. 66; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52 (Ont. C.A.), at para. 54; *Vavilov*, at para. 142.

78 The respondents and the decision maker submit that if we allow the appeal, the matter should be remitted to the decision maker. The Complainants submit that the reasons for an open hearing are so strong that we should simply make the order the decision maker should have made.

79 This appeal deals with a preliminary issue and the open hearing issue has further stalled the very slow pace of the OIPRD recommendation for disciplinary proceedings. In these circumstances, I am tempted do as the Complainants ask: see *Vavilov*, at para. 142, holding that "urgency of providing a resolution to the dispute" is a relevant factor to consider.

80 In the end, however, I am not persuaded that this is one of those exceptional cases where the court should put itself in the shoes of the decision maker. My view of the matter largely turns on the *Langenfeld* decision that was not available and therefore not considered by the decision maker. *Vavilov* holds, at para. 142, that a factor to consider on this issue is "whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question". The decision maker should be permitted to take another look at the matter with the benefit of *Langenfeld*. Accordingly, I would remit the matter to the decision maker for reconsideration in light of these reasons.

G. DISPOSITION

81 For these reasons, I would allow the appeal from the Divisional Court's judgment and set aside its order dismissing the application for judicial review. I would quash the decision and remit the matter to him for reconsideration in light of these reasons.

82 No party seeks costs of the appeal.

***G.R. Strathy C.J.O.*:**

I agree.

***Doherty J.A.*:**

I agree.

Appeal allowed; motion dismissed.

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): The Canadian Broadcasting Corporation v. Morrison | 2020 MBQB 169, 2020 CarswellMan 508 | (Man. Q.B., Dec 2, 2020)

2004 SCC 43
Supreme Court of Canada

Vancouver Sun, Re

2004 CarswellBC 1376, 2004 CarswellBC 1377, 2004 SCC 43, [2004] 2 S.C.R. 332, [2004] B.C.W.L.D. 804, [2004] S.C.J. No. 41, [2005] 2 W.W.R. 671, 120 C.R.R. (2d) 203, 184 C.C.C. (3d) 515, 199 B.C.A.C. 1, 21 C.R. (6th) 142, 240 D.L.R. (4th) 147, 322 N.R. 161, 33 B.C.L.R. (4th) 261, 61 W.C.B. (2d) 216, J.E. 2004-1332, REJB 2004-66287

The Vancouver Sun, Appellant v. Attorney General of Canada, Attorney General of British Columbia, "The Named Person", Ajaib Singh Bagri and Ripudaman Singh Malik, Respondents and Attorney General of Ontario, Intervener

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

Heard: December 10, 2003
Judgment: June 23, 2004
Docket: 29878

Proceedings: reversing in part *Vancouver Sun, Re* (2003), 2003 BCSC 1330, 2003 CarswellBC 2083 (B.C. S.C.)

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Subject: Criminal; Public; Family
Related Abridgment Classifications
Criminal law
VII Terrorism
Criminal law
XXIX Pre-trial procedures
XXIX.4 Victims' rights
XXIX.4.b Exclusion of public
Criminal law
XXIX Pre-trial procedures
XXIX.5 Public or publication ban order
XXIX.5.d Miscellaneous
Headnote
Criminal law --- Offences — Terrorism — General
Section 83.28 of Criminal Code must be interpreted consistently with preamble to Anti-terrorism Act and fundamental characteristics of judicial process, including open court principle — Dagenais/Mentuck test should be applied to all discretionary

judicial decisions that limit freedom of expression by press — While s. 83.28(2) application in this case was properly heard ex parte and in camera, there was no reason to keep existence of order or its subject-matter secret.

Criminal law --- Victims' rights and third party remedies — Exclusion of the public

Section 83.28 of Criminal Code must be interpreted consistently with preamble to Anti-terrorism Act and fundamental characteristics of judicial process, including open court principle — Dagenais/Mentuck test should be applied to all discretionary judicial decisions that limit freedom of expression by press — While s. 83.28(2) application in this case was properly heard ex parte and in camera, there was no reason to keep existence of order or its subject-matter secret.

Criminal law --- Pre-trial procedure — Public or publication ban order — General

Section 83.28 of Criminal Code must be interpreted consistently with preamble to Anti-terrorism Act and fundamental characteristics of judicial process, including open court principle — Dagenais/Mentuck test should be applied to all discretionary judicial decisions that limit freedom of expression by press — While s. 83.28(2) application in this case was properly heard ex parte and in camera, there was no reason to keep existence of order or its subject-matter secret.

Droit criminel --- Infractions — Terrorisme — En général

Article 83.28 du Code criminel doit être interprété de manière compatible avec le préambule de la Loi antiterroriste et avec les caractéristiques fondamentales du processus judiciaire, incluant le principe de la publicité des débats judiciaires — Critère des arrêts Dagenais et Mentuck doit être appliqué à toutes les décisions judiciaires discrétionnaires qui limitent la liberté d'expression de la presse — Même si la demande présentée en vertu de l'art. 83.28(2) a été entendue à bon droit ex parte et à huis clos, rien ne justifiait de taire l'existence de l'ordonnance ou du sujet visé.

Droit criminel --- Droits des victimes et réparations pour les tiers — Exclusion du public

Article 83.28 du Code criminel doit être interprété de manière compatible avec le préambule de la Loi antiterroriste et avec les caractéristiques fondamentales du processus judiciaire, incluant le principe de la publicité des débats judiciaires — Critère des arrêts Dagenais et Mentuck doit être appliqué à toutes les décisions judiciaires discrétionnaires qui limitent la liberté d'expression de la presse — Même si la demande présentée en vertu de l'art. 83.28(2) a été entendue à bon droit ex parte et à huis clos, rien ne justifiait de taire l'existence de l'ordonnance ou son contenue.

Droit criminel --- Procédure avant procès — Ordonnance interdisant la publicité ou publication — En général

Article 83.28 du Code criminel doit être interprété de manière compatible avec le préambule de la Loi antiterroriste et avec les caractéristiques fondamentales du processus judiciaire, incluant le principe de la publicité des débats judiciaires — Critère des arrêts Dagenais et Mentuck doit être appliqué à toutes les décisions judiciaires discrétionnaires qui limitent la liberté d'expression de la presse — Même si la demande présentée en vertu de l'art. 83.28(2) a été entendue à bon droit ex parte et à huis clos, rien ne justifiait de taire l'existence de l'ordonnance ou du sujet visé.

Two accused were jointly charged with several offences in relation to the explosion of Air India Flight 182 and the intended explosion of Air India Flight 301 in 1985. Shortly after the start of the trial, the Crown brought an ex parte application for an order that a Named Person, a potential Crown witness, attend a judicial investigative hearing for examination pursuant to s. 83.28 of the Criminal Code , which provides for investigative hearings in relation to terrorism offences as defined in s. 2. The applications judge granted the order, directing that the hearing be held in camera and that notice of the hearing not be given to the accused, the press or the public. Counsel for the accused became aware of the order and sought to make submissions, while counsel for the Named Person sought to challenge the constitutional validity of s. 83.28. The applications judge directed that submissions should be made to the judge presiding over the investigative hearing.

Shortly after the investigative hearing began, a reporter for the appellant newspaper, who recognized lawyers from the Air India trial entering a closed courtroom, was denied access to the proceedings. The hearing judge refused to entertain a motion at that time for the proceedings to be opened to the public. The newspaper filed a notice of motion, seeking an order that the proceedings be opened to the public and that its counsel and a member of its editorial board, upon filing an undertaking of confidentiality, be provided with access to the pleadings and all materials to date. Prior to hearing the motion, the hearing judge, in camera, concluded that the s. 83.28 order had been validly issued and that s. 83.28 was constitutionally sound. However, she varied the initial order to allow counsel for the accused to attend the investigative hearing with the right to cross-examine the Named Person, subject to certain restrictions. She ordered her judgment to be sealed until the conclusion of the investigative hearing or the making of any contrary court order.

When the courtroom was finally opened to the public, the hearing judge delivered, in open court, a synopsis of her reasons for judgment. She then stated that the s. 83.28 proceeding had been adjourned so that the Named Person could seek leave to appeal. The newspaper's motion was dismissed and the newspaper appealed.

Held: The appeal was allowed in part and the order of the hearing judge was varied.

Per Iacobucci and Arbour JJ. (McLachlin C.J.C., Major, Binnie, Fish JJ. concurring): The unique judicial procedure provided for in s. 83.28 of the Criminal Code must be interpreted consistently with the preamble to the Anti-terrorism Act, which stresses the imperatives of an effective response to terrorism as well as a continued commitment to the values and constraints of the Canadian Charter of Rights and Freedoms, and with the fundamental characteristics of a judicial process insofar as it contemplates the judicial proceeding.

The open court principle is a hallmark of democracy and a fundamental characteristic of all judicial proceedings, and it should not be presumptively displaced in favour of an in camera process. Public access to the courts guarantees the integrity of the judicial process and is integral to public confidence in the justice system and the public's understanding of the administration of justice. The open court principle is inextricably linked to the freedom of expression protected by s. 2(b) of the Charter and advances the core values therein, including the freedom of the press to report on judicial proceedings and the right of the public to receive information. The principle of openness of judicial proceedings extends to the pre-trial stage because the policy considerations upon which openness is predicated are the same as at the trial stage.

The Dagenais/Mentuck test should be applied to all discretionary judicial decisions that limit freedom of expression by the press. The test was developed to balance freedom of expression and other important rights and interests, which are broader than simply the administration of justice and may include privacy and security interests. While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the Charter, whether it arises under the common law or is authorized by statute or rules of court. The burden of displacing the general rule of openness lies on the party making the application.

Section 83.28(2) does not expressly provide for any part of the judicial investigative hearing to be in camera. One must distinguish between an application for a s. 83.28 judicial investigative hearing and the holding of that hearing. Section 83.28(2) provides that the application for an order that a investigative hearing be held, made by a peace officer with prior consent of the Attorney General, is ex parte. By its very nature, this application must be presented to a judge in camera. However, it does not necessarily follow that due to its investigative nature, the hearing itself must be presumptively held in secret. The proper balance between the investigative imperatives and the judicial assumption of openness is best achieved by a proper exercise of the discretion granted to judges to impose terms and conditions on the conduct of the investigative hearing under s. 83.28(5)(e). In exercising that discretion, judicial officers should reject the notion of presumptively secret hearings. Parliament chose to have investigative hearings of a judicial nature, and they must contain as many of the guarantees and indicia that come from judicial involvement as is compatible with the task at hand. One such guarantee is a presumption of openness, which should be displaced only upon proper consideration of the competing interests at every stage of the process. The existence of an order made under s. 83.28, and as much of its subject-matter as possible, should be made public unless, under the balancing exercise of the Dagenais/Mentuck test, secrecy is necessary.

In this case, the level of secrecy imposed was unnecessary. While the application for the order for the investigative hearing under s. 83.28(2) was properly heard ex parte and in camera, there was no reason for keeping the existence of the order or its subject-matter secret. In light of the position taken by the Named Person at that stage, the identity of that person was properly kept confidential, but that direction should have been subject to revision by the hearing judge. In the circumstances of this case, where a potential Crown witness in an ongoing trial became the subject of the investigative order, it was obvious that third party interests should have been considered. On a proper application of the principles in the Dagenais/Mentuck test, notice of the hearing should have been given to counsel for the accused at the outset.

When the Named Person indicated an intention to challenge the constitutionality of the order, the imperatives of the open court principle became even more compelling. The constitutional challenge should not have been held in camera. Rather, the challenge and as much of the information about the case as could be revealed without jeopardizing the investigation should have been made public, subject, if need be, to a total or partial publication ban. Much of the constitutional challenge could have been properly argued without the details of the information submitted to the applications judge being revealed. It was clear under s. 83.28(5)(e) that the terms and conditions attached to the investigative hearing must be varied and adjusted to achieve the proper balance between confidentiality and publicity as the matter progressed. Accordingly, the name of the Named Person should be made public and the order of the hearing judge should be varied so that the investigative hearing was held in public, subject to any order of the hearing judge that the public be excluded and/or a publication ban regarding aspects of the anticipated evidence to be given by the Named Person. The hearing judge should also review the continuing need for any secrecy at the end of the judicial investigative hearing, and release publicly any gathered information that could be made public without unduly jeopardizing the interests of the Named Person, third parties, or the investigation.

Per LeBel J.: Subject to the comments in the companion appeal, Application Under s. 83.28 of the Criminal Code, Re, the reasons of the majority and their proposed disposition were agreed with.

Per Bastarache and Deschamps JJ. (dissenting in part): While openness of judicial proceedings, both as a principle of common law and as an aspect of s. 2(b) of the Canadian Charter of Rights and Freedoms guaranteeing freedom of the press, is the rule and covertness the exception, public access to judicial proceedings can be curtailed where there is a need to protect social values of superordinate importance. Where the rights of third parties would be unduly harmed and the administration of justice rendered unworkable by the presence of the public, the court may sit in camera. Such is normally the case for investigative proceedings under s. 83.28.

The Dagenais/Mentuck test is not an appropriate framework to guide a judge's discretion under s. 83.28 to order an in camera investigative hearing. A convincing evidentiary basis for denial of access to any judicial proceeding is generally necessary under this test to rebut the presumption of open courts. However, it is only after the information and evidence has been gathered by the Crown that the presiding judge will be able to exercise his or her discretion judicially. To act otherwise would present great risks to the proper administration of justice and to the safety, interests and rights of third parties.

The open court principle must yield to circumstances that would render the proper administration of justice unworkable. Public access to investigative hearings would normally defeat the purpose of the proceedings by rendering them ineffective as an investigative tool. Police cannot gather information and act upon it at the same time it is disseminated to the public and the media. Moreover, the information obtained at a s. 83.28 hearing could be used in connection with subsequent applications for search warrants, wiretaps and further s. 83.28 orders against other witnesses. The efficacy of these investigative tools would be seriously compromised if the details of the s. 83.28 proceedings were open to the public. There is a legitimate law enforcement interest in maintaining the confidentiality of a witness's identity and testimony, since the premature disclosure of information about a terrorism offence would compromise and impede the very investigation of this gathered information. This would frustrate effective law enforcement, which is meant to benefit society as a whole.

The predominant purpose of the investigative hearing, like the execution of a search warrant, is to gather information. While the purposes of these investigative tools are similar, the judge's role in investigative proceedings under s. 83.28 is limited to ensuring that information is gathered in a proper manner and protecting the integrity of the investigation and interests of the witness. Without knowing what information will be revealed, it is not possible to evaluate the seriousness of the risk to third parties' rights and to the proper administration of justice. Thus, in the case of investigative hearings, the presumption of openness must yield to other serious considerations so as to preserve the rights of third parties and ensure the proper administration of justice. The fact that an investigative hearing takes place during an ongoing investigation further supports the confidentiality of the proceedings. The challenge to the validity of s. 83.28 did not make the open court principle more compelling, since the constitutional challenge could not realistically be separated from the actual investigative hearing. The protection of the judicial system's integrity does not depend on the public's knowledge of potentially harmful information, nor would advance notice to the media of the s. 83.28 hearing serve any useful purpose. Until the witness testifies, it is inherently uncertain whether or not public access to the hearing will jeopardize the countervailing interests at stake.

Different considerations apply after the completion of investigative procedures, when the evidentiary uncertainty surrounding investigative proceedings under s. 83.28 is dispelled. The information gathered by the Crown will provide a basis upon which the presiding judge can balance the competing interests at stake and more accurately assess the risk presented by the disclosure of information to third parties and to the proper administration of justice.

In this case, there was no way of knowing prior to the investigative hearing whether the level of secrecy imposed was unnecessary because until the witness has testified, judges cannot assess with any degree of accuracy the extent to which the proper administration of justice and third parties' rights could be jeopardized. Accordingly, the hearing judge properly exercised her discretion and did not err by ordering that the s. 83.28 hearing be held in camera.

Les deux accusés ont été inculpés de plusieurs infractions relativement à l'explosion du vol 182 d'Air India et à l'explosion prévue du vol 301 d'Air India en 1985. Peu de temps après le début du procès, le ministère public a présenté une demande ex parte afin d'obtenir une ordonnance obligeant la personne désignée, un témoin éventuel du ministère public, à se présenter à une investigation judiciaire pour être interrogé conformément à l'art. 83.28 du Code criminel, qui prévoit la tenue d'une audition d'enquête relativement à des infractions de terrorisme telles que définies par l'art. 2. Le juge saisi de la demande a accordé l'ordonnance, a ordonné la tenue de l'audition à huis clos et qu'aucun avis de l'audition ne soit donné aux accusés, à la presse ou au public. Les avocats des accusés ont eu vent de l'ordonnance et ont demandé la permission de faire des soumissions, tandis que l'avocat de la personne désignée a demandé d'attaquer la validité constitutionnelle de l'art. 83.28. Le juge saisi des demandes a décidé que les soumissions devaient être faites devant le juge présidant l'investigation.

Peu de temps après le début de l'investigation, une journaliste travaillant pour le journal appelant s'est vu refuser l'accès à une salle d'audience fermée après avoir reconnu les avocats du procès Air India qui y entraient. La juge présidant l'audition a refusé d'entendre, à ce moment-là, une requête visant à autoriser que les débats se déroulent en public. Le journal a déposé un avis de requête dans laquelle il indiquait son intention de solliciter la publicité des débats en plus de demander que son avocat et un membre de son équipe éditoriale, après avoir signé une promesse de confidentialité, aient accès aux procédures écrites et aux documents déposés jusque-là. Avant d'entendre la requête, la juge présidant l'audition a conclu, à huis clos, que l'ordonnance en vertu de l'art. 83.28 avait été validement rendue et que l'art. 83.28 était constitutionnel. Elle a cependant modifié l'ordonnance originale pour permettre aux avocats des accusés d'assister à l'investigation et de contre-interroger la personne désignée, avec quelques restrictions. Elle a ordonné que son jugement soit scellé en attendant la conclusion de l'investigation ou une ordonnance contraire.

Lorsque la salle d'audience a finalement été ouverte au public, la juge présidant l'audition a donné un résumé de ses motifs. Elle a ensuite indiqué que la procédure en vertu de l'art. 83.28 avait été ajournée afin que la personne désignée puisse interjeter appel. La requête du journal a été rejetée; le journal a interjeté appel.

Arrêt: Le pourvoi a été accueilli en partie et l'ordonnance de la juge présidant l'audition a été modifiée.

Iacobucci et Arbour, JJ. (McLachlin, J.C.C., Major, Binnie et Fish, JJ., souscrivant à l'opinion de Iacobucci et Arbour, JJ.): L'unique procédure judiciaire prévue par l'art. 83.28 du Code criminel doit être interprétée de manière compatible avec le préambule de la Loi antiterroriste, laquelle énonce les impératifs d'une réponse efficace au terrorisme, un engagement continu à l'égard des valeurs et des limites à la Charte canadienne des droits et libertés ainsi que les caractéristiques fondamentales du processus judiciaire, dans la mesure où l'on envisage des procédures judiciaires.

Le principe de la publicité des débats est un fondement de la démocratie ainsi qu'une caractéristique fondamentale de toutes les procédures judiciaires; il ne devrait pas être mis de côté, par présomption, en faveur d'un huis clos. L'accès du public aux tribunaux assure l'intégrité du processus judiciaire et fait partie intégrante de la confiance du public envers le système judiciaire et de la compréhension qu'à ce dernier de l'administration de la justice. Le principe de la publicité des débats est inextricablement lié à la liberté d'expression protégée par l'art. 2b) de la Charte et sert à promouvoir les valeurs fondamentales qu'elle véhicule, y compris la liberté de la presse de rapporter les procédures judiciaires et le droit du public de recevoir de l'information. Ce principe englobe le stade précédant le procès étant donné que les raisons sur lesquelles se fonde la publicité des débats sont les mêmes que pour le stade du procès.

Le critère des arrêts Dagenais et Mentuck devrait être appliqué à toutes les décisions judiciaires discrétionnaires qui limitent la liberté d'expression de la presse. Le critère a été élaboré afin de concilier la liberté d'expression et d'autres droits importants qui sont plus larges que l'administration de la justice et qui peuvent inclure les droits à la vie privée et à la sécurité. Même si le critère a été élaboré dans le contexte des interdictions de publication, il s'applique tout autant aux décisions discrétionnaires d'un juge du procès qui limitent la liberté d'expression de la presse dans le cadre de procédures judiciaires. Ce pouvoir discrétionnaire doit être exercé de façon conforme à la Charte, peu importe s'il découle de la common law ou s'il est autorisé par la loi ou par les règles de la cour. C'est la partie qui fait la demande qui a le fardeau de prouver la nécessité d'une exception à la publicité des débats.

L'article 83.28(2) ne prévoit pas expressément le huis clos pour quelque portion de l'investigation judiciaire. Il faut faire une distinction entre une demande visant à obtenir une investigation judiciaire de l'art. 83.28 et la tenue même de cette audition. L'article 83.28 prévoit que la demande d'un officier de la paix, qui a préalablement obtenu le consentement du procureur général, visant à obtenir la tenue d'une investigation, doit être entendue ex parte. De par sa nature véritable, cette demande doit être présentée à huis clos devant un juge. Cependant, cela ne veut pas dire que, en raison de sa nature d'enquête, l'audition doit elle-même être tenue, par présomption, en secret. La meilleure façon de concilier les impératifs d'enquête et la présomption judiciaire de la publicité des débats se fait grâce à l'exercice approprié de la discrétion accordée au juge d'imposer les modalités du déroulement de l'investigation en vertu de l'art. 83.28(5)e). Lorsqu'ils exercent ce pouvoir discrétionnaire, les officiers de justice devraient rejeter la présomption d'auditions secrètes. Le Parlement a choisi la tenue d'investigations de nature judiciaire et ces dernières doivent inclure le plus possible des garanties et protections du processus judiciaire qui soient compatibles avec la démarche. Une de ces garanties est justement la présomption de la publicité des débats, laquelle ne devrait être mise de côté qu'après avoir examiné de façon approfondie les intérêts opposés à chaque stade du processus. L'existence d'une ordonnance en vertu de l'art. 83.28, ainsi que le plus possible son contenu, doit être révélée au public à moins que le secret ne soit nécessaire en vertu du critère de conciliation Dagenais/Mentuck.

En l'espèce, le niveau de secret imposé n'était pas nécessaire. Même si la demande sollicitant une ordonnance pour obtenir une audition d'enquête en vertu de l'art. 83.28(2) a été à bon droit entendue ex parte et à huis clos, rien ne justifiait de continuer de taire l'existence de l'ordonnance ou le contenu de celle-ci. À la lumière de la position prise par la personne désignée à ce stade-là, l'identité de cette personne a été gardée confidentielle à bon droit, mais cet ordre aurait dû être assujetti à une révision par la juge présidant l'audition. Dans les circonstances de l'espèce, alors qu'un témoin éventuel du ministère public dans un procès en cours était devenu assujetti à une ordonnance d'investigation, il était clair que les intérêts des tiers auraient dû être pris en compte. Les principes du critère Dagenais/Mentuck auraient dû être appliqués et les avocats des accusés auraient dû recevoir dès le départ un avis d'audition.

Les impératifs du principe de la publicité des débats sont devenus encore plus importants à partir du moment où la personne désignée a indiqué son intention d'attaquer la constitutionnalité de l'ordonnance. La contestation constitutionnelle n'aurait pas dû être entendue à huis clos. En fait, on aurait dû rendre publiques la contestation ainsi que toutes les informations qui pouvaient être révélées sans mettre en danger l'enquête, assujetties par ailleurs à une interdiction totale ou partielle de publication, s'il y avait lieu. La plupart des soumissions pour la contestation constitutionnelle auraient pu être faites sans que soient révélées les détails de la dénonciation présentée au juge saisi de la demande. Il était clair, en vertu de l'art. 83.28, que les modalités de l'investigation doivent être modifiés et ajustés au fur et à mesure afin de concilier la confidentialité et la publicité. Par conséquent, le nom de la personne désignée doit être rendu public et l'ordonnance devrait être modifiée afin que l'investigation soit tenue en public, assujettie par ailleurs à toute ordonnance du juge excluant le public ou à une interdiction de publication relativement à la preuve anticipée fournie par la personne désignée. À la fin de l'investigation judiciaire, la juge présidant l'audition devrait réévaluer la nécessité du secret et dévoiler publiquement toute l'information recueillie qui peut être rendue publique sans mettre en danger les intérêts de la personne désignée, des tiers ou de l'enquête.

LeBel, J.: Sous réserve des commentaires faits dans l'arrêt connexe, Application Under s. 83.28 of the Criminal Code, Re, les motifs des juges majoritaires et le dispositif qu'ils proposent étaient partagés.

Bastarache et Deschamps, JJ. (dissidents en partie): Même si la règle est la publicité des débats, en tant que principe de common law et aspect de l'art. 2b) de la Charte canadienne des droits et libertés garantissant la liberté de la presse, et que le secret est l'exception, l'accès du public aux procédures judiciaires peut être mis de côté lorsque cela est nécessaire pour protéger des valeurs sociales d'importance supérieure. Lorsqu'un préjudice serait causé aux droits des tiers et que l'administration de la justice serait rendue impossible par la présence du public, la cour peut alors siéger à huis clos. Cela est généralement le cas pour les procédures d'enquête en vertu de l'art. 83.28.

Le critère Dagenais/Mentuck ne constitue pas un cadre approprié pour guider le juge dans l'exercice de son pouvoir discrétionnaire en vertu de l'art. 83.28 d'ordonner que l'investigation soit tenue à huis clos. Selon ce test, il est généralement nécessaire, pour repousser la présomption de la publicité des débats, d'avoir suffisamment de preuve pour justifier de refuser l'accès aux procédures judiciaires. Cependant, le juge présidant l'audition ne sera capable d'exercer sa discrétion judiciaire qu'après avoir reçu les informations et la preuve recueillie par le ministère public. Agir autrement ne ferait que faire courir de graves risques à l'administration de la justice et à la sécurité, les intérêts et les droits des tiers.

Le principe de la publicité des débats doit céder le pas aux circonstances qui rendraient impossible la bonne administration de la justice. L'accès du public aux auditions d'enquête irait généralement à l'encontre de l'objet des procédures en les rendant inefficaces en tant qu'outil d'enquête. La police ne peut recueillir des renseignements et agir sur la base de ceux-ci en même temps s'ils sont dévoilés au public et aux médias. De plus, les renseignements obtenus lors d'une audition de l'art. 83.28 peuvent être utilisés dans le cadre de demandes subséquentes de mandats, d'écoute électronique et d'autres ordonnances de l'art. 83.28 à l'égard d'autres témoins. L'efficacité de ces outils d'enquête serait sérieusement compromise si les détails des procédures en vertu de l'art. 83.28 étaient révélés au public. L'application des lois a un intérêt légitime dans le maintien du caractère confidentiel de l'identité du témoin et des informations données, étant donné que la divulgation prématurée de renseignements sur une infraction de terrorisme pourrait compromettre et entraver l'enquête même sur les renseignements recueillis. Cela empêcherait une application efficace de la loi, laquelle est censée bénéficier à la société dans son ensemble.

Tout comme l'exécution d'un mandat de perquisition, le but premier de l'investigation est de recueillir des renseignements. Même si le but visé par ces outils d'enquête est semblable, le rôle du juge dans les procédures d'enquête en vertu de l'art. 83.28 se limite à s'assurer que l'information est recueillie de manière appropriée et à protéger l'intégrité de l'enquête et les intérêts du témoin. Si l'on ignore quelle information sera révélée, il est impossible d'évaluer la gravité du danger pour les droits des tiers et la bonne administration de la justice. Par conséquent, dans le cas d'investigations, la présomption de la publicité des débats doit céder le pas à d'autres considérations, de façon à préserver les droits des tiers et à assurer la bonne administration de la justice. Le fait qu'une audition d'enquête est tenue dans le cadre d'une enquête en cours appuie d'autant plus la nécessité que les procédures soient confidentielles.

La contestation de la validité de l'art. 83.28 ne rendait plus nécessaire la publicité des débats, puisque la contestation constitutionnelle ne pouvait pas, de façon réaliste, être séparée de l'audition d'enquête. La protection de l'intégrité du système judiciaire ne dépend pas de la connaissance par le public de renseignements possiblement préjudiciables; un avis aux médias de la tenue d'une audition en vertu de l'art. 83.28 ne servirait à rien non plus. Tant que le témoin n'a pas témoigné, il demeure difficile de savoir si permettre ou non l'accès au public peut compromettre les intérêts opposés en jeu.

Différentes considérations s'appliquent après la fin des procédures d'enquête, lorsque s'est dissipée l'incertitude quant à la preuve qui entourait les procédures d'enquête. Les renseignements recueillis par le ministère public fourniront un fondement qui peut être utilisé par le juge présidant l'audition pour concilier les intérêts opposés en jeu et pour mieux apprécier le danger que pose la divulgation des renseignements aux tiers et à la bonne administration de la justice.

Dans ce cas-ci, rien ne permettait de savoir avant l'audition d'enquête si le niveau de secret imposé n'était pas nécessaire, parce que, tant que le témoin n'a pas témoigné, les juges ne peuvent évaluer précisément dans quelle mesure la bonne administration de la justice et les droits des tiers pourraient être mis en danger. Par conséquent, la juge présidant l'investigation a bien exercé son pouvoir discrétionnaire et n'a commis aucune erreur en ordonnant que l'audition de l'art. 83.28 soit tenue à huis clos.

Annotation

The majority ruling on the openness of investigative hearings is a welcome relief from the majority positions in the companion case, which upheld the constitutionality of investigative hearings and held that they did not offend the independence of the judiciary. The application of the open court principle to investigative hearings is important because it prevents an already suspect process from becoming too Star Chamber-like. Time will tell, however, whether judges exercise their discretion in favour of *in camera* proceedings more in this context than in the usual criminal context. In making annual reports under section 83.31 of the *Criminal Code*, the Attorneys General should be obliged to outline the extent to which *in camera* hearings and publication bans are ordered in connection with investigative hearings. As well, when Parliament has an opportunity to re-visit investigative hearings in early 2007, this information should be considered by members of Parliament in deciding whether or not the provisions should continue in force.

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Cases considered by *LeBel J.*:

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Statutes considered by *Iacobucci, Arbour JJ.*:

Anti-terrorism Act, S.C. 2001, c. 41

Preamble — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 2(b) — considered

s. 7 — referred to

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

Generally — referred to

s. 2 "terrorism offence" — referred to

s. 83.28 [en. 2001, c. 41, s. 4] — considered

s. 83.28(2) [en. 2001, c. 41, s. 4] — considered

s. 83.28(3) [en. 2001, c. 41, s. 4] — referred to

s. 83.28(4)(a) [en. 2001, c. 41, s. 4] — considered

s. 83.28(4)(b) [en. 2001, c. 41, s. 4] — considered

s. 83.28(5)(e) [en. 2001, c. 41, s. 4] — considered

s. 83.31 [en. 2001, c. 41, s. 4] — referred to

s. 83.32(1) [en. 2001, c. 41, s. 4] — referred to

s. 486(1) — considered

Statutes considered by *Bastarache J.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 2(b) — considered

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

s. 83.28 [en. 2001, c. 41, s. 4] — considered

s. 83.28(3) [en. 2001, c. 41, s. 4] — referred to

s. 83.28(4) [en. 2001, c. 41, s. 4] — referred to

Words and phrases considered

judicial investigative hearing

[Per Iacobucci, Arbour JJ. (McLachlin C.J.C., Major, Binnie, Fish JJ. concurring):] The judicial investigative hearing provided for in s. 83.28 of the [*Criminal Code*, R.S.C. 1985, c. C-46] is a procedure with no comparable history in Canadian law. It provides essentially that a peace officer, with the prior approval of the Attorney General, may apply *ex parte* to a judge for an order for "the gathering of information". The gathering of information is in relation to a terrorism offence, which is described in s. 2 of the *Code*.

Termes et locutions cités

investigation judiciaire

[Iacobucci et Arbour, JJ. (McLachlin, J.C.C., Major, Binnie et Fish, JJ., souscrivant à l'opinion de Iacobucci et Arbour, JJ.):] L'investigation judiciaire prévue à l'art. 83.28 du [*Code criminel*, L.R.C. 1985, c. C-46] est une procédure sans précédent dans l'histoire du droit canadien. Elle prévoit essentiellement qu'un agent de la paix, avec le consentement préalable du procureur général, peut demander à un juge, en l'absence de toute autre partie, de rendre une ordonnance autorisant « la recherche de renseignements ». La recherche de renseignements se rapporte à une infraction de terrorisme, définie à l'art. 2 du *Code*.

APPEAL by newspaper from judgment reported at *Vancouver Sun, Re* (2003), 2003 BCSC 1330, 2003 CarswellBC 2083 (B.C. S.C.), dismissing its motion for order that judicial investigative hearing under s. 83.28 of *Criminal Code* be open to public.

POURVOI du journal à l'encontre de l'arrêt publié à *Vancouver Sun, Re* (2003), 2003 BCSC 1330, 2003 CarswellBC 2083 (B.C. S.C.), qui a rejeté sa requête afin qu'il soit ordonné que l'investigation judiciaire en vertu de l'art. 83.23 soit ouverte au public.

***Iacobucci, Arbour JJ.*:**

I. Introduction

1 This appeal is a companion to *Application Under s. 83.28 of the Criminal Code, Re*, 2004 SCC 42 (S.C.C.) (the "constitutional appeal"), released concurrently. For a comprehensive review of all of the issues on the constitutionality and application of s. 83.28 of the *Criminal Code*, R.S.C. 1985, c. C-46 (as amended by the *Anti-terrorism Act*, S.C. 2001, c. 41), the constitutional appeal should be read first.

2 The judicial investigative hearing provided for in s. 83.28 of the *Code* is a procedure with no comparable history in Canadian law. It provides essentially that a peace officer, with the prior approval of the Attorney General, may apply *ex parte* to a judge for an order for "the gathering of information". The gathering of information is in relation to a terrorism offence, which is described in s. 2 of the *Code*. The information to be gathered relates both to the circumstances of the offence and the whereabouts of possible suspects. If satisfied that proper grounds have been established, the court may order the attendance of a person for examination under oath before a judge, and the person must remain in attendance and answer questions put to him or her by the Attorney General or his agent. Although the person who is the subject of the order cannot refuse to answer a question on the ground that it may incriminate him or her or subject him or her to any proceeding or penalty, his or her answers receive full direct and derivative use immunity. The person has the right to retain and instruct counsel, and the judge has a

wide discretion to impose terms and conditions to protect the person named in the order, third parties, as well as the integrity of ongoing investigations.

3 In our view, this unique judicial procedure must be interpreted and applied in light of the two following principles:

> 1. The interpretation of s. 83.28 must be guided by the Preamble to the *Anti-terrorism Act*, which amended the *Criminal Code* to include s. 83.28. The Preamble stresses the imperatives of an effective response to terrorism as well as a continued commitment to the values and constraints of the *Canadian Charter of Rights and Freedoms*;
>
> 2. Section 83.28 should be interpreted in a manner consistent with the fundamental characteristics of a judicial process insofar as the section contemplates a judicial proceeding.

4 The issue in this appeal deals with the level of secrecy with which the judicial investigative hearing was conducted. We have concluded that the open court principle is a fundamental characteristic of judicial proceedings, and that it should not be presumptively displaced in favour of an *in camera* process. The need to close the courtroom doors, for the whole or parts of the judicial investigative hearing is governed by the principles expressed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), and *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 (S.C.C.).

II. The Facts

5 The judicial investigative hearing relates to two alleged acts of terrorism that occurred on June 23, 1985. An explosion caused the deaths of two baggage handlers and injured four others at the Narita Airport in Japan. A second explosion caused Air India Flight 182 to crash off the west coast of Ireland, causing the death of all 329 passengers and crew.

6 On February 4, 1988, the first accused, Inderjit Singh Reyat was arrested in England where he was living with his family. Mr. Reyat was extradited to Canada on December 13, 1989, to face a number of charges relating to the explosion at Narita Airport. On May 10, 1991, he was convicted on seven counts: *R. v. Reyat*, [1991] B.C.J. No. 2006 (B.C. S.C.).

7 On October 27, 2000, Ripudaman Singh Malik and Ajaib Singh Bagri were jointly charged with respect to both explosions and the intended explosion of Air India Flight 301. A few months later, on March 8, 2001, a direct indictment was filed against the accused, Mr. Malik and Mr. Bagri, and on June 5, 2001, a new indictment was filed, adding a third accused, Mr. Reyat. Mr. Reyat plead guilty on February 10, 2003, to a new indictment that charged him with aiding or abetting the construction of the explosive device that was placed on Air India Flight 182. He was sentenced to 5 years imprisonment in addition to the time already spent in custody.

8 Following Mr. Reyat's guilty plea to a charge of manslaughter in February 2003, Mr. Malik and Mr. Bagri re-elected, before Josephson J. of the Supreme Court of British Columbia, to be tried by a judge alone. The trial of Mr. Malik and Mr. Bagri (the "Air India Trial") commenced on April 28, 2003 and continues to this date.

9 On May 6, 2003, the Crown applied to a judge *ex parte* for a s. 83.28 order to gather information regarding the Air India offences from the Named Person. Dohm A.C.J. of the British Columbia Supreme Court issued the s. 83.28 order for a judicial investigative hearing on the strength of an affidavit by a member of the RCMP's Air India Task Force. He directed the hearing to be held *in camera* and no notice was given to the accused in the Air India Trial, to the press, or to the public. He also prohibited The Named Person from disclosing any information or evidence obtained at the hearing.

10 Sometime prior to May 20, 2003, when the hearing was to be held, counsel for Mr. Malik and Mr. Bagri fortuitously became aware of the order and advised Dohm A.C.J. that they wished to make submissions. The Named Person retained counsel, and on June16, 2003, Dohm A.C.J. was advised that the Named Person wished to challenge the constitutional validity of s. 83.28. Dohm A.C.J. directed that, seven days later, all submissions be heard by Holmes J. The constitutional challenge to s. 83.28 and the application to have the hearing order of Dohm A.C.J. set aside commenced on June 23, 2003. Neither the public nor the press was informed.

11 On June 27, 2003, the Air India Trial adjourned for the summer. That same day, Ms. Bolan from the Vancouver Sun recognized lawyers from the Air India trial and attempted to follow them into a closed courtroom where *in camera* proceedings were taking place. The trial list disclosed that "*R v. I.* * (conference)" was taking place before Holmes J. in Courtroom 33. Ms. Bolan contacted counsel for the Vancouver Sun who knocked on the door of Courtroom 33. Counsel was informed by a sheriff that the judge would not entertain a motion at that time for the proceedings to be opened to the public.

12 The Vancouver Sun then filed a Notice of Motion and a letter setting out the background with the Supreme Court of British Columbia and asked for an early date for its motion to be heard. The motion sought an order that counsel for the appellant and a member of the Vancouver Sun's editorial board, upon filing an undertaking of confidentiality, be provided with access to the pleadings and all materials from the proceedings to date and for an order that the court proceedings be open to the public. The Vancouver Sun was informed, on July 3, 2003 that Holmes J. would hear its application on July 23, 2003.

13 The hearing before Holmes J. continued *in camera*, and on July 21, 2003, she issued her reasons dismissing the application to set aside the s. 83.28 judicial investigative hearing. She did, however, vary the order of Dohm A.C.J. to allow counsel for Malik and Bagri to attend the investigative hearing with the right to cross-examine the Named Person, subject to the restriction that any information received was to be kept confidential by counsel and was not to be shared with the two accused. The Named Person immediately applied to Holmes J., who, on July 22, 2003, stayed the investigative hearing to September 2, 2003, so that the Named Person could seek leave to appeal to this Court. None of this was known to the public or press.

14 On July 22, 2003, the Vancouver Sun received a call from the registry of the British Columbia Supreme Court indicating that the hearing of its application had been delayed to 10 a.m. the following day, apparently to allow the s. 83.28 proceedings to continue *in camera* earlier in the morning. When the courtroom was finally opened to the public, the Vancouver Sun made its application to be allowed further access to pleadings and proceedings on the filing of an undertaking of confidentiality and for a declaration s. 83.28 proceedings should not be *in camera*. The application was dismissed by Holmes J. on July 24, 2003: [2003] B.C.J. No. 1992, 2003 BCSC 1330 (B.C. S.C.).

15 Immediately prior to Vancouver Sun's application, Holmes J. delivered, in open court, a synopsis of her reasons for judgment dated July 21, 2003 in which she set out that the hearing before her had involved the constitutional validity of s. 83.28 and the validity of a s. 83.28 order for a judicial investigative hearing. Holmes J. gave a synopsis because the reasons for judgment were sealed. She also revealed that the questioning of the Named Person had not yet commenced. It was at this point that the appellant learned that the British Columbia Supreme Court had been involved in the first-ever application by the Crown under s. 83.28 of the *Criminal Code* for an order requiring a witness to attend a judicial investigative hearing. The appellant contends that but for serendipity and their persistence, no "synopsis" would have been released and the existence of proceedings under s. 83.28 would not have been made public.

16 The synopsis of reasons for judgment dated July 21, 2003, 2003 BCSC 1172 (B.C. S.C.), set out that "[t]he proceedings concerned the interpretation, application, and constitutionality of the new s. 83.28 of the *Criminal Code*, which provides for investigative hearings in relation to terrorism offences, as now defined in s. 2 of the *Code*" (para.1). Holmes J. then explained that an order had been issued under s. 83.28 for a judicial investigative hearing as part of the ongoing Air India Investigation but that the Named Person who was required to attend was neither a suspect nor an accused. She summarized her findings that the order was validly issued and constitutionally sound; that counsel for Mr. Malik and Mr. Bagri would participate in the investigative hearing because of the unusual circumstance that the Air India Trial was underway; the hearing might have an incidental effect on the Air India Trial but the predominant purpose of the hearing is to further the ongoing investigation; the hearing is subject to restrictions protecting the privacy and other rights and interests of the Named Person and the integrity of the investigation.

17 After delivering her synopsis, Holmes J. stated that the s. 83.28 proceeding had been adjourned so that the Named Person could seek leave to appeal to this Court. On July 25, 2003, LeBel J. ordered that the Supreme Court of Canada file be sealed and that the application for leave be expedited. Leave was granted on August 11, 2003, to appeal the order of Holmes J. of July 21, 2003.

18 On October 6, 2003, the Vancouver Sun was granted leave to appeal the July 24, 2003 order of Holmes J. dismissing its application for access to the materials in the courts below: [2003] 2 S.C.R. xi (note) (S.C.C.). The Vancouver Sun, the National Post, and Global Television Network Inc. were also given intervener standing in the constitutional appeal, limited to issues of media access. Submissions were also made at the October 6 hearing on whether all or part of the constitutional appeal could be opened to the public and the media.

19 At the October 6, 2003 leave hearing, the Named Person indicated the constitutional appeal could be conducted in public. The Attorney General of British Columbia took the position that parts of the appeal, constituting stand-alone issues, could be held in public: the constitutionality of s. 83.28 of the *Criminal Code*, the role of the judge, and retrospective application of the provision. Mr. Bagri submitted that grounds of appeal relating to self-incrimination and privacy under section 7 of the *Charter*, judicial independence, and retrospectivity could be heard in public.

20 This Court heard the constitutional appeal on December 10 and 11, 2003 in its entirety in open court subject to a number of restrictions specified at the start of the oral hearing by the Chief Justice. During the oral arguments, counsel refrained from mentioning the name and gender of the Named Person, any facts that could identify this person, and any material supporting the order for an investigative hearing. In addition, the hearing was not broadcast, contrary to the usual practice of the Court.

III. Analysis

21 The issue on appeal is the level of secrecy that should apply to the application for and conduct of a judicial investigative hearing under s. 83.28 of the *Criminal Code*.

A. The Parameters of the Open Court Principle

22 Section 83.28 of the *Criminal Code*, which provides for the judicial investigative hearing, will cease to apply at the end of the fifteenth sitting day of Parliament after December 31, 2006 unless its application is extended by resolution passed by both Houses of Parliament: *Criminal Code*, s. 83.32(1). Until that time, the Attorney General must make accessible to the public an annual report on its use: *Criminal Code*, s. 83.31. The sunset clause and annual reporting requirements underscore the unusual and serious nature of the judicial investigative hearing. It is therefore important to allow the public to scrutinize and discuss the reasoning and deliberations of a Court when it deals with a challenge to the constitutionality of that proceeding. It is also important to allow the legal profession and the public at large to observe how such a procedure is actually used, as long as this can be done, in full or in part, without undue injury to the administration of justice or without frustrating the purpose of s. 83.28.

23 This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings: *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), at p. 187; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), at paras. 21-22; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). "Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized": *Edmonton Journal*, *supra*, at p. 1336.

24 The open court principle has long been recognized as a cornerstone of the common law: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 21. The right of public access to the courts is "one of principle ... turning, not on convenience, but on necessity": *Scott v. Scott*, [1913] A.C. 417 (U.K. H.L.), *per* Viscount Haldane L.C., at p. 438. Justice is not a cloistered value": *Ambard v. Attorney General for Trinidad & Tobago*, [1936] A.C. 322 (Trinidad & Tobago P.C.), *per* Lord Atkin, at p. 335. "[P]ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity": J.H. Burton, ed., *Bethamiana or, Select Extracts from the Works of Jeremy Bentham* (1843), p. 115.

25 Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in

the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.

26 The open court principle is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 17. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression: *Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712 (S.C.C.); *Edmonton Journal, supra*, at pp. 1339-40. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions: *Edmonton Journal*, *supra*, at pp. 1339-40. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.

27 Furthermore, the principle of openness of judicial proceedings extends to the pretrial stage of judicial proceedings because the policy considerations upon which openness is predicated are the same as in the trial stage: *MacIntyre*, *supra*, at p. 183. Dickson J. found "it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy": *MacIntyre*, at p. 186.

28 This Court has developed the adaptable *Dagenais/Mentuck* test to balance freedom of expression and other important rights and interests, thereby incorporating the essence of the balancing of the *Oakes* test: *Dagenais*, *supra*; *Mentuck*, *supra*; *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). The rights and interests considered are broader than simply the administration of justice and include a right to a fair trial: *Mentuck*, *supra*, at para. 33, and may include privacy and security interests.

29 From *Dagenais*, *supra*, and *Mentuck*, *supra*, this Court has stated that a publication ban should be ordered only when:

> a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

(*Mentuck, supra*, at para. 32)

30 The first part of the *Dagenais/Mentuck* test reflects the minimal impairment requirement of the *Oakes* test, and the second part of the *Dagenais/Mentuck* test reflects the proportionality requirement. The judge is required to consider not only "whether reasonable alternatives are available, but also to restrict the order as far as possible without sacrificing the prevention of the risk": *Mentuck*, *supra*, at para. 36.

31 While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban (*Dagenais*, *supra*; *Mentuck*, *supra*); is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41 (S.C.C.)). The burden of displacing the general rule of openness lies on the party making the application: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 71.

B. The Nature of the Judicial Investigative Hearing Under Section 83.28

32 We have reproduced the relevant statutory provisions of the *Criminal Code* as an Appendix to these reasons. From the perspective of the open court principle, the proceedings under s. 83.28 can be usefully broken down into three steps:

> (a) the *ex parte* application under s. 83.28(2) for an order for the gathering of information;

(b) the hearing itself, under the terms and conditions contemplated in s. 83.28(5)(*e*); and

(c) the post-hearing stage, at which non-public information may be released publicly, again subject to the terms and conditions in s. 83.28(5)(*e*).

Section 83.28 does not expressly provide for any part of the judicial investigative hearing to be held *in camera*.

33 Competing views about the proper interpretation of the provision as a whole are as follows: on the one hand, the appellant argues that the open court principle applies to the entire process and should only be displaced in accordance with the *Dagenais/Mentuck* test. The respondents, on the other hand, submits that when Parliament enacted the section, it was entitled to rely on this Court's jurisprudence to the effect that investigative processes, even if they involve a judicial officer, are presumptively held *in camera* (referring, for example to an application for a search warrant: *MacIntyre*, *supra*).

34 The validity of the respondents' submission rests on the assumption that the s. 83.28 hearing is an investigative measure akin to the issuance of a search warrant. This assumption is only partly accurate because one must distinguish between an *application* for a s. 83.28 judicial investigative hearing and the *holding* of the judicial investigative hearing. The application for an order that a judicial investigative hearing be held is procedurally similar to the application for a search warrant or for a wiretap authorization. Section 83.28(2) provides that the application, made by a peace officer with prior consent of the Attorney General, 83.28(3), is *ex parte*. By its very nature, this application must be presented to a judge *in camera*.

35 In that *in camera* procedure, the judge is directed to determine, for a past offence under s. 83.28(4)(*a*), whether (1) there are reasonable grounds to believe that a terrorism offence has been committed; and (2) information about the offence, or about a suspect, is likely to be obtained by the holding of a judicial investigative hearing. The judge may also determine, for a future offence under s. 83.28(4)(*b*), whether (1) there are reasonable grounds to believe that a terrorism offence will be committed; (2) that the person has information about the offence or a third party who may commit that offence; and (3) reasonable attempts have already been made to obtain that information from the person.

36 This first step of the process is akin to the application for the issuance of a search warrant. Although that application is heard by a judge, the imperatives of the investigation require that it not be made public: *MacIntyre*, *supra*, at pp. 177-78. The same is true of a wiretap application, and, in most cases, of an application for a DNA warrant (although, in *R. v. B. (S.A.)*, [2003] 2 S.C.R. 678, 2003 SCC 60 (S.C.C.), we left open the discretion of a judge to hold a contested hearing on the appropriateness of issuing a DNA warrant). In any event, since that process must be held *ex parte*, it follows that in that context it could not be held in open court: see *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75 (S.C.C.).

37 The real issue is whether, because of the investigative nature of the judicial hearing, it too must, by necessity, be presumptively held in secret. In that respect, the analogy to the execution of search warrants, as opposed to their issuance, is not particularly helpful. It is true that search warrants are not only issued, but executed in secret. On the other hand, they are not executed by judges. The judicial role consists of ensuring that there are reasonable grounds to authorize a particular police action. In contrast, the judicial investigative hearing requires full judicial participation in the conduct of the hearing itself.

38 The proper balance between the investigative imperatives and the judicial assumption of openness is best achieved by a proper exercise of the discretion granted to judges to impose terms and conditions on the conduct of the hearing under s. 83.28(5)(*e*). In exercising that discretion, judicial officers should reject the notion of presumptively secret hearings. This conclusion is supported by the choice of Parliament to have investigative hearings of a judicial nature; these hearings must contain as many of the guarantees and indicia that come from judicial involvement as is compatible with the task at hand.

39 One such guarantee is a presumption of openness, which should only be displaced upon proper consideration of the competing interests at *every* stage of the process. In that spirit, the *existence* of an order made under s. 83.28, and as much of its subject-matter as possible should be made public unless, under the balancing exercise of the *Dagenais/Mentuck* test, secrecy becomes necessary. Similarly, once a search warrant has been executed and something has been found, the necessity for secrecy

has abated and continued limits on public accessibility should only be "undertaken with the greatest reluctance": *MacIntyre*, *supra*, at p. 189.

40 If the existence of the order is made public, the issuing judge, acting under s. 83.28(5)(*e*), would determine, still under the guidance of the *Dagenais/Mentuck* test, whether any information ought to be withheld from the public. For example, even though there may be no reason to hide an order for a judicial investigative hearing in relation to an identified alleged terrorist act, it may not be appropriate to reveal the reasonable grounds upon which the police relied to obtain the order. Whether the name of the person who will be heard at the hearing needs to be kept confidential may largely dictate whether the time and place of the hearing will also be the subject of a non-disclosure order. Of course should the hearing proceed in a public forum, the Crown would be expected to request that parts of the hearing proceed *in camera* in light of the sensitive nature of the information sought.

41 It may very well be that by necessity large parts of judicial investigative hearings will be held in secret. It may also very well be that the very existence of these hearings will at times have to be kept secret. It is too early to determine, in reality, how many hearings will be resorted to and what form they will take. This is an entirely novel procedure, and this is the first case — to our knowledge — in which it has been used.

42 The parties on the present appeal seem to agree that this is a "unique" case, in the sense that this is not a "typical" set of circumstances in which such a hearing will be sought. This may be so. We cannot speculate as to what will be more "typical". Resort to "reasonable hypotheticals" is fraught with difficulties in an environment as unprecedented as this one. Applying this novel legislation to the fact situation before us, it becomes apparent that at least in this case, the level of secrecy imposed from the outset was unnecessary. It is therefore prudent to proceed with as little departure as possible from the basic tenets of judicial proceedings, all the while developing a discretionary framework that will reflect the unique investigative role of the judge acting under s. 83.28.

43 In applying the *Dagenais/Mentuck* approach to the decision to hold the investigative judicial hearing *in camera*, judges should expect to be presented with evidence credible on its face of the anticipated risks that an open inquiry would present, including evidence of the information expected to be revealed by the witness. Even though the evidence may reveal little more than reasonable expectations, this is often all that can be expected at that stage of the process and the presiding judge, applying the *Dagenais/Mentuck* test in a contextual manner, would be entitled to proceed on the basis of evidence that satisfies him or her that publicity would unduly impair the proper administration of justice.

C. Application to This Case

44 At the outset, we must state that this judicial investigative hearing is the first to our knowledge, and our comments are not to be taken as critical of the judges below who dealt with these novel matters under great pressure and time constraints. Properly adapted to the circumstances of this case, the *Dagenais/Mentuck* test in our view leads to the following conclusions.

45 The application for the order for the judicial investigative hearing under s. 83.28(2) before Dohm A.C.J. on May 6, 2003, was properly heard *ex parte* and *in camera*.

46 On the other hand, there was no reason for keeping the existence of the order secret, nor the fact that the investigative hearing ordered by Dohm A.C.J. was in relation to the explosion that caused the crash of Air India Flight 182 in June 1985.

47 In light of the position taken by the Named Person at that stage, the identity of the person was properly kept confidential. That direction should have been made subject to revision by the judge presiding at the judicial investigative hearing.

48 It is apparent on the facts that notice of the hearing should have been given to counsel for Mr. Malik and Mr. Bagri promptly. In the circumstances of this case where a potential Crown witness in an ongoing trial becomes the subject of the investigative order, it is obvious that third party interests have to be considered. Section 83.28(5)(*e*) specifically contemplates the imposition of terms and conditions that are "desirable ... for the protection of the interests of ... third parties". The subsequent participation of counsel for Mr. Malik and Mr. Bagri in the hearings before Holmes J., merely emphasizes that they should have received notice in the first instance. Instead, in light of the secrecy surrounding the very existence of the judicial investigative

hearing ordered by Dohm A.C.J., counsel found out only accidentally of its existence. They then persuaded Holmes J. that the interests of their clients required their participation in the hearing. A proper application of the principles in *Dagenais/Mentuck* test reveals that there was no justification for the order that counsel for Mr. Malik and Mr. Bagri not be given notice of the hearing at the outset. It is particularly incumbent on the presiding judge to turn his or her mind to the *Dagenais/Mentuck* test in *ex parte* applications because the media is not present to represent its own rights and interests: *Mentuck*, *supra*.

49 It is not necessary in this appeal, given our conclusion that the hearing should have been held in open court, to decide whether an appropriate condition under s. 83.28(5)(*e*) could include an order that counsel be present but be prohibited from disclosing to their clients the content of the information revealed in the hearing. It is difficult to anticipate all the difficulties that such an order may pose. In the same way, we would not endorse the suggestion made by the Vancouver Sun that some members of its Editorial Board be allowed to attend the hearings and have access to the materials but be subject to an undertaking of confidentiality. It is difficult again to understand how the public good is better served by the qualified participation of professionals who cannot discharge fully their publicly entrusted mandate. In any event, these issues can be left for another day, and should be debated amongst the professional bodies involved so that court imposed conditions can properly consider ethical standards and best practices in the professions involved.

50 Keeping in mind our statements about the novelty of this case, the present facts clearly illustrate the mischief that flows from a presumption of secrecy. Secrecy then becomes the norm, is applied across the board, and sealing orders follow as a matter of course.

51 When the Named Person indicated an intention to challenge the constitutionality of the order, the imperatives of the open court principle became even more compelling. The constitutional challenge, and as much of the information about the case as could be revealed without jeopardizing the investigation, should have been made public, subject, if need be, to a total or partial publication ban. When that matter resumed before Holmes J., it became apparent that the existence of a judicial investigative hearing related to the Air India case was already known to counsel for Mr. Malik and Mr. Bagri and later to the Vancouver Sun.

52 The unfolding of events in this case also illustrates how antithetical to judicial process secret court hearings are. Courthouses are public places. In the course of a public hearing a judge may order that part of the proceedings be held *in camera*, thus excluding the public for from that part of the hearing. But, of course, in such a case, the fact that an *in camera* hearing is taking place, as well as the overall context in which it was ordered, are in the public domain, subject to challenge, *inter alia* by the Press and to comments by interested parties and by the public. Whether better notice should be given to the Press, or to other possibly interested parties, of proceedings that are held *in camera* or that are subject to a publication ban is beyond the scope of the issues raised on this appeal but we again suggest serious consideration should be given to this matter by the legal profession, the media, and the courts.

53 In retrospect, the hearing of the constitutional challenge that was held in open court before us could and should have been held in the same manner before Holmes J. Although she may have felt bound by the secrecy order issued by Dohm A.C.J., it is clear under s. 83.28(5)(*e*) that the terms and conditions attached to the judicial investigative hearing must be varied and adjusted to achieve the proper balance between confidentiality and publicity as the matter progresses.

54 Here, for instance, the Named Person now takes the position that the proceedings should be held in public and no longer wishes that his or her identity be protected. Although this is only one factor to consider and certainly not dispositive of the issue, it removes in part the concerns that the investigative judge may have had regarding the privacy interests of the named person. The only factors militating in favour of a degree of secrecy in this case are the factors related to the protection of an ongoing investigation or for other vital but unstated reasons. In a case in which so much of the information relating to the offence is already in the public domain, and in which recourse to a judicial investigative hearing is sought in the midst of an ongoing non jury trial, the case for extensive secrecy is a difficult one to make and was not made out here.

55 We again emphasize that in the difficult circumstances of this unusual application of a novel criminal procedure, Holmes J. did excellent work in fleshing out the issues and addressing them as best she could. Any shortcomings in her decision become much easier to identify with hindsight, particularly since much of the ordered secrecy in this case has been lifted causing no

apparent damage to the investigation. Furthermore, shortcomings in the original decision also become apparent when a hearing is truly adversarial, with all affected interests represented.

56 It is therefore clear that the constitutional challenge here should not have been conducted *in camera*. We would add that there would have been no need to give the Vancouver Sun (through some members of its editorial board or otherwise) preferential and confidential access to secret information in this case if much of the constitutional challenge had been conducted in open court, along the lines of the process followed in this court, with the helpful cooperation of all parties. Much of the constitutional case can be properly argued without the details of the information submitted to the application judge being revealed.

IV. Disposition

57 We would therefore order that:

> The appeal be allowed in part and that the order made by Holmes J. be varied.
>
> That the name of the Named Person be made public.
>
> That the proposed judicial investigative hearing be held in public, subject to any order of the presiding judge that the public be excluded and/or that a publication ban be put in place regarding aspects of the anticipated evidence to be given by the Named Person.

58 In any event, we would also order that the investigative judge review the continuing need for any secrecy at the end of the investigative hearing and release publicly any part of the information gathered at the hearing that can be made public without unduly jeopardizing the interests of the Named Person, of third parties, or of the investigation: *Criminal Code*, s. 83.28(5)(*e*). Even in cases where the very existence of an investigative hearing would have been the subject of a sealing order, the investigative judge should put in place, at the end of the hearing, a mechanism whereby its existence, and as much as possible of its content, should be publicly released.

Bastarache J. **(dissenting in part):**

I. Introduction

59 I agree with Iacobucci and Arbour JJ.'s discussion on the importance of openness of judicial proceedings, both as a principle of common law and as an aspect of s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* guaranteeing freedom of the press (paras. 23-36). However, I respectfully cannot agree with their analysis or disposition in this appeal.

60 While I do recognize that openness of judicial proceedings is the rule and covertness the exception, this Court has held that public access to judicial proceedings can be curtailed "where there is present the need to protect social values of superordinate importance": *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), at 186-87. In my view, several considerations of superordinate importance, such as the proper administration of justice as well as the protection of the interests, rights and safety of third parties, warrant the curtailment of public access to investigative proceedings under s. 83.28 of the *Criminal Code*, R.S.C. 1985, c. C-46, in most instances. As discussed below, I believe that public access to investigative hearings would normally defeat the purpose of the proceedings by rendering them ineffective as an investigative tool.

II. Inapplicability of the *Dagenais/Mentuck* Framework

61 This Court developed, in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), and *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 (S.C.C.), a framework to guide the exercise of judicial discretion in restricting access to judicial proceedings. Nevertheless, with respect, I do not believe that the *Dagenais/Mentuck* test can guide a judge's discretion in ordering that the investigative proceedings under s. 83.28 should be held *in camera*.

62 The first requirement of the *Dagenais/Mentuck* test is that a public ban should only be ordered when "such an order is necessary in order to prevent a serious risk to the proper administration of justice" (*Mentuck*, *supra*, at para. 32). This requirement was explained by our Court in *Mentuck*, at para. 34:

> One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in *Dagenais*, a "real and substantial" risk. That is, it must be a risk reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained. [Emphasis added.]

63 Thus, in order to deny access to judicial proceedings, this test requires, at the outset, the existence of a serious risk that is well grounded in the evidence. But where the purpose of the investigative proceeding under review is to gather information and possibly evidence, it would be quite difficult if not impossible to present an application for denial of access that is well grounded in the evidence. The presumption of openness cannot operate in circumstances where it cannot in fact be rebutted. This is the case because there is no evidence before the hearing actually takes place. The very object of the hearing is to gather information and evidence.

64 In my opinion, the only evidence on which a judge presiding over an investigative hearing could assess the risk under the *Dagenais/Mentuck* test would be the information, if any, supporting the reasonable grounds presented by the peace officer to satisfy the judge hearing the application (s. 83.28(3) and (4)). However, I do not think that reasonable grounds to believe that a person has direct and material information that relates to a past or future terrorist offence, or that relates to the whereabouts of an individual suspected of having committed a terrorism offence, is sufficient evidence upon which a judge can assess the application and upon which he or she may exercise his or her judicial discretion. It is imperative to bear in mind that the information sought has not yet been obtained, and that neither the investigators, the Crown nor the presiding judge is able to predict what the witness will say during the hearing. Consequently, if the presumption of openness applies to investigative hearings, an applicant seeking a denial of public access for the s. 83.28 proceedings could never satisfy the *Dagenais/Mentuck* test. It is not possible for the presiding judge to assess, in an evidentiary vacuum, the degree of risk that would be created if the hearing were open to the public. In light of this inherent uncertainty with which presiding judges are confronted, public access to all investigative hearings under s. 83.28 must be very limited.

65 In sum, a convincing evidentiary basis for denial of access to any judicial proceeding is generally necessary under the *Dagenais/Mentuck* test to rebut the presumption of open courts, a highly valued democratic principle of our society. However, because of the lack of information and evidence prior to an investigative hearing, this framework is not appropriate to determine denial of access. This situation is not unique.

66 In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), La Forest J. found that in situations where judges are confronted with an uncertain evidentiary record, the evidence should be received by way of a *voir dire*, from which the public is excluded (at para. 72):

> There must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially. In some cases in which the facts are not in dispute the statement of counsel will suffice. If there is insufficient evidence placed before the trial judge, or there is a dispute as to the relevant facts, the applicant should seek to have the evidence heard *in camera*. This may be done by way of a *voir dire*, from which the public is excluded.... The decision to hold a *voir dire* will be a function of what is necessary in a given case to ensure that the trial judge has a sufficient evidentiary basis upon which to act judicially. [Emphasis added.]

67 Thus, it is only after the information and evidence has been gathered by the Crown that the presiding judge will be able to exercise his or her discretion judicially. To act otherwise would present great risks to the proper administration of justice and to the safety, interests and rights of third parties.

III. Risk to the Safety, Interests and Rights of Witnesses and Third Parties

68 The importance of protecting the innocent was considered by Dickson J. in *MacIntyre*, *supra*, at p. 187:

> Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear. [Emphasis added.]

69 In s. 83.28 proceedings, which deal with acts of terrorism, the possibility that information may be disclosed which unfairly prejudices or tarnishes the reputation of innocent people clearly exists. Such proceedings run the risk that "unfounded, even outrageous, allegations of misconduct may be made against the absent target of the information": *Southam Inc. v. Ontario* (1990), 60 C.C.C. (3d) 267 (Ont. C.A.), at p. 275. This unreliable and possibly untruthful testimony could severely damage the reputation of innocent people, who may themselves lack adequate means to counter the effect of information they know to be erroneous or false. This consideration therefore warrants confidentiality in investigative proceedings.

70 With regards to safety, the disclosure of a witness's identity may place that person at serious risk of harm from suspects or their allies. The same can be said for third parties identified by the witness as having information to provide during the investigative hearing. This Court has acknowledged the potential jeopardy to the safety of the witness should it become known that he or she is about to be questioned: *R. v. A*, [1990] 1 S.C.R. 992 (S.C.C.).

71 As noted by the respondent Attorney General of Canada, for some witnesses, the likelihood that the persons against whom they can provide information will discover their identity or the content of their testimony may cause them to commit perjury or refuse to comply with the order. This would go against society's interest in encouraging the reporting of offences and the participation of witnesses in the investigative process. Given the nature of the threat posed by terrorism and terrorist organizations, confidentiality will likely encourage witnesses to come forward and be honest in their recollection of facts, because they would not fear for their safety.

IV. Risk to the Proper Administration of Justice

72 This Court has held that "the open court principle itself must yield to circumstances that would render the proper administration of justice unworkable": *Canadian Broadcasting Corp.*, *supra*, at para. 29. This confirmed the findings of our Court in *MacIntyre*, *supra*, at pp. 187-88:

> The point taken here is that the effective administration of justice would be frustrated if individuals were permitted to be present when the warrants were issued. Therefore, the proceeding must be conducted *in camera*, as an exception to the open court principle. I agree. The effective administration of justice does justify the exclusion of the public from the proceedings attending the actual issuance of the warrant. The Attorneys General have established, at least to my satisfaction, that if the application for the warrant were made in open court the search for the instrumentalities of crime would, at best, be severely hampered and, at worst, rendered entirely fruitless. In a process in which surprise and secrecy may play a decisive role the occupier of the premises to be searched would be alerted, before the execution of the warrant, with the probable consequence of destruction or removal of evidence. I agree with counsel for the Attorney General of Ontario that the presence in an open courtroom of members of the public, media personnel, and, potentially, contacts of suspected accused in respect of whom the search is to be made, would render the mechanism of a search warrant utterly useless. [Emphasis added.]

73 Although the investigative hearings under s. 83.28 are a new form of proceeding, the question of public access raises essentially the same issues that this Court has considered in the context of other investigative tools. The necessity of clandestine proceedings in relation to the application for and execution of investigative tools has been accepted by this Court in situations concerning search warrant applications and wiretap authorization proceedings.

74 For example, this Court recognized at para. 51 of *Michaud c. Québec (Procureur général)*, [1996] 3 S.C.R. 3 (S.C.C.), that "[t]he reality of modern law enforcement is that police authorities must frequently act under the cloak of secrecy to effectively counteract the activities of sophisticated criminal enterprises." Speaking about electronic surveillance, Lamer C.J. went on to state at para. 52:

> The effectiveness of such surveillance would be dramatically undermined if the state was routinely required to disclose the application and affidavits filed in support of a surveillance authorization to every non-accused surveillance target. The wiretap application will often provide a crucial insight in the *modus operandi* of electronic surveillance, and regular disclosure would permit criminal organizations to adjust their activities accordingly.

75 Secrecy has therefore been recognized as paramount in the context of wiretaps, and public access has been limited to ensure the effectiveness of electronic surveillance as an investigative device. The same could be said of terrorist groups or organizations: if the police cannot investigate and collect information in a confidential environment, their investigation or attempt to prevent the terrorist offence would be undermined because suspects could be "tipped off".

76 The confidentiality of investigative tools was recently confirmed by this Court in *R. v. B. (S.A.)*, [2003] 2 S.C.R. 678, 2003 SCC 60 (S.C.C.). In her discussion of the constitutionality of DNA warrants, Arbour J. stated that "as with most investigative techniques, the *ex parte* nature of the proceedings is constitutionally acceptable as a norm because of the risk that the suspect would take steps to frustrate the proper execution of the warrant" (para. 56).

77 I agree with the respondent Attorney General of British Columbia that police cannot gather information and act upon it at the same time it is disseminated to the public and the media. Information gathered may lead to other avenues of investigation and other potential witnesses. Moreover, the information obtained at a s. 83.28 hearing could be used in connection with subsequent applications for search warrants, wiretaps and further s. 83.28 orders against other witnesses. The efficacy of these investigative tools would be seriously compromised if the details of the s. 83.28 proceedings were open to the public. Corruption of witnesses' recollections, the potential fleeing of suspects and the risk of pressure being put on future witnesses to give false testimony are but a few examples.

78 Unlike other investigative proceedings, such as search warrants, where the evidence found and things seized are material, a witness's version of events may vary substantially, especially in response to threats or intimidation. This person could also flee. Thus, there is a legitimate law enforcement interest in maintaining the confidentiality of a witness's identity and testimony, because the premature disclosure of information about a terrorism offence would compromise and impede the very investigation of this gathered information. This would frustrate effective law enforcement, which is meant to benefit society as a whole: *B. (S.A.), supra*, at para. 51.

79 The predominant purpose of the investigative hearing, like the execution of a search warrant, is to gather information. While the purposes of these investigative tools are similar, this should not be taken as saying that the role of the judge in investigatory proceedings is like that of an agent of the State charged with executing a search warrant. Rather, the companion reasons clearly state that the judge's role in investigative proceedings under s. 83.28 is limited to ensuring that information is gathered in a proper manner and protecting the integrity of the investigation and interests of the witness (2004 SCC 42 (S.C.C.), at paras. 86-87). However, the evidentiary uncertainty preceding both procedures is the same. Without knowing what information will be revealed, it is not possible, in my view, to evaluate the seriousness of the risk to third parties' rights and to the proper administration of justice. Judges simply do not have sufficient evidence on which to make an informed assessment. Thus, in the case of investigative hearings, the presumption of openness must yield to other serious considerations so as to preserve the rights of third parties and ensure the proper administration of justice.

80 In my opinion, the fact that an investigative hearing takes place during an ongoing investigation further supports the confidentiality of the proceedings. For example, the respondent Bagri argues that the premature disclosure of investigative information from a s. 83.28 hearing could compromise the integrity of the ongoing investigations, which could in turn hamper his ability to make full answer and defence in the Air India trial.

81 Likewise, the fact that the hearing was in part about the constitutional validity of s. 83.28 did not make the imperatives of the open court principle more compelling in this case. To the contrary, the public disclosure of this challenge to the provision would ignore the fact that the Named Person's identity and any information that person may disclose should be kept confidential until the completion of the proceeding. An examination of the Record shows that the constitutional challenge could not realistically be separated from the actual investigative hearing — in fact, public disclosure of such a challenge would normally have the effect of publicizing the fact that an application has been made under s. 83.28 and that an investigative hearing may be taking place, though I would not rule out the possibility of isolating these proceedings and holding them in open court under the appropriate circumstances. In my view, the protection of the judicial system's integrity does not depend on the public's knowledge of potentially harmful information, especially in light of the fact that any information which is found to be non-prejudicial will be publicly disclosed after the end of the proceeding.

82 For the same reasons, like Holmes J. (*Vancouver Sun, Re*, [2003] B.C.J. No. 1992, 2003 BCSC 1330 (B.C. S.C.)), I see no merit in alerting the media to the fact that an *in camera* hearing is to take place. Advance notice of the s. 83.28 hearing would serve no useful purpose. The media's pursuit of a newsworthy event at that point would only undermine the proper administration of justice and could potentially damage third parties' rights and interests. The trouble is that until the witness testifies, is it inherently uncertain whether or not public access to the hearing will jeopardize the countervailing interests at stake.

V. Completion of the Investigative Hearing

83 I agree with Holmes J. that different considerations apply after the completion of investigative procedures (para. 27). Much like the execution of a search warrant, the evidentiary uncertainty surrounding investigative proceedings under s. 83.28 is dispelled upon completion of the hearing and "the purposes of the policy of secrecy are largely, if not entirely, accomplished": *MacIntyre*, *supra*, at p. 188. The information gathered by the Crown at the s. 83.28 proceeding will provide a basis upon which the presiding judge can balance the competing interests at stake and more accurately assess the risk presented by the disclosure of information to third parties and to the proper administration of justice. Consequently, all information which is deemed non-prejudicial can be released shortly after the hearing. Because openness is the presumption, the person who wishes to deny the right of public access has the burden of proof and must satisfy the *Dagenais/Mentuck* test.

VI. Conclusion

84 Although the rule is that of openness, where the rights of third parties would be unduly harmed and the administration of justice rendered unworkable by the presence of the public, the court may sit *in camera*. Such is normally the case for investigative proceedings under s. 83.28.

85 Courts reviewing a trial judge's decision to deny public access must remember that a trial judge is usually in the best position to assess the demands of a given situation: *Canadian Broadcasting Corp.*, *supra*, at para. 77. A reviewing court may look at the facts of this case in hindsight and conclude that the level of secrecy imposed from the outset was unnecessary. Nonetheless, there is no way of knowing this prior to the investigative hearing, because until the witness has testified, judges cannot assess with any degree of accuracy the extent to which the proper administration of justice and third parties' rights could be jeopardized. Accordingly, I find that Holmes J. properly exercised her discretion and did not err by ordering that the s. 83.28 hearing be held *in camera*. For these reasons, I would dismiss the appeal.

***LeBel J.*:**

86 Subject to my comments in the companion case of *Application Under s. 83.28 of the Criminal Code, Re*, 2004 SCC 42 (S.C.C.), I agree with the reasons of Justices Iacobucci and Arbour and with their proposed disposition in this appeal.

Appeal allowed in part.

Pourvoi accueilli en partie.

APPENDIX

APPENDIX

Statutory Provisions

Criminal Code, R.S.C. 1985, c. C-46, as amended by S.C. 2001, c. 41

Investigative Hearing

83.28 (1) In this section and section 83.29, "judge" means a provincial court judge or a judge of a superior court of criminal jurisdiction.

(2) Subject to subsection (3), a peace officer may, for the purposes of an investigation of a terrorism offence, apply *ex parte* to a judge for an order for the gathering of information.

(3) A peace officer may make an application under subsection (2) only if the prior consent of the Attorney General was obtained.

(4) A judge to whom an application is made under subsection (2) may make an order for the gathering of information if the judge is satisfied that the consent of the Attorney General was obtained as required by subsection (3) and

(a) that there are reasonable grounds to believe that

(i) a terrorism offence has been committed, and

(ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order; or

(b) that

(i) there are reasonable grounds to believe that a terrorism offence will be committed,

(ii) there are reasonable grounds to believe that a person has direct and material information that relates to a terrorism offence referred to in subparagraph (i), or that may reveal the whereabouts of an individual who the peace officer suspects may commit a terrorism offence referred to in that subparagraph, and

(iii) reasonable attempts have been made to obtain the information referred to in subparagraph (ii) from the person referred to in that subparagraph.

(5) An order made under subsection (4) may

(a) order the examination, on oath or not, of a person named in the order;

(b) order the person to attend at the place fixed by the judge, or by the judge designated under paragraph (*d*), as the case may be, for the examination and to remain in attendance until excused by the presiding judge;

(c) order the person to bring to the examination any thing in their possession or control, and produce it to the presiding judge;

(d) designate another judge as the judge before whom the examination is to take place; and

(e) include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation.

(6) An order made under subsection (4) may be executed anywhere in Canada.

(7) The judge who made the order under subsection (4), or another judge of the same court, may vary its terms and conditions.

(8) A person named in an order made under subsection (4) shall answer questions put to the person by the Attorney General or the Attorney General's agent, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.

(9) The presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing.

(10) No person shall be excused from answering a question or producing a thing under subsection (8) on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but

(a) no answer given or thing produced under subsection (8) shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136; and

(b) no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136.

(11) A person has the right to retain and instruct counsel at any stage of the proceedings.

(12) The presiding judge, if satisfied that any thing produced during the course of the examination will likely be relevant to the investigation of any terrorism offence, shall order that the thing be given into the custody of the peace officer or someone acting on the peace officer's behalf.

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): The Canadian Broadcasting Corporation v. Morrison | 2020 MBQB 169, 2020 CarswellMan 508 | (Man. Q.B., Dec 2, 2020)

2010 ONCA 726
Ontario Court of Appeal

Canadian Broadcasting Corp. v. R.

2010 CarswellOnt 8225, 2010 ONCA 726, [2010] O.J. No. 4615, 102 O.R. (3d) 673, 221 C.R.R. (2d) 242, 262 C.C.C. (3d) 455, 271 O.A.C. 7, 327 D.L.R. (4th) 470, 91 W.C.B. (2d) 175

Canadian Broadcasting Corporation (Applicant / Appellant in Appeal / Respondent in Cross-Appeal) and Her Majesty the Queen (Respondent / Respondent in Appeal) and Valentino Burnett, Karen Eves, Blaine Phibbs and Travis MacDonald (Respondents / Respondents in Appeal) and Waterloo Regional Police Service and The Office of the Chief Coroner (Respondents / Respondents in Appeal)and Correctional Service of Canada (Respondent / Respondent in Appeal / Appellant in Cross-Appeal)

Gloria Epstein J.A., John Laskin J.A., and Robert J. Sharpe J.A.

Heard: September 15, 2010
Judgment: November 1, 2010
Docket: CA C51613, C51617

Proceedings: reversing in part *Canadian Broadcasting Corp. v. R.* (2010), (sub nom. *R. v. Canadian Broadcasting Corp.)* 251 C.C.C. (3d) 414, 2010 CarswellOnt 707, 2010 ONSC 86 (Ont. S.C.J.)

Counsel: Patricia M. Latimer for Canadian Broadcasting Corporation
Joel Robichaud, Nancy Noble for Correctional Service of Canada
Lorenzo D. Policelli for Office of the Chief Coroner
Gary Melanson for Waterloo Regional Police Service

Subject: Criminal; Constitutional; Human Rights
Related Abridgment Classifications
Criminal law
IV Charter of Rights and Freedoms
IV.8 Freedom of expression [s. 2(b)]
Criminal law
XXIX Pre-trial procedures
XXIX.5 Public or publication ban order
XXIX.5.d Miscellaneous
Headnote
Criminal law --- Pre-trial procedure — Public or publication ban order — General principles
Release of exhibits to media where proceedings and publication ban ended — Inmate died at correctional facility — Officers were charged and preliminary inquiry was conducted — All officers were discharged upon preliminary inquiry, and publication ban expired — Media outlet brought unsuccessful application for access to all preliminary inquiry exhibits, including videotaped exhibits, for purpose of producing television documentary — Media outlet brought application for certiorari quashing decision of applications judge and ordering access to exhibits — Application was granted — Test for access to videotaped exhibits is in

Supreme Court of Canada judgments, Dagenais and Mentuck — Media outlet was only entitled to view and copy portions of video evidence that were played at preliminary inquiry, and it was entitled to view but not copy portion of video that showed inmate's death — Media outlet appealed limitations; Correctional Service of Canada ("CSC") cross-appealed — Appeal allowed; cross-appeal dismissed — Principles enunciated in Dagenais and Mentuck were fully applicable to media outlet's requests — Case law has affirmed that right to access exhibits includes right to make copies — Most of decisions cited by CSC were distinguishable; debate over cameras in courtroom raised very different issues that did not concern case at bar — Application judge erred by limiting media outlet's right of access to only those exhibits that were played in open court — When exhibit is introduced as evidence to be used without restriction in judicial proceeding, entire exhibit becomes part of record — Further, application judge's perception that image of person dying was not something that needed to be broadcast was not based upon finding of potential harm to recognized legal interest.

Criminal law --- Charter of Rights and Freedoms — Freedom of expression [s. 2(b)]

Media's right to gather information.

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s. 539 — referred to

s. 539(1)(c) — referred to

APPEAL from judgment, reported at *Canadian Broadcasting Corp. v. R.* (2010), (sub nom. *R. v. Canadian Broadcasting Corp.)* 251 C.C.C. (3d) 414, 2010 CarswellOnt 707, 2010 ONSC 86 (Ont. S.C.J.), allowing media outlet to view and copy portions of evidence that were played at preliminary inquiry.

***Robert J. Sharpe J.A.*:**

1 This appeal involves consideration of the media's right to access and copy exhibits filed at a preliminary inquiry. In October 2007, Ashley Smith died in custody at the Grand Valley Institution for Women. Four correctional officers were charged with criminal negligence causing death. Those charges proceeded to a preliminary inquiry where certain exhibits were introduced into evidence. The exhibits included video recordings, one of which captured the actual circumstances of Ashley Smith's death. Part way through the preliminary inquiry, the Crown decided not to proceed with the charges and the four correctional officers were discharged. A coroner's warrant was subsequently issued for the seizure of all documents related to Ashley Smith's death including the preliminary inquiry exhibits.

2 The appellant Canadian Broadcasting Corporation ("CBC") decided to produce an investigative documentary on Ashley Smith's tragic life. CBC sought access to and copies of the preliminary inquiry exhibits. The preliminary inquiry judge refused CBC's request on the ground that he should not interfere with the process of the coroner's inquest. The application judge granted certiorari to review that order and held that CBC was entitled to access the exhibits, but he limited CBC's rights in certain respects. In particular, he held that CBC was entitled to view and copy only those portions of the video evidence that were actually played at the preliminary inquiry, and that CBC was entitled to view but not copy the portion of the video that was played showing Ashley Smith's death.

3 CBC appeals the limitations imposed on its right to access and copy the exhibits. The Correctional Service of Canada ("CSC") cross-appeals arguing that the application judge erred by applying the *Dagenais/Mentuck* test and granting CBC any right to copy the exhibits.

Facts

4 Ashley Smith, a 19-year-old from Moncton, New Brunswick, was serving a six-year sentence at the Grand Valley Institution for Women in Kitchener. On October 19, 2007, while under observation in an isolation cell, she strangled herself with a strip of cloth. Four correctional officers employed by CSC were charged with criminal negligence causing death. Those charges proceeded to a preliminary inquiry in November 2008. A publication ban was imposed pursuant to s. 539 of the *Criminal Code*. The exhibits entered into evidence included photographs, documents and audio and video recordings relating to CSC's management of Ashley Smith. Although these recordings were marked as exhibits in their entirety, only portions were actually played in open court. The portion of one of the video recordings showing the actual circumstances of Ashley Smith's death was played in open court.

5 Several days into the preliminary inquiry, the Crown determined that there was no reasonable prospect of any of the accused being convicted and decided not to proceed with the charges. All four accused were discharged. As the preliminary inquiry had concluded, the publication ban expired pursuant to s. 539(1)(c) of the *Criminal Code*. The exhibits were returned to the investigating police force, the Waterloo Region Police Service ("WRPS"), and then given to the Office of the Chief Coroner ("OCC") pursuant to a coroner's warrant for the purpose of a coroner's inquest into Ashley Smith's death.

6 Several CSC employees were disciplined and grievances were filed. The estate and members of Ashley Smith's family commenced a civil action against CSC.

Proceedings in the Ontario Court of Justice and Superior Court of Justice

7 In July 2009, some seven months after the conclusion of the preliminary inquiry, CBC applied to the Ontario Court of Justice for access to the preliminary inquiry exhibits. CBC wanted copies of the exhibits to use in a proposed documentary on Ashley Smith's life for the series *the fifth estate*. The preliminary inquiry judge held that he retained jurisdiction over the exhibits but he refused to deal with CBC's request on the ground that he should not interfere with the process of the coroner's inquest.

8 CBC sought certiorari in the Superior Court of Justice to quash the decision of the preliminary inquiry judge and an order pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* granting it access to and the right to copy the exhibits.

The application judge found that the preliminary inquiry judge erred by refusing to deal with CBC's application on the merits, and then turned to CBC's application for a s. 24(1) *Charter* remedy.

9 The application judge held that the principles enunciated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), and *R. v. Mentuck*, [2001] 3 S.C.R. 442 (S.C.C.), generally know as the "*Dagenais*/*Mentuck*" test, applied to CBC's request. The *Dagenais*/*Mentuck* test requires the party opposing media access to demonstrate that the order is necessary to prevent a serious risk to the proper administration of justice and that the salutary effects of the order sought outweigh the deleterious effects on the rights and interests of the parties and the public.

10 The application judge concluded that the respondents could not satisfy that onus and that CBC was entitled to access the preliminary inquiry exhibits subject to a number of exceptions and limitations. CBC takes no issue with the following exceptions and limitations imposed by the application judge:

- the faces of any CSC officer or any other individual who did not consent to their faces being shown was to be digitally obscured;

- the audio recordings were to be edited to remove the names of any corrections officers or other person who did not consent to their name being broadcast;

- the copying and editing of the video and audio recordings was to be done so as to maintain the integrity of the original recordings;

- the exhibits are to be used solely for use in a documentary by *the fifth estate*;

- no copies are to be made of the exhibits other than for that use;

- copies of the exhibits are not to be posted on any internet site except as part of a documentary by *the fifth estate*.

11 CBC appeals the following exceptions and limitations imposed by the application judge, namely, that it:

- is entitled to access and copy only the portions of the video recordings that were played in open court;

- is entitled to view but not copy the portion of the video showing Ashley Smith's death that was played in open court;

- is entitled to view but not to copy the portion of one video recording showing four correctional officers entering the segregation unit;

- where it is uncertain what portion of an exhibit was actually played in open court CBC was denied any access to that exhibit.

12 The application judge denied the OCC's request for an order delaying release of the exhibits until completion of the coroner's inquest.

13 On January 8, 2010, CBC aired *the fifth estate* documentary on the life of Ashley Smith which incorporated some video footage from the exhibits copied in accordance with the application judge's order.

Issues

14 CBC appeals the restrictions imposed by the application judge on its right to access and copy the exhibits that I have identified in para. 11 of these reasons. The respondent CSC cross-appeals the order granting CBC the right to access and copy the exhibits. The respondent OCC takes the position that the application judge should have deferred CBC's request to the coroner presiding at the coroner's inquest into Ashley Smith's death. The respondent WRPS essentially supports the order of the application judge.

15 As the cross-appeal raises the fundamental issue of whether CBC was entitled to any access to the exhibits, I will deal with that issue first. I will then turn to the issues raised by CBC's appeal as to the limitations imposed on its right to access and copy the exhibits.

16 The issues may be summarized as follows:

1. Did the application judge err by applying the *Dagenais*/*Mentuck* test to CBC's request?

2. Did the application judge err by limiting CBC's right to access and copy the exhibits?

3. Did the application judge err by failing to give adequate consideration to the coordinate jurisdiction of the OCC?

Analysis

1. Did the Application Judge Err by Applying the Dagenais/Mentuck Test to CBC's Request?

17 CSC submits that the application judge erred by applying the *Dagenais*/*Mentuck* test to CBC's request to access and obtain copies of exhibits. CSC argues that *Vickery v. Nova Scotia (Prothonotary, Supreme Court)*, [1991] 1 S.C.R. 671 (S.C.C.), governs such requests and required that CBC satisfy the onus of demonstrating why it was entitled to copies of the exhibits. CSC argues that the open court principle allows the public and the media to attend court and to listen to and observe the evidence as it is given, but does not stand for the proposition that the media is entitled to obtain copies of the exhibits and to publish or broadcast the copies.

18 *Vickery* involved a media request for access to an accused's alleged confession that had been excluded at a murder trial. The accused was acquitted and a journalist sought access to the alleged confession. By a 6-3 majority, the Supreme Court denied access, essentially on the ground that the acquitted accused's privacy interest and the need to protect the innocent outweighed the public's right of access.

19 *Vickery* preceded *Dagenais* and *Mentuck*. In *Vickery*, the Supreme Court of Canada expressly refused to consider the *Charter* as the journalist seeking access had not raised the *Charter* at first instance. As *Dagenais* and *Mentuck* make clear, the *Charter* has fundamentally altered the legal landscape in relation to court orders limiting freedom of the press in relation to court proceedings. *Vickery* plainly did not take into account that fundamental legal change. And, as the application judge rightly observed at para.14, *Vickery* did not purport "to formulate a general rule for regulating access to audio and video recordings which were made court exhibits."

20 For the Supreme Court's post-*Charter* test that applies to all discretionary decisions limiting freedom of the press in relation to court proceedings, it is to *Dagenais* and *Mentuck* that one must turn. The *Dagenais*/*Mentuck* test, as restated in *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 (S.C.C.) at para. 26, reflects the importance of the open court principle and the rights of freedom of expression and freedom of the press in relation to judicial proceedings. Restrictions on the open court principle and freedom of the press in relation to judicial proceedings can only be ordered where the party seeking such a restriction establishes through convincing evidence that:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the restriction outweigh the deleterious effects on the rights and interest of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

21 While the *Dagenais*/*Mentuck* test was developed in the context of publication bans, the Supreme Court has stated that it applies any time s. 2(b) freedom of expression and freedom of the press rights are engaged in relation to judicial proceedings: "[T]he *Dagenais*/*Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press

in relation to legal proceedings": *Toronto Star* at para. 7 (emphasis in original). See also *Vancouver Sun, Re*, [2004] 2 S.C.R. 332 (S.C.C.) at paras. 30-31.

22 The open court principle, permitting public access to information about the courts, is deeply rooted in the Canadian system of justice. The strong public policy in favour of openness and of "maximum accountability and accessibility" in respect of judicial or quasi-judicial acts pre-dates the *Charter*: *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.) at p. 184. As Dickson J. stated at pp. 186-187: "At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance."

23 Now recognized as a fundamental aspect of the rights guaranteed by s. 2(b) of the *Charter*, the open court principle has taken on added force as "one of the hallmarks of a democratic society" that deserves constitutional protection: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) at para. 22.

24 The open court principle and the rights conferred by s. 2(b) of the *Charter* embrace not only the media's right to publish or broadcast information about court proceedings, but also the media's right to gather that information, and the rights of listeners to receive the information. "[T]he press must be guaranteed access to the courts in order to gather information" and "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press.": *CBC v. New Brunswick* at paras. 23-26. In *Vancouver Sun (Re)* at para. 25, the Supreme Court of Canada described the openness of the courts and judicial processes as being "necessary to maintain the independence and impartiality of courts", "integral to public confidence in the justice system" and "a principal component of the legitimacy of the judicial process".

25 I am unable to accept CSC's submission that the *Dagenais/Mentuck* test does not apply to media requests for access to exhibits. That argument has been properly and firmly rejected by two provincial appellate courts. In *R. v. Fry* (2010), 254 C.C.C. (3d) 394 (B.C. C.A.) at para. 65, a majority of the British Columbia Court of Appeal held that "the principles enunciated by the Supreme Court of Canada" in *Dagenais* and *Mentuck* "are fully applicable" to a media request for access to and the right to copy an exhibit after the conclusion of a trial. *CTV Television Inc. v. R.* (2006), 208 Man. R. (2d) 244 (Man. C.A.) [hereinafter R. v. Hogg] is to the same effect. The Manitoba Court of Appeal applied the *Dagenais/Mentuck* test to assess the media's right to access a video recording of a statement made by an accused person that had been entered as an exhibit at a preliminary inquiry.

26 To paraphrase Fish J. in *Toronto Star* at para 30, CSC's argument that the *Dagenais/Mentuck* test does not apply to CBC's right to access and copy exhibits "is doomed to failure by more than two decades of unwavering decisions" from the Supreme Court and from provincial courts of appeal.

27 In my view, the authority of *Vickery*, post *Dagenais* and *Mentuck*, is limited. The case still stands as authority for the proposition that concern for the protection of the privacy and reputation of innocent persons are among the factors to be considered and weighed by the judge applying the *Dagenais/Mentuck* test, although under *Dagenais/Mentuck*, privacy interests and the protection of the innocent no longer automatically trump the public's right to access: *Episcopal Corp. of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry Commissioner* (2007), 278 D.L.R. (4th) 550 (Ont. C.A.) at para. 42.

(i) Are the media's rights limited to attending court and observing and reporting on what transpires in the courtroom?

28 I do not agree with CSC's submission that the open court principle and the media's s. 2(b) *Charter* rights are limited to attending court and observing and reporting on what actually transpires in the courtroom. Even before the *Charter*, access to exhibits that were used to make a judicial determination, even ones introduced in the course of pre-trial proceedings and not at trial, was a well-recognized aspect of the open court principle: *MacIntyre*. That approach was endorsed in *Vancouver Sun* at para. 27:

> [T]he principle of openness of judicial proceedings extends to the pretrial stage of judicial proceedings because the policy considerations upon which openness is predicated are the same as in the trial stage....[In *MacIntyre*,] Dickson J. found "it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy".

29 Likewise, in *Toronto Star*, the Supreme Court applied the *Dagenais*/*Mentuck* test to a Crown application to seal search warrant materials, thereby underlining that *Dagenais*/*Mentuck* applies to ensure the "openness of the judicial process", not only what actually transpires in open court. CSC's argument was implicitly rejected by this court in *CTV Television v. Ontario Superior Court of Justice* (2002), 59 O.R. (3d) 18 (Ont. C.A.), where the court held that the jurisdiction to order access to exhibits does not vanish simply because the exhibits were filed in open court.

30 In *Lac d'Amiante du Québec ltée c. 2858-0702 Québec inc.*, [2001] 2 S.C.R. 743 (S.C.C.) at para. 72, the Supreme Court defined the media's right to access to court records and exhibits very broadly and in terms that are inconsistent with notion of a bare right to report on what actually transpires in open court:

> [O]nce the trial begins, and except for the limited number of cases held *in camera* or subject to a publication ban, *the media will have broad access to the court records, exhibits and documents filed by the parties, as well as to the court sittings*. They have a *firm guarantee of access*, to protect the public's right to information about the civil or criminal justice systems and freedom of the press and freedom of expression.
>
> [Emphasis added.]

(ii) Does the right to access exhibits include the right to make copies?

31 In my view, absent the proof of some countervailing interest sufficient to satisfy the *Dagenais*/*Mentuck* test, the right to access exhibits includes the right to make copies.

32 While the Supreme Court of Canada appears not to have directly ruled on this point, there are *dicta* in at least two Supreme Court decisions supporting the proposition that the right to access exhibits includes the right to make copies.

33 In *Application to proceed in camera, Re*, [2007] 3 S.C.R. 253 (S.C.C.) at para 33, the court reaffirmed the holding in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.) at p. 1338, that the right to access exhibits includes the right to make copies as "s. 2(b) provides that the state must not interfere with an individual's ability to 'inspect and copy public records and documents, including judicial records and documents'."

34 We were referred to a long list of first instance decisions dealing with the right to make copies. While those decisions are not entirely consistent, the clear preponderance of authority applies the *Dagenais*/*Mentuck* test to such requests and allows for copies to be made.

35 Most, if not all, of the decisions cited by CSC in support of the argument that there is no right to copy exhibits are readily distinguishable. *R. v. Pilarinos* (2001), 158 C.C.C. (3d) 1 (B.C. S.C.), dealt with the British Columbia Supreme Court's policy banning cameras from the courtroom. Likewise, *Société Radio-Canada c. Québec (Procureur général)*, 2008 QCCA 1910 (C.A. Que.), dealt with restrictions on holding interviews and recording images within the courthouse and the prohibition of broadcasts of court hearings. The debate over cameras in the courtroom and the right to broadcast court proceedings raises very different issues that do not concern us in this appeal.

36 Three cases cited by CSC dealt with the impact of allowing access on fair trial rights in ongoing criminal trials. In *Canadian Broadcasting Corp. v. R.* (2007), 222 C.C.C. (3d) 106 (Ont. S.C.J.), the trial judge refused to allow a media request to copy an exhibit, but he did so because he was satisfied (at para. 86) that "to permit dissemination to occur...would pose a real and substantial risk to [the accused's] right to a fair trial." *R. v. Cairn-Duff* (2008), 237 C.C.C. (3d) 181 (Alta. Q.B.), also dealt with a mid-trial request to copy an exhibit. While there are certainly some statements in that case that could be taken to support CSC's position, the trial judge also referred to the need to protect the accused's right to a fair trial and the failure of the media to give notice to all persons who might be affected by allowing copies to be made.

37 *R. c. Dufour*, 2008 CarswellQue 14365 (C.S. Que.), leave to appeal granted, [2009] S.C.C.A. No. 84 (S.C.C.), also dealt with a mid-trial application for access to a video recording of a statement made by the accused. The trial judge denied that request on the ground that Rules of Practice of the Superior Court prohibit the broadcast of the proceedings of the court.

38 In my view, the cases cited by CSC do not establish anything approaching a general rule or practice that the media are not entitled to copies of exhibits filed in judicial proceedings. In the present case, there is no fair trial interest to protect, as all four accused were discharged at the preliminary inquiry, and no suggestion that the ban on cameras in the courtroom applies.

39 On the other side of the ledger, there is a very long line of cases that permit the media to make copies of exhibits. In *R. v. Hogg*, the media sought access to a video recording of an accused that had been introduced at a preliminary inquiry. The accused pleaded guilty at trial and received a conditional sentence. The Crown successfully appealed the sentence and a custodial term was imposed. At that point, the media sought access to the video recording of the statement and the right to make a copy for purposes of broadcast. The Manitoba Court of Appeal held at para. 47 that the media were "entitled to have access to and copy the videotape subject to any condition the court officers may impose to preserve the integrity of the exhibit." For other cases allowing the right to access and copy exhibits, see e.g.: *R. v. Fry*; *Canadian Broadcasting Corp. v. R.* (2008), 232 C.C.C. (3d) 445 (Ont. S.C.J.); *CanWest MediaWorks Inc. v. R.* (2007), 213 Man. R. (2d) 233 (Man. Q.B.); *R. v. Hilderman* (2006), 395 A.R. 218 (Alta. Q.B.); *R. v. Black*, 2006 BCSC 2040 (B.C. S.C.); *R. v. Arenburg* (1997), 38 O.T.C. 91 (Ont. Gen. Div.); *R. v. Van Seters* (1996), 31 O.R. (3d) 19 (Ont. Gen. Div.); *R. v. Stark*, [1995] B.C.J. No. 3064 (B.C. S.C.).

(iii) Conclusion: application of the Dagenais/Mentuck test.

40 I conclude that the trial judge was correct in applying the *Dagenais*/*Mentuck* test to CBC's request for access to and copies of the exhibits at issue in this case. If CBC is to be denied access, or to have its access limited, it is for the party seeking to assert or uphold that denial to demonstrate through convincing evidence that the two-part *Dagenais*/*Mentuck* test has been satisfied.

41 Accordingly, I would dismiss the cross-appeal.

2. Did the Application Judge Err by Limiting CBCs Right to Access and Copy the Exhibits?

(a) Is access and the right to copy limited to only those portions of the videos played in open court?

42 In my view, the application judge erred by limiting CBC's right of access to only those portions of the exhibits that were played in open court. While this result follows from much of what I have already said about the application of the *Dagenais*/*Mentuck* test, I add the following considerations.

43 When an exhibit is introduced as evidence to be used without restriction in a judicial proceeding, the entire exhibit becomes a part of the record in the case. While a party may choose to read or play only portions of the exhibit in open court, the trier of fact, whether judge or jury, is not limited to considering only those portions when deciding the case. A party who introduces an exhibit without restriction cannot limit the attention of the trier of fact to only portions of the exhibit that favour that party and that the party chooses to read out or play in open court.

44 As the entire exhibit is evidence to be used in deciding the case, I can see no principled reason to restrict access to only those portions played or read out in open court. When Dickson J. articulated and applied the open court principle to accord a journalist access to an affidavit filed in support of a search warrant application in *MacIntrye*, he was plainly confronted with material that had not been read out in open court. Yet he did not hesitate to order access. Absent some countervailing consideration sufficient to satisfy the *Dagenais*/*Mentuck* test, the open court principle and the media's right of access to judicial proceedings must extend to anything that has been made part of the record, subject to any specific order to the contrary.

45 Accordingly, it is my view that the application judge erred by limiting CBC's access to only those portions of the exhibits that were played in open court.

(b) Did the Application Judge Err by Refusing CBC the Right to Copy the Portion of the Video Exhibit Showing the Actual Circumstances of the Death of Ashley Smith?

46 The application judge did not give extensive reasons for refusing CBC the right to copy the portion of the video showing the circumstances of the death of Ashley Smith. He stated at para. 49:

> I have decided that the CBC should be entitled to access to the video recording of Ashley Smith's death but not to have a copy of the recording. The gruesome image of a person dying is not something that I feel needs to be broadcast to the general public. By allowing the CBC access to the recording, will permit a verbal description to be broadcast, which in my view is sufficient.

47 We have viewed the contested portion of the video and it is certainly disturbing. However, I am not persuaded that there is anything in the record before us that can be invoked to justify the limitation imposed by the application judge, whether under the *Dagenais*/*Mentuck* test or under any other legal rule or principle.

48 The circumstances of this case are distinguishable from *R. v. Bernardo*, [1995] O.J. No. 1472 (Ont. Gen. Div.), leave to appeal refused, [1995] S.C.C.A. No. 250 (S.C.C.), further appeal dismissed for lack of jurisdiction, (1998), 122 C.C.C. (3d) 475 (Ont. C.A.), where the trial judge made an order relating to the treatment at trial of video tape evidence depicting in explicit detail the sexual assaults and rapes of four young girls, three of who were murder victims. LeSage A.C.J.O.C. applied the *Dagenais* test and, after a careful review of the evidence and the competing *Charter* arguments, concluded that the case for restricting access had been made out. He ruled that when the evidence was played, it should be visible only to the judge, the jury, counsel, the accused and to the extent necessary, court staff. No limit was imposed on the access to the audio portion of the exhibit. LeSage A.C.J.O.C. stated at para. 121 that the evidence established that "the harm that flows from the public display of this videotape evidence far exceeds any benefit that will flow from the public exposure of sexual assault and child pornography." LeSage A.C.J.O.C. found, again at para. 121, that the families of the victims would

> ...suffer tremendous psychological, emotional and mental injury if the evidence, as the Crown has described it in the opening statement, that is rape; anal and vaginal, the forced fellatio, cunnilingus, anilingus, forcing of the neck of a wine bottle in both the vagina and anus of one of these young women, is publicly displayed.

49 There are no comparable findings in this case. The application judge's perception that "[t]he gruesome image of a person dying is not something that I feel needs to be broadcast to the general public" is not based upon a finding of potential harm or injury to a recognized legal interest. Ashley Smith's mother, willing to have the circumstances of her daughter's death publicly considered, asserts no claim to privacy and agrees that CBC should have access and no other member of Ashley Smith's family has objected.

50 With respect, absent any finding of potential harm or injury to a legally protected interest, there is nothing in the law that permits a judge to impose his or her opinion about what does not need to be broadcast to the general public. That would be inconsistent with the constitutional protection our legal order accords freedom of expression and freedom of the press. In this case, there is no finding of harm or injury capable of overriding a constitutional guarantee, and I would set aside that part of the application judge's order.

(c) Other limitations

51 CBC also raises the issue of the propriety of the restriction the application judge imposed on copying a portion of exhibit 41 because it "is something about which the Correction Service of Canada has security concerns". The evidence in support of that contention is limited to a bald assertion and, having viewed the exhibit, it is very difficult to discern what the security concern would be. In my view, the evidence led to support this restriction on access falls well short of the "convincing evidence" required to satisfy the *Dagenais*/*Mentuck* test. Accordingly, I would set aside that part of the application judge's order.

3. Did the Application Judge Err by Failing to Give Adequate Consideration to the Coordinate Jurisdiction of the OCC?

52 The OCC takes the position that the presiding coroner is in the best position to decide the impact of publication or broadcast of exhibits on a pending inquest and that the application judge failed to take that into account. The OCC submits that the issue of the right to access and copy the exhibits should be left to the coroner presiding at the inquest into the death of Ashley Smith.

53 I am unable to accept that submission. As specified by s. 31 of the *Coroners Act*, R.S.O. 1990, c. C. 37, the coroner's jury will be prohibited from making any findings of legal responsibility in relation to Ashley Smith's death, but will be asked to make recommendations "directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest." There is nothing in this record to show that the order sought by CBC would interfere with the successful accomplishment of that mandate. In my view, the application judge quite properly concluded that there was no risk to the administration of justice arising from the pending coroner's inquest that would justify restricting CBC's access to the exhibits.

54 Nor, in the context of this case, does any possessory interest of the CSC, OCC or WRPS constitute a factor capable of precluding the court from exercising its jurisdiction over the exhibits and making an order in favour of CBC: see *CTV Television Inc.* at paras. 24-27.

Disposition

55 For these reasons, I would allow CBC's appeal and dismiss CSC's cross-appeal. The order of the application judge should be amended in accordance with these reasons.

***John Laskin J.A.*:**

I agree.

***Gloria Epstein J.A.*:**

I agree.

Appeal allowed; cross-appeal dismissed.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

Court of Appeal File No. M52287
Court File No. CV-21-656040-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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(Motion for Leave to Appeal)

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